

SUPREME COURT OF NIGERIA
FRIDAY 18TH MARCH, 2016. SC. 207/2014
CORAM:- M. MOHAMMED CJN, S. GALADIMA,
O. RHODES-VIVOUR, N. S. NGWUTA,
M. D. MUHAMMAD, JJSC

GE INTERNATIONAL OPERATIONS (NIG) LTD ... APPELLANT
AND
Q OIL AND GAS SERVICES LIMITED RESPONDENT

APPEALS - Grounds - Competence - Appeal is struck out where all grounds are incompetent - But one competent ground can save appeal
- From being struck out (H1)

APPEALS - Filing - Endorsement - Although appeal is not filed unless fees are paid - Yet it is technical justice to strike out appeal - On mere fact that there is no endorsement relating to payment of fee (H2)

ACTIONS - Declaratory relief - Basis for grant - Plaintiff must satisfy Court by credible evidence - That he is entitled to the right he claims
- As the relief is not granted even on admission of defendant (H3)

JUDGMENTS - Default judgment - Condition - Rivers State HC Rules O. 20 r. 1 2006 - Judgment could be entered for plaintiff in default - Based on the statement of claim (H4)

DAMAGES - Award of - Respondent is only entitled to claims in para. 12(iv)(v) of statement of claim - As it cannot be awarded both special and general damages for the same set of fact (H5)

JUDGMENTS - Omission - Weight - Issue 4 predicated on the omission of the word “not” is resolved against appellant - As its counsel should not have built the issue on the omission (H6)

FACTS

Plaintiff/respondent by a writ of summons filed at the High Court of Rivers State, claimed inter alia against defendant/appellant, for a declaration that the Master Services Agreement between the parties is valid and subsisting and a declaration that the act of appel-

lant in rejecting Mr. Raja Kumar a contract staff supplied by respondent to appellant, pursuant to the Master Services Agreement between the parties, without any reason whatsoever amounts to a breach of the said contract. The originating processes in the matter were duly served on appellant as shown in Exhibit A (proof of service). Appellant failed to enter appearance or file any process in reaction to the processes served on it by respondent.

In the circumstance, respondent subsequently brought an application, praying the court to enter judgment in its favour in line with its statement of claim. The court heard the application and awarded respondent the sum of \$20,000 being the money spent by respondent in bringing Mr. Raja Kumar to Nigeria to work for appellant. Respondent was also awarded the sum of \$500,000 being payment due to respondent against appellant for breach of contract. Again, the sum of N35,000.00 was equally awarded as costs in favour of respondent. Aggrieved, appellant by a Notice of Appeal appealed to the Court of Appeal, Port Harcourt Division. However, there was no evidence of the date of filing the appeal. The Court in its judgment struck out the appeal for being incompetent as there was no evidence that the appellant paid any fee for the filing of the appeal. Aggrieved further, appellant appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether the lower court was right when it suo motu struck out the appellant’s Notice of Appeal dated 19 September, 2013 on the ground of non-payment of filing fees.

2. Whether the lower Court was right when it held that the Respondent’s witness statement on oath constitutes evidence on which the trial court rightly granted default judgment in favour of the Respondent in respect of its claims for declaratory reliefs, special and general damages?

3. Whether the award of the sum of US\$5,000,000 (Five Million US Dollars) as general damages in addition to the sum of US\$520,000,000 (five hundred twenty thousand dollars) upheld by the lower court are based on the same facts and amount to double compensation to the Respondent in respect of the same alleged items of loss.

4. Whether the lower court’s finding with respect to the award of special damages is inconsistent, when having held that the sum

awarded as special damages includes compensation for expenses, time, energy and inconveniences suffered by the claimant in recruiting a competent worker for the Appellant, the Court also held in another breath that the said award does not include the compensation for the said items of damages?

HELD (Unanimously allowing the appeal in part per

NGWUTA JSC)

APPEALS - Grounds - Competence

1. Respondent has challenged the competence of the appeal on the ground that appellant needed leave of the Court below or this Court to raise grounds 2, 2, 4, 5 and 7 of the Notice of Appeal. He started his argument with ground 1 which he said was premature even though he did not attack the competence of the said ground. I think the respondent appears to have been confused. He argued that ground 1 is premature even though it did not object to it. It wants the appeals struck out as incompetent even though it did not challenge all the grounds of appeal. It is only where all the grounds of appeal can be said to be incompetent that the appeal is liable to be struck out.

Respondent cannot challenge the competence of the appeal when, from its own showing, not all the grounds are incompetent. One competent ground can save the appeal from being struck out. In any case, I have considered the submissions of Counsel for the parties and I am inclined to agree with Counsel for the appellant that all the grounds of appeal are competent. (p. 2111 C)

APPEALS - Filing - Endorsement

2. I agree with the respondent that appeal is not filed unless the appropriate filing fees are paid in compliance with Order 7 Rule 11 and Order 12 Rule 1 of the Court of Appeal Rules, 2011.

Be that as it may, I think it is mechanical justice to strike out an appeal on the mere fact that on the face of the processes there is no endorsement relating to payment of fees. It

is not an everyday occurrence for a process meant for filing to be smuggled in through the Registry into the Court file without due compliance with the rules relating to the payments of filing fees.

B It would have been more in tune with justice to enquire from the Registry whether or not fees were paid and the appellant could be asked to satisfy the Court that the fees were paid, especially when it applied to validate the appeal, perhaps by showing evidence that the fees were paid.

C Appellant could have been granted leave to tender fresh evidence that it paid the filing fees. Justice is not a game of hide and seek. It is an attempt, notwithstanding human imperfection, to discover the Registry. If the Registry fails to endorse the process appropriately or fails to charge appropriate fees, the appellant could be ordered to pay the fees to complete payment of the fees.

