

SUPREME COURT OF NIGERIA
FRIDAY 26TH FEBRUARY, 2016. SC. 180/2005
CORAM:- W. S. N. ONNOGHEN, N. S. NGWUTA, M. U.
PETER-ODILI, O. ARIWOOLA, M. D. MUHAMMAD, JJSC

URS REICHIE (Suing by his attorney Oluyomi George-Taylor) AND NIGERIA BANK FOR COMMERCE AND INDUSTRY APPELLANT RESPONDENT
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APPEALS - Grounds - Limit - A party on an appeal against decision of court - Must confine itself to the matter already adjudicated upon (H1)

CONTRACTS - Privity of - For action in contract to be sustained - There must be privity of contract - Hence appellant relying on relief in equity without substance - Cannot set up a cause of action against respondent (H2)

FACTS

This action was commenced at the High Court of Lagos State by appellant, claiming inter alia the sum of N90,510.00 with interest at the rate of 45% per annum from 9th of January 1991 until the final liquidation of the said sum, being money payable by respondent to appellant on account of money had and received by respondent for the use of appellant. Respondent entered appearance in the matter. Subsequently, appellant filed summons for summary judgment under Order 10, Rules 1 & 2 of the Court. Respondent intending to raise points of law from the Bar filed no affidavit of facts to defend the action. When the summons for judgment was heard, respondent and its learned counsel were absent and judgment was thus entered against respondent.

Thereafter, respondent applied to set aside the summary judgment entered in its absence in the Court. The application was supported with affidavit explaining reasons for not filing affidavit of facts to defend the action. Exhibit C (respondent's statement of defence)

was attached to the affidavit. Respondent's defence among other things is that it is a complete stranger to the contract appellant is alleging. The Court heard the application to set aside the summary judgment and dismissed same. Dissatisfied, respondent appealed to the Court of Appeal Lagos Division. The Court allowed the appeal on the ground that no contractual relationship existed between appellant and respondent. Hence, there is no cause of action against respondent. Aggrieved, appellant appealed to the Supreme Court.

ISSUE FOR DETERMINATION

"Whether the absence of contractual relationship between the Appellant and the 3rd Respondent necessarily implied that there was no cause of action in respect of Appellant's claims in equity for money had and received and for money held in constructive trust."

HELD (Unanimously dismissing the appeal per **PETER-ODILI JSC**)

APPEALS - Grounds - Limit

1. The case of *Alfortin* (supra) was clearly cited by the Appellant to a situation completely different from the one existing in the case at hand. In that case, there was a matter of some linkage on work and services between the parties on ground here. Therefore, the constructive trust which the Appellant is harping on to create a cause of action against the Respondent finds no anchor herein and even outside what was claimed in the pleadings and extraneous to the decision the Court below and therefore, unsustainable and the only option open is to disregard it as not forming part of the case adjudicated upon by the Court below. It is now well settled that a party dissatisfied by the decision of a Court when seeking a revisit by the appellate Court has to confine itself to the matter already adjudicated upon and not some imported commodity floating around. Another way of putting it is, that where a Court of law did not decide against such a decision this Court cannot enter into a discourse thereof because a ground of appeal challenges a decision of Court posed on the issues as joined, litigated and adjudicated upon by the Court. (p. 1266 H)

CONTRACTS - Privity of

2. For emphasis and perhaps at the risk of repetition, an action in contract such as the one in the case at hand to be sustained, there must be privity of contract. Therefore exploring through the pleadings and verifying affidavit, there is none between the Appellant and Respondent and that situation is not transformed merely because the borrowed money from Plaintiff/Appellant was paid to Respondent. That would not create a liability on the Respondent when no fraud is alleged, for the repayment of the loan of the said sum of N90,510.00 (Ninety Thousand, Five Hundred and Ten Naira only) from the Appellant.

