

SUPREME COURT OF NIGERIA

FRIDAY 20TH MAY, 2016. SC. 113/2006

**CORAM:- W. S. N. ONNOGHEN, C. B. OGUNBIYI, K. B.
AKA'AH, K. M. O. KEKERE-EKUN, C. C. NWEZE, JJSC**

CHITRA KNITTING AND WEAVING

MANUFACTURING COMPANY LIMITED APPELLANT
AND

G. O. AKINGBADE RESPONDENT

AGREEMENTS - Pleadings - Oral evidence is not allowed for transaction reduced to writing - And once the writings are specifically pleaded as conveyance - It has to be registered to be allowed to be pleaded (H1)

COURTS - Findings - Binding nature of - The fact that there is no appeal against finding of CA - Means that the finding remains valid and subsisting - And binding on the parties (H2)

FAIR HEARING - Breach - Effect - Breach of constitutional right of fair hearing in any trial nullifies the trial - And decision taken thereon is also a nullity (H3)

APPEALS - Oral evidence - Evaluation - Appellate Court is in as much as a good position as trial Court - To evaluate documentary or oral evidence - Where the demeanor of the witness is not in issue (H4)

COURTS - Evidence - Evaluation - Trial Court that heard witnesses testify - Is in a better position to evaluate their testimonies and assign probative value thereto (H5)

APPEALS - Retrial - Correctness of - Court of Appeal was right to have ordered a retrial before another Judge - As doing so will guarantee a fair determination of issues in the matter (H6)

FACTS

Plaintiff/respondent instituted this action against defendant/

appellant at the High Court of Ogun State, claiming inter alia, a declaration that the agreement dated 4th day of April 1992 for an assignment of all that piece or parcel of land covered in part by a deed or instrument registered as No 31 at page 31 in Volume 8 of the Lands Registry, Abeokuta, executed by respondent and appellant is the only valid and subsisting agreement between both parties. Appellant counter-claimed inter alia, a declaration that the agreement executed between the parties dated the 26th of March 1992 for the assignment of ALL THAT parcel of land situate and lying at Abi Feeds along Ildiroko Road, Otta, Ogun State opposite A U. D School, Sango - Otta, and consisting in part of ALL the parcel of land forming the subject matter of the instrument registered as No 31/31/8 in the Lands Registry in the office at Abeokuta is valid and binding.

Trial commenced in the matter and at the end of which the Court dismissed both the main claim and counter-claim of the parties on the ground that Exhibits “A”- A1 and ‘B’ relied upon by both parties were registrable instruments which were not so registered and as such they ought not to have been tendered and admitted in evidence. However, the issue raised and upon which ground trial Court determined the suit was raised suo motu and without calling on parties/counsel to address the Court thereon. Both parties were dissatisfied. Hence, each party appealed separately to Ibadan Division of the Court of Appeal. The Court held that the trial Court was in error to have decided upon an issue it raised suo motu without hearing the parties. The Court therefore ordered for retrial of the matter in the High Court. Aggrieved, appellant appealed to Supreme Court.

ISSUES FOR DETERMINATION

“(I) Whether the Court of Appeal should not have considered other issues raised before their Lordships other than that concerning the matter raised by the learned trial Chief Judge suo motu.

“(II) Whether the Court of Appeal could not have evaluated evidence before the Court on the main documents in question in the case, give judgment thereon without remitting the case to the High Court.”

HELD (Unanimously dismissing the appeal per
ONNOGHEN JSC)

AGREEMENTS - Pleadings

1. The two Agreements are executed after 1st day of July, 1944 thus the provision is not applicable. The crux of the matter is that these Agreements were not pleaded but evidence was led on them. In *Akintola v. Solano* (1986) 2 NLR (pt. 24) 601, the Court held that it is the law that any transaction having been reduced into writing, no oral evidence of the transaction would be allowed and once the writings are specifically pleaded as a Conveyance, as in this case, it has to be to be registered to be allowed to be pleaded, let alone to be given or admitted, in evidence. If the conveyance is not registered but pleaded, it is incumbent on the Court to strike out the relevant paragraphs of the pleadings.