E On no account should a litigant be made to suffer for the mistake of the Registry as is apparent in this appeal. In the circumstances, I hold the view that the lower Court erred in striking out the appeal on ground of non-payment of fees. The order striking out the appeal is hereby set aside. Issue 1 is partly resolved in favour of the appellant. (p. 2112C)

F ACTIONS - Declaratory relief - Basis for grant

3. In an action for declaration of a right, the plaintiff must satisfy the Court by credible evidence that he is entitled to the right he claims. The claim for declaration cannot be granted on admission of the defendant. (p. 2113B)

G JUDGMENTS - Default judgment - Condition

H 4. In the application for judgment in default, the respondent relied on the witness statement. The application was granted pursuant to Order 20 Rule 9 of the Rivers State High Court (Civil Procedure) Rules 2010 hereunder reproduced:

Order 20 Rule 1 of the 2006 Rules provides:

“If the sum claimed is only for a debt or liquidated demand, and the defendant does not within the time allowed for such purpose, file a defence, the claimant may at the expira-

tion of such time, apply for final judgment of the amount claimed with costs.”

Under this rule, judgment could be entered for the plaintiff in default based on the Statement of Claim. The requirement that a plaintiff must by credible evidence satisfy the Court that he is entitled to the declaratory relief he claims is satisfied by the witness statement made on oath pursuant to the 2006 Rules of the Rivers State High Court. B

The respondent served all the relevant processes on the appellant, appellant saw no need to file a defence as and when due or at all and the claim is for liquidated demand. On the facts of this case, the trial Court rightly granted the claim and the Court of Appeal affirmed same. Pre-2006 decided cases on the issue of adoption of witness statement are inapplicable because of the requirement for witness statement on oath. I resolve issue 2 in favour of the Respondent. C D (p. 2113 D)

DAMAGES - Award of

5. In my view and based on the facts, the two heads of claim in paragraph 12 (iv) and (v) of the Statement of Claim are what will restore the respondent to the position he would have been if there was no breach of the contract. And that is all the respondent is entitled to and not general damages. E

The US\$5,000,000.00 damages awarded to the respondent as general damages cannot stand as the respondent cannot be awarded both special and general for the same set of fact. F (p. 2116 D)

JUDGMENTS - Omission - Weight G

6. Issue 4 is an alleged inconsistency with respect to award of special damages. At page 121 of the record, the Court below held, inter alia:

“The total sum of US\$520,000.00 awarded as special damages does include compensation or damages for other legal injuries like expenses...” H

In the same paragraph the Court held: “It also does not include expenses, time and energy...”

Obviously, the ‘not was omitted after the word “does”.

This is clear from the next sentence in which it was stated that: "It also..."

In the same paragraph the Court held: "It also does not include expenses, time and energy..."

Obviously, the word "not" was omitted after the word "does". This is clear from the next sentence in which it was stated that: "It also does not include..." If the special damages does include them it would be out of place to say in the next sentence that: It also does not include..." It was the omission to argue that the award of special damages is inconsistent. It was an omission that could have been detected by a community reading of the whole portion of the judgment.

The practice of law is not a game of dice. Learned Counsel for the appellant should not have built his issue 4 on what he knew, or should have known, was an omission of the word "not". On the other hand, learned Counsel for the respondent ought to have acknowledged the error before or after correcting same. I resolve issue 4 which was predicated on the omission of the word "not" between "does" and "include" against the appellant.

Be that as it may, the \$20,000 awarded as claimed "being money spent by the claimant in bringing Mr. Raja Kumar to Nigeria to work for the defendant" includes all the expenses in bringing the expert to Nigeria. It includes the immigration requirements. (p.2116 F)

REPRESENTATION

***Tunde Olowu with him: Raymond Ofagbor, for the Appellant
Femi Falana, SAN with him: T. O. Waamah, Deji Morakiyo, Ernest Olawale, Marshal Abubukar for the Respondent***

CASES REFERRED TO

***Abass v. Suleman (2001) 15 NWLR (pt. 735) 144
Urhobo v. Oteri (1999) 2 NWLR (pt. 589) 3 NWLR
Adeyemi v. Ike-Oluwu & Sons Ltd (1999) 8 NWLR (pt. 309) 27
Shuaibu v. Muazu (2014) 8 NWLR (pt. 1409) 209
Aregbesola v. Oyinlola (2011) 9 NWLR (pt. 1253) 458
Agagu v. Mimiko (2007) 7 NWLR (pt. 1140) 342***

Okongwu v. NNPC (1989) 4 NWLR (pt. 115) 296

Ativie v. Kabelmetal Nig. Ltd (2008) 10 NWLR (pt. 1095) 399

Odumogu v. African Continental Bank Ltd (1976) 11 SC 55

Ofuani v. Nigeria Navy (2007) 8 NWLR (pt. 1037) 470

STATUTES & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria 1999, s. 36

High Court of Rivers State (Civil Procedure) Rules 2006, O. 20 r. 9,
O. 39 r. 1

Court of Appeal Rules 2011, O. 7 r. 11, O. 12 r. 1

LEAD JUDGMENT BY NGWUTA JSC

Endorsed on the Writ of Summons issued out of the Registry of the High Court of Justice Rivers State sitting at Port Harcourt on 5th March, 2010 are the Respondents' (the plaintiff) claims against the appellant, then defendant:

"1. A declaration that the Master Services Agreement between the claimant and the Defendant is still valid and subsisting.

2. A declaration that the act of the defendant in rejecting Mr. Raja Kumar a contract staff supplied by the claimant to the defendant, pursuant to the Master Services Agreement between the claimant and the defendant without any reason whatsoever amounts to a breach of the said contract.

3. A declaration that the defendant's refusal of the claimant to fill the vacant slot/position of the contract staff as provided in their agreement is wrongful, illegal and unlawful and therefore amounts to a breach of contract.

4. The sum of twenty thousand US Dollars (\$20,000) being money spent by the claimant in bringing Mr. Raja Kumar to Nigeria to work for the defendant.

5. The sum of five hundred thousand US Dollars (\$500,000) only against the defendant being payment due to the claimant by the defendant for five years of the contract of skilled labour of Mr. Raja Kumar supplied by the claimant to the defendant.

6. General damages in the sum of five million US Dollars (\$5,000,000) only against the defendant for breach of contract."

The facts are apparent from the claims. There is no useful purpose in repeating them. The claims are reproduced as paragraph 2

(i), (ii), (iii) of the Statement of Claim. The Respondent as plaintiff also filed a written Statement on Oath of its Managing Director, Mr. Viswanathan Ramachandran in which the claims were repeated. Also filed was a list of documents to be relied on by the claimant, as well as the elaborate Master Services Agreement entered into by the parties.