The Appellant clinging and shouting a relief in equity without substance cannot set up a cause of action as known to law against the Respondent and so, the Court of Appeal was correct in saying it as it was. I see no basis for departing from the judgment of the Court of Appeal in setting aside the decision of the trial High Court and so, this appeal lacking in merit is hereby dismissed as I affirm the judgment and orders of the Court Below. (p. 1267 E)

REPRESENTATION

Adewale Adesokan with Ijeoma Iwuoha, for the Appellant
Theodore Jnr. Ezeobi, for the Respondent

CASES REFERRED TO

Alfrin Ltd. v. A.G. Federation (1996) 9 NWLR (pt. 475) 634
Eboni Finance & Security Ltd. v. Wole Ojo Technical Serv. Ltd (1996) 7 NWLR (pt. 461) 464
Hart v. T.S.K.J. (1998) 12 NWLR (pt. 578) 372
Jov v. Dom (1999) 9 NWLR (pt. 620) 538
Nishizawa v Jethwani (1984) 12 SC 234
Twendelle v. Atkinson (1861-73) All E.R. 369
Snelling v. Snelling (1972) 2 All ER 79
Bourne v. Milson (1668) Ventris 6
Scruttons Ltd. v. Midland Silicones Ltd. (1962) AC 446
Telepower (Nig) Ltd v. Banna (2002) FWLR (pt. 95) 255

RULES REFERRED TO

High Court of Lagos (Civil procedure) Rules 1972, O. 10 rr. 1 & 2

BOOK REFERRED TO

Nigerian Commercial Law & Practice vol. 1 p. 6

B

LEAD JUDGMENT BY PETER-ODILI JSC

This is an appeal from the Court of Appeal, Lagos Division
Coram: George A. Oguntade, Pius Olayiwola Aderemi and Christo-
pher M. Chukwuma-Eneh, JJCA against the judgment delivered by
C P.O Aderemi, JCA (as he then was) on 02/12/2002 in which that
Court held there was no contractual relationship between the Plain-
tiff/1st Respondent and 3rd Defendant/Appellant/Respondent neces-
sitating an order for summary judgment under the provisions of the
D Lagos High Court (Civil Procedure) Rules by which the Court below
allowed the appeal, set aside the judgment of the trial Court dated
4th July, 1994 per Akinsanya J, and dismissed the suit as instituted in
the trial Court against the Appellant now Respondent.

BACKGROUND FACTS:

E The facts would be better gleaned with reference to the Plain-
tiff/Appellant's Statement of Claim and the Affidavit in support of the
Summons for Judgment deposed to by Oluyomi George-Taylor at
the trial Court as follows:-

F *"(a) The Plaintiff/Appellant is a business man resident in Swit-
zerland.*

*(b) The 1st Defendant is the alter ego of the 2nd Defendant
which is a limited liability company with its office at Akure, Ondo
State.*

G *(c) The 3rd Defendant is a banker carrying on business in Ni-
geria.*

H *(d) About November, 1990, the 1st and 2nd Defendants raised
a loan of #90,510.00 from the Respondent with which they met
certain obligation of the 2nd Defendant to the 3rd Defendant by way
of a non-refundable part payment of legal fees, the repayment of
which, it was understood, that "the 1st and 2nd Defendants shall be
responsible for jointly and severally as primary debtors.*

*(e) The 1st and 2nd Defendants, by their solicitors' letter to the
Plaintiff's agent, of 07/12/92, exhibited to the verifying affidavit in*

support of the summons for judgment, confirmed the payment of the sum of N90,510.00 to the Appellant but stated that it was “on the understanding that the said amount would not be refundable in case the project did not take off.”

The Plaintiff in his Statement of Claim at the Trial Court claims:-

“19 *WHEREOF* the plaintiff claims against the Defendants B jointly and severally the sum of N90,510.00 (Ninety Thousand, Five Hundred and Ten Naira only) with interest at the rate of 45% per annum from the 9th day of January, 1991 until the final liquidation of the said sum being:

(i) Money payable by the Defendant to the Plaintiff on account of money had and received by the Defendants for the use of the Plaintiff, C

(ii) *FURTHER AND IN THE ALTERNATIVE* sum due and payable by the first Defendant upon the first Defendant’s covenant and undertaking to indemnify the Plaintiff for paying the sum of N90,510.00 to the third Defendant at the instance of the first Defendant and on behalf of the second Defendant. D

(iii) *FURTHER AND IN THE ALTERNATIVE*, money held in constructive Trust by the third Defendant for the benefit of their Plaintiff. E

The 3rd Defendant duly entered appearance with a verifying affidavit, and subsequently, the plaintiff filed a summons for summary judgment under Order 10, Rules 1 & 2 High Court of Lagos (Civil procedure) Rules 1972 (hereafter referred to as the Lagos High Court Rules) for an order - F

“granting the plaintiff/Applicant liberty to enter final judgment against the Third Defendant in the sum of N90,520.00 with interest at the rate of 45% per annum from (sic) the 9th day of January G 1991 until the whole sum is finally (sic) liquidated... TAKE FURTHER NOTICE that this

Plaintiff/Applicant shall rely on its statement of claim filed in this suit in further support of this application.”