From above, the relevant paragraphs dealing with the Agreements of both April, 4, 1992 and March 26, 1992 ought to be struck out. (p. 2650 A)

COURTS - Findings - Binding nature of

2. It must be noted that there is no appeal against the finding by the lower Court that the error of the trial Court “occasioned a miscarriage of justice and constituted a breach of the provisions of Section 36(1) of the 1999 Constitution.” The fact that there is no appeal against the above finding by the lower Court means that the finding remains valid and subsisting and binding on the parties. (p. 2652 E)

FAIR HEARING - Breach - Effect

3. The next question is: what does Section 36(1) of the 1999 Constitution as amended which the decision of the trial Court is said to have offended provide? It enacts as follows -

“In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a Court or other Tribunal established by law and constituted in such manner as to secure its independence and impartiality”

The above provision is a constitutionally guaranteed right to fair hearing of every party to any litigation in our Courts or

Tribunals.

What then is the consequence of a breach of the rights of fair hearing as guaranteed under the provision of Section 36(1) of the 1999 Constitution as amended?

It is settled law that a breach of constitutional right of fair hearing in any trial or investigation nullifies such trial or investigation and decision taken thereon is also a nullity. The breach of the rights of fair hearing in any proceeding therefore vitiates the entire proceedings. It follows, therefore, that once an Appellate Court finds, as in this case, that there is a breach of the right of fair hearing in the proceeding in issue, it must allow the appeal having no other alternative in the matter.

In the instant case, appellant agrees that there was a breach of the right of a fair hearing but that the effect of nullity resulting from the breach must be limited to the erroneous decision on inadmissibility of Exhibits “A” - “A1” and “B” which should have no effect on the other aspect of the proceedings!! This is clearly misconceived having regard to the effect of breach of the right of a fair hearing. (p. 2652 F)

Document - Evaluation

4. Apart from the brief, the trial Judge did not go any further to evaluate the evidence before the Court, be it oral or documentary. It is true Appellate Court is in as much as a good position as the trial Court in evaluation of documentary evidence or oral evidence in which the demeanor of the witness is not in issue or where the Court is not called upon to prefer one version of oral testimony as against the other by believing same. (p. 2653 E)

Evidence - Evaluation

5. The decision as to which version of the case of the parties as regard the transaction involving the exhibits forming the foundation of the claim and counter-claim should be preferred by the Court cannot be reached without considering the credibility of the witnesses for the parties. It is a case of the oath of the plaintiff against that of the defendant and the Court must

of necessity believe one against the other. In the circumstance the law is settled that it is the duty of the trial Court which heard the witnesses testify that is in a better position to evaluate their testimonies and assign probative value thereto.

(p. 2654 B)

B

APPEALS - Retrial - Correctness of

6. In the circumstances of this case was the lower Court right in ordering a re-trial before another Judge? The answer to the question is obviously in the positive. In the case of Eagle Super Pack (Nigeria) Ltd vs. African Continental Bank (2006) 12 S.C. 3 at 20 this Court held thus:

“When an intermediate Appellate Court reaches a conclusion on one or some of the issues raised before it, it should normally proceed to consider the other issues bearing in mind that its conclusion may be set aside by a Higher Court in the hierarchy. There are recognized exceptions to this practice. Where an Appellate Court reaches the decision to send the case back to the trial Court for re-hearing, it should normally refrain from considering other issues as this may prejudice a fair determination of the issues at the re-hearing. Considering that the Court below later sent back the case for re-hearing, I do not accept that the failure to consider all the outstanding issues as an error.”