B Exhibit A is the proof that the Writ of Summons, the statement of claim and other processes filed by the Respondent as plaintiff were duly served on the appellant as defendant on the 26th day of March, 2010. The defendant (appellant) failed or neglected to enter appearance or file any process in reaction to the processes served on it by
C the Respondent.

On the 8th day of June, 2010 the Respondent as plaintiff filed a motion, pursuant to Order 20 Rule 9, Order 39 Rule 1 of the High Court (Civil Procedure) Rules, 2006 of the High Court of Rivers State
D asking for:

“An order entering judgment in favour of this Claimant/Applicant in terms with its Writ of Summons and Statement of Claim, the defendant/respondent having failed/refused to file its statement of defence and other processes within the time limited by the Rules.”

E The motion was supported by an affidavit of 10 paragraphs deposed to by one Loveday Bagbi, the Litigation Secretary in the Law Firm of Uche Wali & Co, Solicitors to the claimant. It was also accompanied by a written address.

F When the motion was called for hearing on 26th September, 2010 the parties were absent. The Respondent/applicant in the motion was represented by Counsel but the Respondent was not represented. The motion was served on the appellant (then Respondent) on 21st September, 2010.

G On the 29th September, 2010 the learned trial judge granted the application and awarded the claimant the sum of twenty thousand US Dollars (\$20,000) as being the money spent by the claimant in bringing Mr. Raja Kumar to Nigeria to work for the defendant. Also awarded to the claimant is the sum of five hundred thousand
H US Dollars (\$500,000) being payment due to the claimant against the defendant for breach of contract, as well as the sum of N35,000.00 as costs in favour of the claimant.

On 6th day of September, 2013 the Court of Appeal, Port Harcourt Division, struck out the appellant's motion filed on 11/3/

2013 for extension of time to appeal and stay of execution of the judgment of the trial court, the application having been withdrawn. On the same date the Court below granted the application for trinity reliefs filed on 30/5/2013 and struck out relief 4 for a deeming order and reliefs 5 and 6 which were withdrawn by appellant as applicant.

Pursuant to the trinity reliefs granted to it, appellant prepared a notice of appeal consisting of four grounds of appeal but the date of filing was not indicated. The parties duly filed and exchanged briefs of argument.

On 16/4/2014, the Court below struck out the appeal *“for being incompetent as there was no evidence that the appellant paid any fee for the filing of the appeal.”* The Court held further that:

“Even on the merits, the Appeal lacks merits and would have been dismissed in its entirety if the appeal were competent.”

Aggrieved by the judgment, the appellant on 10/6/2016, filed a Notice of Appeal on which was endorsed seven grounds of appeal. The parties, by their respective Counsel, filed and exchanged briefs of argument.

In his brief of argument, learned Counsel for the appellant distilled the following four issues for determination.

“1. Whether the lower court was right when it suo motu struck out the appellant’s Notice of Appeal dated 19 September, 2013 on the ground of non-payment of filing fees. (Distilled from ground one of the Notice of Appeal).

2. Whether the lower Court was right when it held that the Respondent’s witness statement on oath constitutes evidence on which the trial court rightly granted default judgment in favour of the Respondent in respect of its claims for declaratory reliefs, special and general damages? (Distilled from grd 2 to 4 of the Notice of Appeal

3. Whether the award of the sum of US\$5,000,000 (Five Million US Dollars) as general damages in addition to the sum of US\$520,000,000 (five hundred twenty thousand dollars) upheld by the lower court are based on the same facts and amount to double compensation to the Respondent in respect of the same alleged items of loss. (Distilled from grounds 5 and 6 of the Notice of Appeal)

4. Whether the lower court’s finding with respect to the award of special damages is inconsistent, when having held that the sum awarded as special damages includes compensation for expenses,

time, energy and inconveniences suffered by the claimant in recruiting a competent worker for the Appellant, the Court also held in another breath that the said award does not include the compensation for the said items of damages? (Distilled from ground 7 of the Notice of Appeal)”

B In his own brief of argument, learned Counsel for the respondent made reference to the notice of preliminary objection filed on 25/2/2015 in which it was indicated that before or at the hearing of the appeal, the Respondent would, by way of preliminary objection, pray the Court to dismiss the appeal on the ground that the appellant's Notice of Appeal is incompetent.

C Except for the bridged wording in Issue 4, the Respondent adopted the four issues in the appellant brief of argument.

D I will herein summarise arguments of learned Counsel on the four issues and preliminary objection before dealing with the merit vel non therein.

In Issue 1, learned Counsel for the appellant reproduced in parts the judgment of the Court below:

E *“An appeal, by Order 7 Rule 11 of the Court of Appeal Rules, is deemed to have been brought when the Notice of Appeal is filled in accordance with the Rules of this court. The fees prescribed in the 3^d schedule of the Rules of this court is N5,000. That, as directed by Order 12 Rule 1 of the said Rules, shall be the fee charged and the fee shall be paid for the filing of the instant appeal. It is the payment of the filing fee that vests legitimacy and validity on the Court process... I have said enough. The notice of appeal at page 49-52 of the record of appeal is duly incompetent. It is accordingly struck out.”*

F Noticing that non-payment of filing fees was not an issue in the G appeal, learned Counsel impugned the procedure adopted by the lower court in raising the issue suo motu and striking out the appeal based on it without inviting learned Counsel for the parties to address the issue. He relied on Umar v. Bayero University (1988) 4 NWLR (Pt. 86) 85. He relied on the following documents produced H by the appellant as further evidence in the appeal.

(i) Keystone Bank Plc teller No. 0001057 dated 18th September, 2013 for the sum of N5,600.

(ii) Certified copy of the entry in the Cash Book of the High Court dated 18th September, 2013 evidencing payment of the said

filing fees.

(iii) Certified copy of a letter dated 8th November, 2013 from the Appeals Registry of the High Court of Rivers State confirming that the Appellant in fact paid the appropriate filing fees in respect of the Notice of Appeal.