The 3rd Defendant intending to raise points of law from the H Bar filed no affidavit but unfortunately, on the 4th July, 1994 when the summons for judgment was heard, learned counsel for 3rd Defendant was absent and judgment was entered against 3rd Defendant.

By an application by notice of motion dated 05/07/94 and filed 07/07/94, the 3rd Defendant/Respondent promptly applied to set aside the summary judgment entered against it under Order 10, Rules 1 & 2 and in the absence in Court of both the 3rd defendant and its counsel. It is supported with an affidavit of 10 Paragraphs explaining the 3rd defendant's reasons for not filing an affidavit of facts entitling it to defend the action and for the absence of its counsel in Court on the day the said summary judgment was entered on 04/07/99. The 3rd Defendant attached as Exhibit 'C' to this affidavit its statement of defence dated 01/07/94 and filed the same morning of 04/07/99 on which the summary judgment was entered but was not before His Lordship at the time of hearing the application for summary judgment.

The 3rd Defendant in its said statement of defence pleads inter alia, to the effect -

(a) That upon 2nd Defendant's application to the 3rd defendant for a loan of N6,034,000.00, the same was approved by the 3rd defendant subject, among other things, to the 2nd defendant's payment of a non-refundable fee of 11/2% of the loan amount in the sum of N90,510.00.

(b) That the 3rd Defendant was a complete stranger to the agreement between the Appellant and the 1st and 2nd Defendants whereby the Appellant let to the 1st and 2nd Defendants the said non-refundable amount of N90,510.00.

(c) That the writ of summons was null and void having been issued in Lagos for service in Ondo State without leave of Court as required by law.

The learned trial Judge duly heard argument on the motion to set aside the summary judgment and dismissed the same in his ruling dated 19/05/95, hence the appeal to the Court of Appeal.

The Court of Appeal allowed the appeal on the ground that no contractual relationship existed between Plaintiff/Appellant and the 3rd Defendant/Respondent and no cause of action against the 3rd Defendant. Based on this judgment of the Court of Appeal or Court below, the Plaintiff/Respondent now Appellant has come before the Supreme Court to ventilate his grievance by a Notice of Appeal of three grounds.

At the hearing of the appeal on the 7th of December, 2015

learned counsel for Appellant, Adewale Adesokan adopted his Brief of Argument filed on 20/10/05 and a Reply Brief filed on the 18/2/2014. He decoded a single issue for determination which is as follows:- *“Whether the absence of contractual relationship between the Appellant and the 3rd Respondent necessarily implied that there was no cause of action in respect of Appellant’s claims in equity for money had and received and for money held in constructive trust.”* B

Theodore Ezeobi (Jnr.) of counsel for the Respondent adopted the Brief of Argument filed on the 18/10/2015 and deemed filed on the 21/01/14. He crafted a sole issue for determination which is thus:-

“Whether upon the copiously admitted and unchallenged finding of the Court below in the negative relationship existed between the Appellant and the Respondent establishing a cause of action against the Respondent pursuant to the Order 10, Rules 1 & 2 of the High Court of Lagos (Civil Procedure) Rules 1972 presently Order 11 procedure for summary Judgment.” C D

The two opposing issues are asking the same question but that as crafted by the Appellant seeming to me simpler, I shall make use of it in the determination of this appeal and that is, viz:-

SOLE ISSUE: E

Whether the absence of contractual relationship between the Appellant and the 3rd Respondent necessarily implied that there was no cause of action in respect of Appellant’s claims in equity for money had and received and for money held in constructive trust.