In the circumstance I find no merit in the two issues under consideration and consequently resolve same against appellant. (p. 2654 E)

REPRESENTATION

CHIEF O. T. AKINBIYI with him, A. O. AFOLABI and T. O. OKOYA, for the Appellant

CHIEF A. F. OKUNUGA, for the Respondent

CASES REFERRED TO

Ibrahim v. Barde, (1996) 12 SCNJ 1

Fashanu v. Adekoya (1974) NSCC 327

Eagle Super Pack (Nig.) Ltd v. ACB (2006) 12 SC 3

Karibo v. Grend (1992) 3 NWLR (pt. 230) 426

- Aramis Transport Ltd v. Martins (1970) 1 All NLR 27
Kareem v. Union Bank of Nigeria Ltd (1996) 5 NWLR (pt. 451) 634
Akintola v. Solano (1986) 2 NLR (pt. 24) 601
Ossai v. Nwajide (1975) 4 SC 207
Ojugbele v. Olasoji (1982) 4 SC 31
B Okedare v. Adebara (1994) 6 NWLR (pt. 349) 157
Udensi v. Odusote (2003) 6 NWLR (pt. 817) 545
Kuti v. Balogun (1978) 1 SC 53
Stirling Eng. (Nig) Ltd v. Yahaya (2005) 11 NWLR (pt. 935) 181
C Omokuwajo v. FRN (2013) 9 NWLR (pt. 1359) 300
Omoniyi v. Alabi (2015) 6 NWLR (pt. 1456) 572

STATUTES & RULES REFERRED TO

- Supreme Court Act Cap 424 LFN 1990, s. 22
D Land Instrument Registration Law Cap 53 Vol. III Laws of Ogun State of Nigeria 1978
Constitution of the Federal Republic of Nigeria 1999, s. 36(1)
Supreme Court Rules, O. 8 r. 12(2)(5)
High Court Rules of Ogun State, O. 2 r. 1
E

LEAD JUDGMENT BY ONNOGHEN JSC

- This appeal is against the judgment of lower Court in appeal No CA/108/98 delivered on the 19th day of December 2005 allow
F the appeals of the parties herein and ordering a retrial de novo before another Judge. By an amended Writ of Summons the respondent as plaintiff claimed the following reliefs against the defendant, now appellant:-

- G *“(i) A declaration that the Agreement dated 4th day of April 1992 for an assignment of all that piece or parcel of land covered in part by a Deed or instrument registered as No 31 at page 31 in Volume 8 of the Lands Registry, Abeokuta, executed by the plaintiff and the Defendant is the only valid and subsisting Agreement between both parties.*
H *(ii) A declaration that in so far as the defendant had committed a fundamental breach of the said Agreement, the plaintiff is entitled to treat the said Agreement as at an end.*
(iii) An order directing the defendant to return forthwith to the plaintiff the original instrument registered as No. 31 at page 31 in

Volume 8 of the Lands Registry, Abeokuta, and other title documents now in possession of the defendant subject to a refund of such sums of money the Court may find the defendant is entitled to from the plaintiff which the defendant paid on account of the said Agreement.

(iv) A perpetual injunction restraining the defendant, its agents or privies from disturbing or interfering with the plaintiff's enjoyment and possession, of the said parcels of land."

By the further Amended Statement of Defence and Counter-Claim at pages 78 – 81 of the record, appellant as defendant counter - claimed against the plaintiff/respondent inter alia as follows -

(i) A declaration that the Agreement executed between the Defendant and plaintiff dated the 26th of March 1992 for the assignment of ALL THAT parcel of land situate and lying at Abi Feeds along Idiroko Road, Otta, Ogun State opposite A U. D School, Sango - Otta, and consisting in part of ALL the parcel of land forming the subject matter of the instrument registered as No 31/31/8 in the Lands Registry in the office at Abeokuta is valid and binding.

(ii) An order of mandatory injunction commanding the plaintiff to give up possession of the aforesaid parcels of land (together with the buildings) the Defendant having carried out its obligations under the Agreement.