He said that the above documents are conclusive proof that the appellant complied with Order 7 Rule 11 and Order 12 Rule 1 of the Court of Appeal Rules, 2011. He relied on *Abass v. Suleman* (2001) 15 NWLR (Pt. 735) 144 at 170 for the procedure to be adopted when a court raises an issue suo motu. He argued that the failure of the Court below to afford the parties an opportunity to address it on the issue it raised suo motu is a breach of appellant's right to fair hearing in Section 36 of the Constitution of the Federal Republic of Nigeria, 1999 as amended. He relied on *Urhobo v. Oteri* (1999) 2 NWLR (Pt. 589) 3 NWLR (Pt. 540) 19; *Adeyemi v. Y.R.S. Ike-Oluwu & Sons Ltd* (1999) 8 NWLR (Pt. 309) 27 at 140.

He relied on *Shuaibu v. Muazu* (2014) 8 NWLR (Pt. 1409) 209 for the effect of the failure by the Registrar to collect appropriate filing fees. He urged the Court to hold that the Court below descended into the arena and its sense of justice obscured to the detriment of the appellant. He relied on *Okoduwa v. The State* (1988) 2 NWLR (Pt. 76) 333 at 354. He urged the Court to resolve issue 1 in favour of the appellant.

Issue 2 is the propriety vel non of entering judgment in default in favour of the Respondent based on the Respondent's witness statement on oath.

Learned Counsel for the Appellant referred to the claim for declaratory reliefs, general and special damages which the trial court granted pursuant to the High Court (Civil Procedure) Rules of Rivers State High Court which provides for filing of witness statements and the decision of the Court below that decisions cited to the effect that a plaintiff must adduce oral evidence in support of its claim for declaratory reliefs and special damages are not applicable since they predate the Rivers State High Court (Civil Procedure) Rules of 2006 which provides for filing of witness statements.

Learned Counsel said that the judgment of the court below is predicated on the witness statement on oath, and queried whether default judgment for declaratory reliefs, general damages and special

damages can be entered without the court taking oral evidence. He referred to *Aregbesola v. Oyinlola* (2011) 9 NWLR (Pt. 1253) 458 at 565 and *Agagu v. Mimiko* (2007) 7 NWLR (Pt. 1140) 342 and argued that the witness statement is not evidence upon which the court can predicate judgment unless the witness enters the witness box and adopts same.

According to learned Counsel, the statement on oath has no probative value unless the witness leads oral evidence adopting same. He urged the Court to resolve Issue 2 in favour of the appellant.

Issue 3 queries the award of the sum of US\$5,000,000 (five million US dollars) as general damages, in addition to the sum of US\$520,000 (Five Hundred Twenty Thousand US dollars) based on the said facts. He argued that the awards amount to double compensation to the Respondent in respect of the same alleged items of loss. He argued that from the facts of the case special damages cannot be distinguished from the general damages as both relate to the recruitment of Mr. Kumar.

He argued that in a claim for breach of contract, the injured party is placed in the position; so far as money can do so, he would have been if there had been no breach of contract. He relied on *Okongwu v. NNPC* (1989) 4 NWLR (Pt. 115) 296 and *Ativie v. Kabelmetal Nig. Ltd* (2008) 10 NWLR (Pt. 1095) 399.

He relied on *Odumogu v. African Continental Bank Ltd* (1976) 11 SC 55 in support of his argument that general damages are not awarded as a matter of course but on sound and solid legal principles. He urged the Court to resolve Issue 3 in favour of the appellant.

Issue 4 is in the finding of the lower Court on award of special damages in view of its decision that the sum awarded as special damages includes compensation for expenses, time, energy and inconvenience suffered by the claimant in recruiting a competent worker for the appellant.

He argued that the judgment of the Court below is inconsistent and issue of special damages does not flow from the pleading, filed by the respondent. He reproduced the finding of the Court below to the effect that:

“The total sum of US\$520,000 awarded as special damages does include compensation or damages for other legal injuries like expenses, time, energy and inconvenience suffered by the claimant

in recruiting a competent worker for the appellant.”

He contrasted this with the finding of the same Court that:

“It (special damages) also does not include the expenses, time and energy and other inconveniences the claimant suffered to get immigration clearance for Raja Kumar to leave India and enter Nigeria in execution of the contract.” B

Based on the above seemingly inconsistent portions of the judgment, he argued that the Court below approbated and reprobated on the issue of special damages contrary to the settled principles of law that a Court must be consistent in its findings. He relied on *Ofuani v. Nigeria Navy* (2007) 8 NWLR (Pt. 1037) 470 at 483-484. He C urged the Court to resolve Issue 4 in favour of the appellant.

In conclusion, learned Counsel urged the Court to allow the appeal and set aside the judgment of the lower court as well as the judgment of the High Court of Rivers State in Suit No: PHC/397/ D 2010.

In the Respondent's brief deemed filed on 11/1/2016, learned Counsel for the respondent argued extensively his objection to the competence of the appeal. He said that appellant did not seek and obtain leave of the Court below or this court to appeal in grounds 2, E 3, 4, 5, and 7 which he said amount to a violation of section 237(3) of the Constitution of the Federal Republic of Nig. 1999 (as amended).

Learned Counsel argued that ground one as well as issue one distilled therefrom render the ground and issue drawn from it as well as the argument canvassed in the brief incompetent. He said refer- F ence was made to documents which do not form part of the record. He argued that grounds 2, 3, 4, 5 and 7 in the appellant's notice of appeal challenging the re-evaluation of facts and law by the Court below are grounds of facts and/or mixed law and facts and were filed G without leave of this Court or the Court below.

After a lengthy submission, he urged the Court to strike out Grounds 2, 3, 4, 5 and 7 of the appellant's Notice of Appeal as the said grounds of facts and mixed law and facts were filed without leave.

In Issue 1, learned Counsel argued that the appellant did not H file the Notice of Appeal in accordance with Order 7 Rule 11 of the Court of Appeal Rules, 2011 in that the prescribed fee of N5,000 was not paid. He referred to *The Nigerian Navy & Ors v. Navy Captain D. O. Labinjo* (2012) LPELR 7868 SC and contended that the

appellant having disobeyed the express provision of the Rules of the Court of Appeal the process filed was incompetent and the Court did not require address of Counsel for the parties to rule on the property *vel non* of hearing an appeal on an incompetent Notice of appeal.