Canvassing the position of the Appellant, learned counsel, Wale Adesokan contended that equity will not fold its arms and watch as the law is applied as an engine of fraud. That even if there is no contractual relationship between Appellant and the 3rd Respondent, the Court of Appeal failed to advert its mind to the fact that the Appellant did not claim in contract and therefore, he was not required to show a cause of action in contract. He referred to Paragraph 19 of the Statement of Claim at page 6 of the Record which contains the Reliefs claimed by the Appellant at the High Court. That it is in recognition of that issue that the Appellant claimed the refund as money held in constructive trust and for money had and received. That what is really sought is the intervention of the Court of equity in order to obtain a refund of the money paid to the 3rd Respondent in support of a project which was unilaterally and without any reasons F G H

deleted by the 3rd Respondent. He cited *Alfrin Ltd V A.G. Federation* (1996) 9 NWLR (Pt. 475) 634; *Eboni Finance & Security Ltd V. Wole Ojo Technical Services Ltd* (1996) 7 NWLR (Pt. 461) 464; *Hart V T.S.K.J.* (1998) 12 NWLR (Pt. 578) 372.

Learned counsel for the Appellant went on to submit that there
 B is a relationship or nexus between the Appellant and the 1st, 2nd
 and 3rd Respondents and that the Appellant had paid the cheque in
 the sum of N90,510.00 directly to the 3rd Respondent who unilaterally
 frustrated the purpose for which the money was paid by the
 C Appellant. That it will be to allow the 3rd Respondent to benefit or
 unjustly enrich itself by its default of not refunding the N90,510.00
 deposited after it had unilaterally and without any excuse deleted the
 contract in respect of which the payment was made to it by the Appellant.
 That if the Court below had adverted its mind to the two
 D equitable remedies (constructive trust and claim for money had and
 received), it would not have concluded that there was no cause of
 action by the Appellant against the 3rd Respondent.

For the Respondent, Mr. Ezeobi of counsel contended that the
 issue raised by the Appellant as distilled from the three Grounds of
 E Appeal to this Court do not reflect or arise from the decision of the
 Court below upon which the appeal may be predicated and so is not
 sustainable. That it is trite that an aggrieved party can only appeal
 against a decision of a Court that was adjudicated upon and so the
 issue for determination in this appeal having not been raised at the
 F Court of Appeal is incompetent. That this appeal in so far as the
 grounds in the Notice of Appeal and the issue distilled therefrom are
 concerned cannot be at all considered as the same is incompetent
 and must be struck out. He referred to *Sparkling Breweries Ltd &*
 G *Ors V. United Bank of Nigeria Ltd* (2001) 15 NWLR (pt. 737) 539 at
 556; *Akaaer Jov V. Kutuku Dom* (1999) 9 NWLR (Pt. 620) 538.

Theodore Ezeobi Jnr. for the Respondent further stated that
 even from the Appellant's showing both in the statement of claim
 and the verifying affidavit, no cause of action is manifested against
 H the Respondent. That to sustain an action in contract against the Respondent,
 the Appellant ought to have pleaded that the Respondent
 joined the 1st and 2nd Respondents in borrowing the N90,510.00
 from the Appellant. He stated that the fact that the money borrowed
 was paid to the Respondent did not create a liability in the Respon-

dent and no fraud is alleged. He cited Dunlop Pneumatic Tyre Co Ltd V. Selfridge & Co Ltd (1914) & (1915) A England Report Rep. 333, Olakunle Orojo in Nigerian Commercial Law and practice Vol,1 at page 6: Nishizawa v Jethwani (1984) 12 SC 234 at 241.

The posture of the Appellant can be briefly captured to be that even though there is an absence of contractual relationship between the Appellant and the 3rd Respondent, it did not foreclose an absence of a cause of action as the statement of claim disclosed a cause of action against the 3rd Respondent for constructive trust and money had and received.

The Respondent disagreeing, states that there being no contractual relationship existing between the Appellant and Respondent and so no basis for the action for summary judgment under Order 10 Procedure of the Lagos State High Court (Civil Procedure) Rules. That the sole issue raised for determination did not emanate from the decision of the Court below and so the same is manifestly incompetent.

The judgment of the Court below particularly the salient part thereof shall be quoted hereunder as anchored by Aderemi JCA (as he then was) and thus:-