(iii) N2m special and General Damages for trespass, breach of contract and for inducing a breach of contract between the plaintiff and a 3rd party.

The case proceeded to trial at the conclusion of which the Learned trial Chief Judge of Ogun State, in a judgment delivered in suit No. HUT/ 151/92 on the 20th day of May 1997, dismissed both the claim and counter-claim of the parties on the ground that Exhibits "A" - A1 and 'B' relied upon by both parties were registrable instruments which were not so registered and as such they ought not to have been tendered and admitted in evidence. However, the issue raised and on which the trial Court determined the suit was raised suo motu and without calling on parties/counsel to address the Court thereon.

Both parties were therefore very upset with the decision, resulting in each filing an appeal against same to the lower Court resulting in the decision now on appeal before this Court.

Originally, Learned Counsel for appellant, CHIEF O.T

AKINBIYI, in the appellant brief of argument deemed filed on the 18th day of July, 2007 formulated three issues for determination but on the 29th day of February, 2016 when the appeal was heard, he withdrew issue 1 which was accordingly struck out leaving two issues which are hereunder renumbered and reproduced as follows:-

B *“(I) Whether the Court of Appeal should not have considered other issues raised before their Lordships other than that concerning the matter raised by the learned trial Chief Judge suo motu.*

C *(II) Whether the Court of Appeal could not have evaluated evidence before the Court on the main documents in question in the case, give judgment thereon without remitting the case to the High Court.”*

D The above issues were adopted by Learned Counsel for respondent in the respondent brief deemed filed on the 29th day of February, 2016.

Looking closely at the two issues supra, it is obvious that they can be taken together, which I intend to do. In fact, learned Counsel for appellant argued them together.

E It is the submission of learned Counsel for appellant that the decision of the Lower Court that the trial Chief Judge was in error in raising the issue in question suo motu and deciding the case thereon without hearing parties on it was right but that the said decision did not affect the entire proceedings before the trial Court thereby making it necessary for the Lower Court to have proceeded to consider
F other issues raised in the appeal before it, that the said other issues are issues of law which, in the opinion of Counsel this Court ought to consider having regard to the powers of the Court under Section 22 of the Supreme Court Act Cap 424, Laws of the Federation of Nigeria 1990 and under the general powers of the Court in Order 8 Rule
G 12(2) and 12(5) of the Supreme Court Rules that the other issues he is talking about are the question of the difference between the date appearing on the judgment that it was delivered and the question of the order granting the appellant leave to amend its pleadings to include forgery after the trial.
H

In a rather strange way, Learned Counsel submitted that the judgment of the High Court is not a nullity for being delivered on a different date from the one shown on the judgment which Counsel said is “a mere clerical mistake or accidental slip” capable of being

regarded as an irregularity under Order 2 Rule 1 of the Rules of the High Court of Ogun State. I said the submission is strange because the lower Court did not decide that the difference in date rendered the judgment of the trial Court a nullity. In the judgment of the lower Court at page 184 of the record, the Court stated inter alia as follows on the matter:

“The date of the judgment does not appear to be certain. While on the heading at page 104 of the record, the judgment was purported to have been delivered on 3rd day of April, 1997, entries from the entirety of the record suggests that it was delivered on or about the 20th of May, 1997. Although the Appellants have made an issue of this uncertainty about the date of the judgment. I would in view of the ultimate conclusion to be reached hereunder, treat it as merely academic”

On the second alleged issue/question of amendment to plead forgery, which the lower Court also failed to consider as it should, learned Counsel submitted inter alia thus:

“...I submit with respect that the issue is not really of much importance. However the power of the High Court of Ogun State - up till today - to grant leave to amend pleadings at any stage of the proceedings is not in doubt”

The question then is what is the complaint of appellant on the issue as arising from the judgment of the lower Court? I fail to see any having regard to the above argument of Counsel.