B He added that the rules of Court are meant to be obeyed and cannot be superseded by administrative arrangement in the Court's Registry. He referred to the record and said that the appellant's application to the lower court to validate the incompetent Notice of Appeal was rejected but the appellant was granted extension of time C to file a fresh notice of appeal. He contended that in the absence of evidence that the notice of appeal was subsequently filed as ordered by the Court; the appeal was dismissed as incompetent.

He argued that in the circumstances it was misleading for the appellant to argue that the court raised the issue of non-payment of D fees *suo motu*. Learned Counsel said that the document sought to be tendered by the appellant to show that the filing fees was paid did not form part of the record of the trial Court and were therefore rejected. He maintained that this Court cannot consider the documents as they were not part of the record of the Court below. He E relied on *Oruoba v. Anekhie* (1997) 5 NWLR (Pt. 506) 618 at 636.

He relied on *Garuba v. Omokhodion* (2011) 33 WRN p.1 at 35 in support of his argument that the parties and the Court are bound by the record and the appellant cannot blame the lower Court F for its own negligence. He relied on *Omoni v. Tom* (1991) 6 NWLR (Pt. 195) 93 at 108 for the duty of the appellant to ensure that the record of appeal is complete as the Court cannot hear appeal on incomplete record.

He argued that issue one as formulated is incompetent as the G documents on which it is based are not part of the record of the lower Court or the trial Court. He relied on *Umar v. Bayero University* (1988) 4 NWLR (Pt. 86) p. 85 among others. He urged the court to resolve issue one in favour of the respondent.

H Issue 2 is the property *vel non* of the Court entering a default judgment in a claim for declaratory reliefs on the basis of a witness statement on oath.

Learned Counsel submitted that appellant did not challenge the pleadings, statement on oath or other documentary evidence front loaded by the respondent and so there is no basis for the argu-

ment that the lower court did not take oral evidence, adding that unchallenged evidence is deemed admitted. He relied on *Nigeria Bottling Co. Plc v. Ubani* (2013) LPELR-21902 SC and *Union Bank of Nig. Plc v. Mr. N. M. Okpara Chimaeze* (2014) LPELR- 699 SC.

He argued that since the appellant did not file a defence at the trial court, there is nothing on the other side of the imaginary scale of justice which might need oral evidence to test the veracity of the case before the Court. He argued that the witness statement on oath was duly served on the appellant who did not challenge same and is therefore deemed to have admitted same and no further evidence was required. He relied on *Ajunwa v. SPDP (Nig) Ltd* (2012) All FWLR (Pt. 615) SC 700. B
C

Learned Counsel relief on *Newswatch Communication Ltd v. Ibrahim Attah* (2006) NSCQR Vol. 26 page 438-459 where Tobi, JSC, held that: “...a Court should not ignore a motion or process before it and give decision one way or the other without considering the motion or process...”

He urged the Court to hold that the Court below did nothing but adjudicated on the instant case on the basis of the available material in the Court file. He referred to *MC Investment Ltd & Anor v. Care Investment and Capital Market Ltd* (2012) LPELR 7801 SC in his contention that the appellant, by disobedience to the rules of Court is deemed to have admitted the claims against it. He relied on *Guaranty Trust Bank Co of New York v. Hanndy & Co.* (1915) 2 KB 536 for the definition of default judgment as: E
F

“...a judgment entered against a defendant who has failed to plead or otherwise defend against the plaintiff’s claims.”

Learned Counsel referred to “Civil Procedure in Nigeria” by Fidelis Nwadialo 2nd Edition p.449 where the learned author posited: G

“Where no statement of defence is filed in answer to the statement of claim, then by the ordinary rules of pleadings, the allegation in the latter is taken as admitted.”

He referred to O. 10 Rule 2 of the Rules 2010 which provides:

“Where any defendant fails to appear, a claimant may proceed upon default of appearance under the appropriate provisions of the Rules upon proof and service.” H

He relied on the *White Book Service* 2007 Vol. 1 at pages 348 and 356 for procedure in obtaining default judgment and contended

that the respondent complied with the procedure enumerated therein. Relying on *Chinedu v. Mbamali* (1990) 3-4 SC 32, among others learned Counsel argued that the appellant failed to make out a case to warrant this Court to disturb the concurrent findings of the two Courts below.

B He said that in awarding the sum of US\$5 million damages, the trial Court below affirmed the trial Court's judgment. He relied on *Irene Nguma v. A-G Imo State* (2014) LPELR 22252. He urged the Court to resolve issue 2 in favour of the respondent.

C Issue 3 is on the award of US\$5,000,000 (five million US Dollars) as general damages in addition to the sum of US\$520,000 (five hundred twenty thousand US dollars).

Learned Counsel for the respondent referred to page 121 of the record and argued that the award of general damages and special damages are not based on the same facts. He relied on *Ijebu Ode LG v. Adedeji Balogun & Co* (1991) 1 NWLR (Pt 166) 136 at 159 and 165 in which the said that this Court affirmed award of general and special damages as an exception to the rule that Courts frown at award of general damages in addition to award of special damages for breach of contract.

He conceded that the essence of damages in contract is based on *restitution integrum* and relied on *UBA v. BTL Industries Ltd* 92006) LPELR 3404 SC where this Court held:

F “*Damages paid in respect of the breach is the amount necessary to put the respondent wronged and aggrieved in the position he would have been had there being no breach.*”

He argued that the sum of \$20,000 is money spent by the respondent and \$500,000 is the sum the parties agreed the respondent would have earned in five years if the contract was not breached. He added that \$5,000,000 general damages was awarded at the legitimate discretion of the trial Court and endorsed by the Court below arguing that the awarded is not double compensation.

H He said that arguing that this heads of damages amounts to double compensation:

“...merely exposes the inevitable fact that the appellant failed, refused and neglected to carefully scrutinize the damages claimed by the claimant. This is simply because the defendant/appellant herein has acted the greatest respect as a weakling, a slumberer, the indo-

lent or a lazy litigant as against being alive to tap into the constitutional opportunity of fair hearing provided for in Section 36 (1) of the 1999 Constitution.”