“From the facts deposed to in the affidavit and the averments in the statement of claim both of which I have reproduced above, no contractual relationship existed between the plaintiff/1st respondent and the 3rd defendant/appellant. If any agreement existed concerning the said of N90,510.00, it was between the plaintiff/1st respondent on the one hand and the second and third respondents on the other hand. It has long been part of our jurisprudence that a contract cannot confer enforceable rights or impose obligations arising thereunder on a person, except parties to it. See (1) Shuwa V. Chad Basin Authority (1991) 7 NWLR (Pt.205) 550, (2) Union Bank of Nigeria Plc V. Sparkling Breweries Ltd & Ors (1997) 5 NWLR (Pt. 505) 344 and (3) Ilesa Local Planning Authority V. Olayide (1994) 5 NWLR (Pt. 342) 91. The result of all I have been saying is the 3rd defendant/appellant has a very strong and meritorious defence to the claim of the 1st Respondent. Consequently, issues No. 1, 2 and 3 as identified by the Appellant are resolved in its favour, issue No. 1 on the Plaintiff/1st Respondent brief is answered in the negative. The judgment entered in favour of the plaintiff/1st respondent is grossly ir-

regular and unjust. Where a judgment is obtained irregularly a defendant affected by it is entitled EX DEBITO JUSTITIAE to the Court setting aside such an irregular judgment shows the Court in pursuance of justice. See In Re Olajori (1969) 2 ALL NLR 293. Issue 4 on the Appellant's brief is therefore answered in the negative with regards to Issues Nos. 2 and 3 on the Plaintiff/1st Respondent's brief. I wish to say that from what I have reviewed above, it was clear from the Plaintiff's deposition and averments that it made no case against the Appellant, those two issues are consequently resolved against the Plaintiff/1st Respondent."

Both parties are on common ground that the judgment of the trial High Court on 4th July, 1994 stemmed from Order 10, Rules 1 (a) and (2) of the High Court (Civil Procedure) Rules of Lagos State 1972 which provisions I shall quote hereunder, viz-

"Rule 1(a)

Where the Defendant appears to a writ of summons specially indorsed with or accompanied by a statement of claim under Order 3, Rule 4, the Plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any liquidated sum is claimed) and stating that in his belief, there is no defence to the action except as to the amount of damages claimed, if any, apply to a judge in Chambers for liberty to enter judgment for such remedy or relief as upon the statement of claim, the plaintiff may be entitled to, the Judge thereupon, unless the defendant shall satisfy him that he has a good defence to the action on the merits or shall disclose such facts as may be deemed sufficient to entitle him to defend the action generally may make an order empowering the plaintiff to enter such judgment as may be just, having regard to the nature of the remedy or relief claimed.

(2) The application by the Plaintiff for leave to enter final judgment under Rule 1 of this Order shall be made by summons returnable in Chambers not less than four clear days after service accompanied by a copy of the affidavit and exhibits referred to therein".

The case of the Plaintiff/Respondent against the 1st Defendant/Appellant would be gleaned from Paragraph 19 of the Statement of Claim which reads as follows- 'WHEREOF, the Plaintiff claims against Defendants jointly and severally the sum of N90,510.00 (Ninety Thou-

sand, Five Hundred and Ten Naira only) with interest at the rate of 45% per annum from the 7th day January, 1991 until the final liquidation of the said sum being.

“(i) Money payable by the Plaintiff to the Defendant on account of money had and received by the Defendant for the use of the Plaintiff,

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(ii) FURTHER AND IN THE ALTERNATIVE, sum due and payable by the first defendant upon the first defendant’s undertaking to indemnify the plaintiff for paying the sum of N90,510.00 to the third Defendant at the instance of the first Defendant and on behalf of the second Defendant.

C

(iii) FURTHER AND IN THE ALTERNATIVE, money held in construction trust by the third Defendant for the benefit of the Plaintiff”.

The stance of the plaintiff/Respondent is amplified further by Paragraphs 5, 6, and 7 of the supporting affidavit which are Stated hereunder, viz:-

THE AFFIDAVIT

“PARA 5:

That the plaintiff at the request of the first and second defendants paid the sum of N90,510.00 to the third defendant vide Cheque No. 364195/432363 dated 29/11/90 drawn on Union Bank of Nigeria (Iganmu Branch) in favour of the third Defendant.

PARA 6

That the said sum of N90,510.00 was according to the 1st and 2nd Defendants to satisfy an urgent need to pay part of fees towards the proceeding of the granting of a loan to the second defendant and the said sum to be repaid within a couple of months.

PARA 7

That in reply to the plaintiff’s request for the repayment of the said sum of N90,510,00, the first defendant through his solicitors Messrs A.A. Akintunde & Co. confirmed the payment of the money to the third defendant and advised defendant who unilaterally deleted (sic) the project for which the loan to the second defendant was meant from the third defendant’s list of assisted projects and thereby terminate the loan arrangement.

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Another reference to the pleadings of plaintiff/Respondent are thus:-

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PARA 6

The Plaintiff avers that sometimes in November, 1990, the first Defendant initially through Mr. Oluyomi George- Taylor asked the Plaintiff for a loan of N90,510.00, only to urgently facilitate the procurement of a loan from the third defendant to the first defendant's
 B *company i.e. the second defendant.*

PARA 7

The Plaintiff further avers that subsequently at a meeting held on the 28th day of November, 1990 at 70 Modupe Johnson Crescent, Surulere, Lagos between the plaintiff and the first defendant's
 C *personal assistant and the second defendant's Manager, one Mr. Awoyemi and Mr. Oluyomi George-Taylor the first defendant's personal assistant confirmed his principle's request for a loan of*
 D *N90,510.00 only from the plaintiff to enable the first defendant on behalf of his company, the second defendant satisfy an urgent need to pay the said sum of N90,510.00 to the third defendant as legal fees in order that the loan agreement between the second defendant and the third defendant could be concluded timeously and the parties agreed to hold another meeting including the first defendant the*
 E *following day i.e. 29th November, 1990."*

In the main, the judgment of the Court of Appeal centred on there not being any agreement existing and concerning the said N90,510.00 as between the plaintiff/Respondent on the one hand and the 2nd and 3rd Respondents in the Court below and the Lower
 F Court had no difficulty in allowing the appeal, therefore and setting aside what the trial High Court had done. Now before this Court, upon an appeal initiated with the following Notice and three grounds of appeal thus:-

G **GROUND ONE**
ERROR IN LAW

The Court of Appeal erred in law when it held in the circumstances of this suit that the 3rd Defendant had a very strong meritorious defence to the Plaintiff's claim because no contractual relationship existed between the plaintiff and the 3rd Defendant.
 H

PARTICULARS

(i) There were pleadings and evidence that the Plaintiff paid the sum of N90,510.00 to the Appellant directly.

(ii) There was also evidence that the contract in respect of which

the plaintiff made the payment was unilaterally deleted by the 3rd Defendant.

iii. The Plaintiff had pleaded that the 3rd Defendant was not entitled to enrich itself with his money and that the funds could be traced to the 3rd Defendant.

iv. Claims for refund of money had and received and money B held in constructive trust for the benefit of the plaintiff are equitable remedies which do not depend on the existence of contractual relationship to be sustained.

v. The Plaintiff being fully aware that he had no contractual C relationship with the Appellant did not frame his cause of action in contract but had duly and legally commenced action against the Respondents jointly and severally for, inter alia, money had and received and money held in constructive trust.

GROUND TWO

D

ERROR IN LAW

The Court of Appeal erred in law in holding that the Judgment entered in favour of the Plaintiff is grossly irregular and unjust when the same was entered pursuant to an application for summary judgment duly filed by the Plaintiff and in respect of which there was no E Counter-Affidavit.

PARTICULARS

(i) There was pleadings and evidence that the Plaintiff paid the sum of N90,510.00 to the Appellant directly.

(ii) There was also evidence that the contract in respect of which F Plaintiff made the payment was unilaterally deleted by 3rd Defendant.

(iii) The Plaintiff had pleaded that the 3rd Defendant was not entitled to enrich itself with his money and that the funds could be G traced to the 3rd Defendant.

GROUND THREE

The Court of Appeal misdirected itself in law in holding that the Plaintiff had no cause of action against the 3rd Defendant without considering the Plaintiff's claim for an account of money had and H received and money held in constructive trust.

PARTICULARS

(i) The Plaintiff's claim for sum of N90,510.00 was based on:

(a) Money had and received

(b) Sums due and payable upon the first Defendant's undertaking to indemnify the Plaintiff, and

(c) Money held in constructive.

(ii) There was pleadings and evidence that the Plaintiff paid the aforesaid sum to the 3rd Defendant directly.

B (iii) There was also evidence that the contract in respect of which the Plaintiff made the payment was unilaterally deleted by the 3rd Defendant.

C (iv) The Plaintiff being fully but aware that he had no contractual relationship with the 3rd Defendant, refrained from framing his cause action in contract but had duly and legally commenced action against the 3rd Defendant along with the others for money had and received and for money held in constructive trust.

D (v) The Court of Appeal did not consider the two other causes of action in money had and received and constructive trust before concluding that the plaintiffs claim disclosed no cause of action against the 3rd Defendant.