He argued that the appellant did not prove a special circumstance of the Court to interfere in the concurrent findings of the two Courts below on the award of damages. He relied on *Okoye v. Obiaso* (2010) 22 WRN 36 at 50. He relied also on *Newswatch Communication Ltd v. Ibrahim Attah* (2006) NSCQLR Vol. 26 page 438 at 458-459 on the principles of hearing. B

He referred to paragraph 4 to 6 of the subsisting orders of the trial Court at page 44 of the record of appeal as indicating the award of US\$5,000,000 as general damages for breach of contract agreement the appellant. He referred to paragraph 12 (iv) of the statement of claim and paragraph 15 (iv) of the deposition on oath of the Respondent’s witness on pages 9 to 11 of the record. C

He relied on *Odulaja v. Hadded* (1973) ANLR (Vol. 1) 836 at 839, 840 for the distinction between general damages which the law will presume to be the direct natural or probable consequence of the amount complained of and special damages which the law will not infer for the from the nature of the act. He contended that damages were awarded in line with the evidence and particulars of the pleadings to restore the respondent to a position he would have been if the contract was performed. D

He referred to pages 13-35 of the record for the documentary evidence of the contract between the parties and submitted that the Court below was right to have held that: F

“Where there is evidence on which general damages can be based it is not wrong for the trial court to award general damages in a summary or default judgment.” G

He relied on *Marine Management Associates Inc & Anor v. National Maritime Authority* (2013) All FWLR (Part 1678) SC 790 in his argument that in case of breach of contract damages is calculated on the basis of the loss sustained by the injured party.

He referred to *Kopek Construction Ltd v. Johnson Koleola Ekisola* (2010) 3 NWLR (Pt. 1182) 618 SC in his argument that *“this rule against double compensation appears to have some exception, like every rule...”* He contended that learned Counsel for the appellant was wrong to have argued that the Court below was wrong in H

law to have awarded general and special damages in a claim for breach of contract.

He relied on *Odiba v. Azege* (1988) 9 NWLR (Pt. 566) SC 320 at 385 in his argument that the award of general and special damages does not amount to double compensation. He urged the Court to resolve issue 3 in favour of the respondent, and to hold that the concurrent decisions of the two Courts below in favour of the respondent have not been faulted.

Issue 4 is whether the award of special damages is inconsistent as the Court below found that the sum awarded does not include compensation for expenses, etc. He referred to pp. 6, 7 & 44 of the record in his argument that there was no inconsistency in the findings of the Court below on the awards. He argued that the findings of the trial Court as affirmed by the Court below do not amount to approbating and reprobating. He argued that appellant did not show that the concurrent findings of the two Courts below are pervert.

He relied on *Ukeje v. Ukeje* (2014) 4 SC (pt. 1) 1 at 27 and argued that when a finding of fact made by the trial court is affirmed by the court below there is a presumption that the trial Court's conclusions are correct. He said that the Court of Appeal decided the appeal on the *ratio decidendi* of the judgment of the trial Court. He urged the Court to resolve the issue in favour of the respondent and to dismiss the appeal.

In his reply brief, learned Counsel for the appellant urged the Court to overrule the preliminary objection. In his reply brief, learned Counsel for the appellant urged the Court to overrule the preliminary objection.

He listed the test for the determination of the nature of a ground of appeal and submitted that his grds. 2, 3 and 4 are grounds of law. In grd. 5, he said that appellant did not contest facts but simply argued that there was a case of misapplication of law to facts. He relied on *Board of Custom & Excise v. Barau* (1982) 10 SC 48 at 137.

In ground 7, he submitted that where a ground of appeal merely deals with a matter of inference, even if it is inference of fact a ground of appeal framed on it is a ground of law. He urged the Court to discountenance respondent's arguments on the competence of grounds 2, 3, 4, 5 and 7 and strike out the preliminary objection.

The rest of the appellant's reply brief is headed "*Appellant's*

Reply on Points of Law". Learned Counsel then re-argued the four issues seriatim. In my view, it is a supplementary brief for the purpose of emphasizing the argument in appellant's brief. It is hardly a reply on points of law as claimed by learned Counsel. The Respondent's brief has joined issues with the appellant's brief as expected. The appellant need not repeat the issue joined either for emphasis or expatiation. See *Ochema v. The State* (2008) 6-7 SC (Pt. 11) page 1. I will discountenance the so-called reply on points of law.

Preliminary objection: "*The respondent had raised an objection to the competence of this appeal, because the appellant did not seek and obtain leave to appeal from the Court of Appeal or this Honourable Court concerning Grounds two, three, four, five and seven of the appellant's Notice of Appeal...*"

Respondent has challenged the competence of the appeal on the ground that appellant needed leave of the Court below or this Court to raise grounds 2, 2, 4, 5 and 7 of the Notice of Appeal. He started his argument with ground 1 which he said was premature even though he did not attack the competence of the said ground. I think the respondent appears to have been confused. He argued that ground 1 is premature even though it did not object to it. It wants the appeals struck out as incompetent even though it did not challenge all the grounds of appeal. It is only where all the grounds of appeal can be said to be incompetent that the appeal is liable to be struck out. See *Agbatua v. Amadi* (1998) 11 NWLR (Pt. 572) 16; *Buzu v. General* (2000) 13 NWLR (Pt. 684) 228.

Respondent cannot challenge the competence of the appeal when, from its own showing, not all the grounds are incompetent. One competent ground can save the appeal from being struck out. In any case, I have considered the submissions of Counsel for the parties and I am inclined to agree with Counsel for the appellant that all the grounds of appeal are competent.

I will determine the appeal on the four issues framed by the appellant and adopted by the Respondent.

Issue 1: Whether the lower Court was right when it *suo motu* struck out the appellant's Notice of Appeal dated 18th September, 2013 on the ground of non-payment of filing fees. (Distilled from

Ground one of the Notice of Appeal).

This is a compound issue and will split it into two.

1. Did the Court strike out the Notice of Appeal *suo motu*. As argued by learned Counsel for the Respondent, appellant's application to validate its appeal was rejected by the Court below. Appellant
B was rather granted extension of time to file a fresh Notice of Appeal. Appellant did not file a fresh Notice of Appeal but proceeded with the Notice of Appeal it had unsuccessfully sought to validate.