E From those three grounds of appeal, the Appellant distilled the single issue which posed the question whether without a contractual relationship between Appellant and now only respondent, there cannot be a cause of action even if the claim is made in equity for money had and received and for money held in constructive trust. The Appellant had sought refuge in the case of this Court per Iguh JSC in *Alfotrin Ltd V. A.G. Federation* (1996) 9 NWLR (pt.475) 634 where F the learned Jurist stated thus at page 659:-

G *"The law is settled that where a plaintiff can prove the rendering of services under an unenforceable contract, the contract is admissible as evidence of the value of the services rendered and he may recover on a quantum meruit basis. Put differently, where work is done or services are rendered by Plaintiff at the request of Defendant and of which Defendant has had the benefit, plaintiff can recover the value of the work or services rendered on a quantum meruit. The law provides remedies for cases of unjust enrichment and thus to H prevent one from retaining some benefit derived from another which it is unconscionable that he should keep. Such remedies, strictly speaking are different from remedies in contract or tort and are recognized to fall within the common law remedy of quasi contract".*

The case of Alfotrin (supra) was clearly cited by the

Appellant to a situation completely different from the one existing in the case at hand. In that case, there was a matter of some linkage on work and services between the parties on ground here. Therefore, the constructive trust which the Appellant is harping on to create a cause of action against the Respondent finds no anchor herein and even outside what was claimed in the pleadings and extraneous to the decision the Court below and therefore, unsustainable and the only option open is to disregard it as not forming part of the case adjudicated upon by the Court below. It is now well settled that a party dissatisfied by the decision of a Court when seeking a revisit by the appellate Court has to confine itself to the matter already adjudicated upon and not some imported commodity floating around. Another way of putting it is, that where a Court of law did not decide against such a decision this Court cannot enter into a discourse thereof because a ground of appeal challenges a decision of Court posed on the issues as joined, litigated and adjudicated upon by the Court. See Sparkling Breweries Ltd & Ors V. Union Bank of Nigeria Ltd. (2001) 15 NWLR (pt. 737) 539 at 556 per Ogundare JSC.

For emphasis and perhaps at the risk of repetition, an action in contract such as the one in the case at hand to be sustained, there must be privity of contract. Therefore exploring through the pleadings and verifying affidavit, there is none between the Appellant and Respondent and that situation is not transformed merely because the borrowed money from Plaintiff/Appellant was paid to Respondent. That would not create a liability on the Respondent when no fraud is alleged, for the repayment of the loan of the said sum of N90,510.00 (Ninety Thousand, Five Hundred and Ten Naira only) from the Appellant.

I place reliance on Dunlop Pneumatic Tyre Co Ltd V. Selfridge & Co Ltd (1914) & (1915) All ER Reprint 333.

The Appellant clinging and shouting a relief in equity without substance cannot set up a cause of action as known to law against the Respondent and so, the Court of Appeal was correct in saying it as it was. I see no basis for departing from the judgment of the Court of Appeal in setting aside the

decision of the trial High Court and so, this appeal lacking in merit is hereby dismissed as I affirm the judgment and orders of the Court Below.

I award the sum of N150,000.00 costs to the Respondent to be paid by the Appellant.

B

ONNOGHEN JSC

I have had the privilege of reading in draft the lead judgment of my learned brother MARY UKAEGO PETER-ODILI JSC just delivered.

C

My learned brother has dealt with the issues as formulated and came to the conclusion that the appeal is without merit and should be dismissed. I agree entirely with that conclusion.

There is clearly no privity of contract between appellant and 3rd respondent to ground the cause of action as claimed in the Statement of Claim. The decision of lower Court cannot be faulted at all.

D

I abide by the consequential orders made in the lead judgment including the order as to costs. Appeal dismissed.

E

NGWUTA JSC

My learned brother Mary U. Peter-Odili, JSC, made available to me a draft of his judgment in this appeal I entirely agree with the reasons leading to the dismissal of the appeal as devoid of merit. I desire to chip in a few words in support of the judgment.

F

The respondent was the plaintiff in the trial Court and in my humble view; his entire case is encapsulated in Paragraphs 5, 6 and 7 of the affidavit in support of his case before the trial Court. The said paragraphs are hereunder reproduced for ease of reference

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"5. that the plaintiff at the request of the first and second defendants paid a sum of N90, 510, 000 to the third defendant vide check No. 364195/432363 dated 29/11/90 drawn on Union Bank of Nigeria (Iganmu Branch) in favour of the third defendant.