In the circumstances, the Court below cannot be said to have
C struck out the appellant's Notice of Appeal.

2. Whether the Court below was right to have struck the appeal for non-payment of filing fees.

***I agree with the respondent that appeal is not filed unless the appropriate filing fees are paid in compliance with
D Order 7 Rule 11 and Order 12 Rule 1 of the Court of Appeal Rules, 2011.***

***Be that as it may, I think it is mechanical justice to strike out an appeal on the mere fact that on the face of the processes there is no endorsement relating to payment of fees. It
E is not an everyday occurrence for a process meant for filing to be smuggled in through the Registry into the Court file without due compliance with the rules relating to the payments of filing fees.***

***It would have been more in tune with justice to enquire
F from the Registry whether or not fees were paid and the appellant could be asked to satisfy the Court that the fees were paid, especially when it applied to validate the appeal, perhaps by showing evidence that the fees were paid.***

***Appellant could have been granted leave to tender fresh
G evidence that it paid the filing fees. Justice is not a game of hide and seek. It is an attempt, notwithstanding human imperfection, to discover the Registry. If the Registry fails to endorse the process appropriately or fails to charge appropriate fees, the appellant could be ordered to pay the fees to
H complete payment of the fees.***

On no account should a litigant be made to suffer for the mistake of the Registry as is apparent in this appeal. See Akpaji v. Udembu (2009) 6 NWLR (pt. 11) 38 at 545. ***In the circum-***

stances, I hold the view that the lower Court erred in striking out the appeal on ground of non-payment of fees. The order striking out the appeal is hereby set aside. Issue 1 is partly resolved in favour of the appellant.

Issue 2 is on the lower Court's reliance on the respondent's witness statement on oath to grant declaratory reliefs. B

In an action for declaration of a right, the plaintiff must satisfy the Court by credible evidence that he is entitled to the right he claims. The claim for declaration cannot be granted on admission of the defendant. See *Fabunmi v. Agbe* (1985) 1 NWLR (Pt. 2) 799; *Ochomma v. Unogi* (1965) NMLR 32. C

In my view, the evidence to support a claim for declaration can be oral or documentary. As rightly held by the lower Court, the Rivers State High Court (Civil Procedure) Rules 2006 provides for the filing of witness statement. In compliance with the rules, the respondent filed a witness statement made on oath. The witness statement is in the nature of affidavit evidence. D

In the application for judgment in default, the respondent relied on the witness statement. The application was granted pursuant to Order 20 Rule 9 of the Rivers State High Court (Civil Procedure) Rules 2010 hereunder reproduced: E

Order 20 Rule 1 of the 2006 Rules provides:

"If the sum claimed is only for a debt or liquidated demand, and the defendant does not within the time allowed for such purpose, file a defence, the claimant may at the expiration of such time, apply for final judgment of the amount claimed with costs." F

Under this rule, judgment could be entered for the plaintiff in default based on the Statement of Claim. The requirement that a plaintiff must by credible evidence satisfy the Court that he is entitled to the declaratory relief he claims is satisfied by the witness statement made on oath pursuant to the 2006 Rules of the Rivers State High Court. G

"Order 20 Rule 9: H

In all actions other than those in the preceding Rules of this Order, if the defendant makes default in filing a defence, the claimant may apply to a judge for judgment and such judgment shall be given upon the statement of claim as the judge shall consider the claimant

to be entitled to.”

The respondent served all the relevant processes on the appellant, appellant saw no need to file a defence as and when due or at all and the claim is for liquidated demand. On the facts of this case, the trial Court rightly granted the claim and the Court of Appeal affirmed same. Pre-2006 decided cases on the issue of adoption of witness statement are inapplicable because of the requirement for witness statement on oath. I resolve issue 2 in favour of the Respondent.

Issue 3 is on the award USD\$5 million as general damages in addition to the sum of USD\$520,000 made by the trial Court and upheld by the Court below. The principle of assessment for breach of contract is *restitution in integrum*, that is, the plaintiff in so far as money can do it shall be restored into the position in which he would have been if the breach did not occur. See *Umuoetuk v. Union Bank Plc* (2001) FWLR (pt. 81) 1849 ratio 8. The terms, general and special damages, are not apt in the categorization of damages for breach of contract – *P2 & 10 Ltd v. Ogedengbo* (1972) 1 All NLR (pt. 1) 203; *Barau v. Cubuits Nig Ltd* (1990) 5 NWLR (Pt. 152) 630.

The relevant portion of the judgment of the Court below on general and special damages is hereunder reproduced:

“There are however facts justifying the award of general damages to the claimant. He incurred expenses, time and energy sourcing for and interviewing a competent skilled worker the defendant requested him to find and recruit for him. The defendant was arbitrary in the rejection of the skilled labour recruited from far away India by the claimant. The defendant gave no reason for rejecting the skilled labour. These facts are material for the award of general damages. The total sum of US\$520,000 awarded as special damages does not include compensation or damages for other legal injuries like expenses, time energy and inconvenience the claimant suffered to source for and interview a competent skilled labour or worker for the defendant/appellant. It also does not indicate the expenses, time and energy and other inconveniences the claimant suffered to get immigration clearance for Raja Kumar to leave India and enter Nigeria in expectation of the contract. The claimant also averred, unchallenged that but for breach of contract he would have earned US\$300,000.00 per year for the first two years, subject to the re-

newal for a further term of 3 years."

The crucial issue here is the propriety *vel non* of the sum of US\$5,000,000 awarded to the respondent as general damages. The claim was not contested. However, the principle of *restitution in integrum* is not *restitution in opulentium*. It is not meant to give a wind-fall to the respondent. See *Umuoetuk v. Union Bank Plc* (Supra) B ratio 2; *Shell BP v. Jammal Engineering Ltd* (1974) 4 SC 33.

Let me set out the various sums claimed and awarded.

1. US\$20,000 spent on bringing Mr. Raja Kumar to Nigeria to work for the appellant.

2. US\$500,000.00 being payment due to claimant by the appellant for five years of the contract. I note that the sum of US\$300,000.00 per year for a period of five years was not part of the claim. If claimed there would have been double claim of US\$500,000.00 and US\$300,000.00 per the same period of five D years.