H

6. That the said sum of N90,510,000 was according to the 1st and 2nd defendants to satisfy an urgent need to pay part of fees towards the proceeding of the granting of a loan to the second defendant and the said sum to be paid within a couple of months.

7. That in reply to the plaintiff request for the re-payment of the said sum of N90,510,000, the first defendant through his solici-

tors Messrs A.A. Akintunde & Co confirmed the payment of the money to the third defendant and advised the defendant who unilaterally deleted the Project from which the loan to the second defendant was meant from the third defendant's list of assisted projects and thereby terminated the loan agreement. "

There are two different agreements involved - the agreement pursuant to which the respondent made a loan of N90,510,000 to the second and third defendants and the agreement between the 2nd and 3rd defendants pursuant to which the 2nd and 3rd defendants paid the money they borrowed from the respondent (plaintiff) to the 3rd defendant (now respondent).

Now, the doctrine of privity of contract is to the effect that a person who intends to enforce a contract must show not only that he gave consideration but also that he is a party to that contract. In law, a contract exists only between parties to it. A person who is not a party to the contract cannot sue upon it. See *Twendelle V. Atkinson* (1861-73) All E.R. 369; *Ikpeazu V. ACB Ltd* (1965) NMLR 375; *Snelling V. John Snelling* (1972) 2 All ER 79.

By the doctrine of privity of contract, a contract cannot confer rights or impose obligations arising therefrom on any person except parties to it. See *Bourne V. Milson* (1668) Ventris 6. This means that a stranger cannot acquire rights or incur obligations arising from a contract to which he is not a party. See *Scruttons Ltd V. Midland Silicones Ltd* (1962) AC 446. Applying the above doctrine to the two contracts is the respondent (as plaintiff in the trial Court) a party to either, or both of them?

Certainly the respondent is a party to the contract by which he granted a loan of N90, 510, 000 to the 1st and 2nd defendants in the trial Court. But the respondent is not a party to the contract pursuant to which the 1st and 2nd defendants paid the N90, 510, 000 loaned to them by the respondent to a third party (the respondent in his appeal in pursuant of the business interest of the said 1st and 2nd defendant.

If the respondent herein defaulted in the contract by which it got the money from the 1st and 2nd defendants the 1st and 2nd defendants are the ones who can sue the respondent and not the appellant who is a stranger to this later contract. Equity follows the law to remedy the defects of the law. In the loan transaction between

respondent (as plaintiff in the trial Court) and 1st and 2nd defendants in the trial Court there is no law applicable between respondent and 3rd defendant in the suit from which this appeal emerged.

In the case of Telepower (Nig) Ltd V. Nicholas Banna (2002) FWLR (Pt. 95) 255 ratio 2, it was held that:

B *“Equity does not act in vain and should not be taken for granted but is buttressed or grounded on solid facts that would induce the Court to act in favour of the applicant.”*

C As between the appellant and the respondent, there are no grounds, legal or factual, for the invocation of equity jurisdiction, for equity does not act in vain. Appellant has failed to show that he deserves the relief he seeks in equity. Contrary to the equitable maxim that he who comes to equity must come with clean hands. See Salako V. Williams (1988) 11 NWLR (pt. 574) 505 at 521 Paras D-F). Appellant has come to equity with empty hands.

D There are no facts upon which equity can act in favour of the appellant nor is there any law here in aid of which equity can act to grant the appellant’s reliefs.

E For the above and the lucid reasoning in the lead judgment, I also dismiss the appeal as devoid of merit. I adopt the order for costs.

ARIWOOLA JSC

F I had the privilege of reading in draft the lead judgment of my learned brother, Peter-Odili, JSC just delivered. I agree with the reasoning therein and the conclusion arrived thereat. The appeal is devoid of any merit and lacking in substance. Accordingly, I too will dismiss the appeal.

G Appeal is dismissed and I affirm the judgment of the Court below which had earlier set aside the judgment of the trial Court. I abide by the other consequential orders in the lead judgment including the order on costs.

MUHAMMAD JSC

H I had a preview of the lead judgment of my learned brother Peter-Odili, JSC and agree with the reasoning and conclusion therein that the unmeritorious appeal stands dismissed. I abide by the consequential orders in the lead judgment.