3. Then the US\$5,000,000.00 as general damages for breach of contract.

The court below rationalized the US\$ 5 million claim for general damages for breach of contract by stating that the sum of E US\$520,000.00 awarded the respondent as special damages:

"...does not include compensation or damages for other legal injuries like expenses, time, energy and inconvenience the claimant suffered to source for and interview a competent, skilled labour or F worker for the defendant/appellant, time and energy and other inconveniences the claimant suffered to get immigration clearance for Mr. Raja Kumar to leave India and enter Nigeria in execution of the contract. The claimant also averred, unchallenged that for breach of contract he would have earned US\$300,000.00 per year for the first G two years, subject to the renewal for a further term of 3 years."

This last item of US\$300,000.00 per annum for the first three years was not claimed but averred as US\$300,000.00 per annum for a period of five years, not first three years. In any case, the respondent is not entitled to the sums of US\$300,000.00 for three or H five years in addition to US\$500,000.00 for the said period of five years both as money he would have earned for the period of the contract had it not been breached.

The respondent did not claim: *"...compensation or damages*

for other legal injuries like expenses, time, energy and inconvenience the claimant suffered to source for and interview...

He had already claimed and was awarded US\$20,000.00 he claimed he spent in bringing Mr. Raja Kumar to Nigeria to work for the defendant. The respondent never made any claim for:

B *"...expenses, time and energy and other inconveniences the claimant suffered to get immigration clearance for Raja Kumar..."*

C It was stated in paragraph 10 of the Written Statement on Oath of Mr. Vismanathan Kamachandran that the claimant *"...also undertook and satisfied all immigration requirements of both Nigeria and Indian countries..."* but there was no specific claim with regard to immigration as the claim for it is incorporated in the US\$20,000.00 spent to bring Mr. Raja Kumar to Nigeria to work for the defendant. This would include immigration requirements, etc.

D ***In my view and based on the facts, the two heads of claim in paragraph 12 (iv) and (v) of the Statement of Claim are what will restore the respondent to the position he would have been if there was no breach of the contract. And that is all the respondent is entitled to and not general damages.***

E ***The US\$5,000,000.00 damages awarded to the respondent as general damages cannot stand as the respondent cannot be awarded both special and general for the same set of fact.*** See *Ativie v. Kabel Metal Nig Ltd* (2008) 10 NWLR (pt. 1095) 399 at 42.

F ***Issue 4 is an alleged inconsistency with respect to award of special damages. At page 121 of the record, the Court below held, inter alia:***

G ***"The total sum of US\$520,000.00 awarded as special damages does include compensation or damages for other legal injuries like expenses..."***

In the same paragraph the Court held: "It also does not include expenses, time and energy..."

H ***Obviously, the 'not' was omitted after the word "does". This is clear from the next sentence in which it was stated that: "It also..."***

In the same paragraph the Court held: "It also does not include expenses, time and energy..."

Obviously, the word "not" was omitted after the word

“does”. This is clear from the next sentence in which it was stated that: “It also does not include...” If the special damages does include them it would be out of place to say in the next sentence that: It also does not include...” It was the omission to argue that the award of special damages is inconsistent. It was an omission that could have been detected by a community reading of the whole portion of the judgment. B

The practice of law is not a game of dice. Learned Counsel for the appellant should not have built his issue 4 on what he knew, or should have known, was an omission of the word “not”. On the other hand, learned Counsel for the respondent ought to have acknowledged the error before or after correcting same. I resolve issue 4 which was predicated on the omission of the word “not” between “does” and “include” against the appellant. C

Be that as it may, the \$20,000 awarded as claimed “being money spent by the claimant in bringing Mr. Raja Kumar to Nigeria to work for the defendant” includes all the expenses in bringing the expert to Nigeria. It includes the immigration requirements. D

In conclusion, the appeal succeeds in part. I set aside the US\$5,000,000.00 awarded as general damages to respondent. On the facts of the case, the award amounts to double compensation.

Appeal allowed in parts on the award of US\$5,000,000.00 general damages. Parties to bear their respective costs. F

MOHAMMED CJN

Having had a preview of the lead judgment of my learned brother Ngwuta JSC, just delivered, I adopt his lordship’s reasoning G and conclusion therein to allow the appeal in part. I also adopt the consequential orders made in the lead judgment.

GALADIMA JSC

I have been obliged a copy of my brother Ngwuta’s JSC judgment just delivered. I am in complete agreement with his reasoning leading to the conclusion that the appeal succeeds in part and ought to be allowed in part. I too allow same and abide by all the consequential orders made in the lead judgment. H

RHODES-VIVOUR JSC

I had the advantage of reading in draft the judgment delivered by my learned brother, Ngwuta JSC. I agree that the appeal succeeds in part and the further orders proposed.

B

MUHAMMAD JSC

My learned brother Ngwuta, JSC, had given me the opportunity to read his lead judgment which has just been delivered in this appeal. I entirely agree with the opinion so ably put in place by my learned brother in the lead judgment.

C

However, I just want to say a word or two on issue 3 in the Appellant's brief of argument on whether the award of the sum of US\$5,000,000 (Five Million US Dollars) as general damages in addition to the sum of US\$520,000 (five hundred and twenty thousand US Dollars) affirmed by the Court below, can be allowed to stand. It is not in dispute that the disagreement between the parties in this appeal, arose from the performance or execution of a written contract. The Law is well settled that where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally that is, according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have

E

F

been in the contemplation of both parties at the time they made the contract, as the probable result of breach of it. In other words if one party to a contract is in breach of its terms, the other party is entitled to bring an action for damages so as to be placed in the same financial position as if the contractual terms had been duly carried out.

G

See *Hadley Vs Baxendale* (1854) 9 Exch.341, and *S.B.N. Plc vs Opanubi* (2004) 15 NWLR (Pt. 896) 437. In the instant case I entirely agree with my learned brother Ngwuta JSC, in the lead Judgment that having regard to the nature of claims of the plaintiff, now

H

Appellant arising from breach of contract, the claim for general damages does not arise at all and therefore must be set aside in partly allowing this appeal.