However, it is the submission of Learned Counsel that *“in the light of the pleadings, all the evidence adduced including especially the Exhibits tendered at the trial, the Court of Appeal was in good position to determine the case without sending it back to High Court for retrial”* that apart from the oral evidence from both sides, there were several pieces of documentary evidence which constituted admission and the Court of Appeal was in the circumstance, in as good a position as the trial Court to assess the veracity of the oral evidence and credibility of all the witnesses based on the various documentary evidence available; that assessment of oral evidence and the credibility of the witnesses does not depend only on the demeanor of the witnesses relying on Ibrahim v. Barde, (1996) 12 SCNJ 1 at 52; Fashanu v. Adekoya (1974) NSCC 327.

Learned Counsel then proceeded to examine the facts of the

case and the documents tendered and stated that what this Court is to do is to *“see whether the truth can come out from the various documents without relying on the demeanor or the witnesses...”*

Finally Learned Counsel urged the Court to resolve the issues in favor of appellant and allow the appeal.

B On his part, learned Counsel for respondent referred the Court to page 186 of the record where the lower Court held that the resolution of appellants/respondents issue three was sufficient to determine the appeal and stated that appellant did not appeal against that finding; that the lower Court further held that any attempt to resolve the other issues raised in the appeal would be a mere academic exercise in view of the ultimate order in the case; that any attempt to go further to determine the other issues would be prejudicial to any findings which the re-trial Court may make at the trial de-novo relying on Eagle Super Pack (Nig.) Ltd v African Continental Bank (2006) 12 SC 3 at 20.

It is also the submission of Counsel that the Learned Counsel for appellant is in error in submitting that the Lower Court was in error in making the order of re-trial etc, that it is evident from the argument of Counsel that both parties led both oral and documentary evidence in support of their respective cases that while appellant relied on Exhibits B, “C”, C1, E and F in support of its counter-claim along with its oral evidence, the respondent on the other hand relied on Exhibits A - A1, “B and D’ and oral evidence in support of their claim, that the pleadings and evidence led by both parties do not fall within the ambit of *Fashanu vs Adekoya (1974) All NLR (pt. 1)35* or *Ibrahim vs Barde (1996) 12 SCNJ 1 at 52*; that the case of *Karibo vs Grend (1992) 3 NWLR (pt 230) 426 at 441*; *Aramis Transport Ltd vs Martins (1970) 1 ALL NLR 27 at 32* and *Kareem vs Union Bank of Nigeria Ltd (1996) 5 NWLR (pt 451)634 at 648 - 649* are more appropriate to the facts of the case and urged the Court to resolve the issues against appellant and dismiss the appeal.

H It is not in dispute that the trial Court dismissed the claim of the plaintiff and the counter-claim of the defendant on the ground that Exhibits ‘A - A1 and B relied upon by both parties were registrable instruments which were not so registered thereby rendering them not liable to be pleaded or admissible in evidence. Both Counsel also agree that the above issue was raised suo motu by the trial Chief

Judge in his Judgment and without affording the parties/their Counsel opportunity of being heard thereon before basing the decision of the Court on same.

It is also clear from the record that the trial Court did not evaluate the evidence both oral and documentary adduced before the Court but decided the matter on the pleadings and the law applicable to registrable Instruments which were not duly registered. ^B

At pages 106 - 112 of the record the trial Chief Judge stated the position as follows:

“According to the Statement of Claim dated January 27th 1995, the plaintiff inter alia in Paragraphs 3, 4, and 9 pleads ^C

‘3 The Plaintiff avers that sometimes in March 1992, the plaintiff agreed with the defendant to transfer his interest in all that piece of parcel of land Covered in part by instrument Registered as No 31 at page 31 in Volume 8 of the Lands Registry, Abeokuta to the defendant for valuable consideration. ^D

4 The intention of both parties was later reduced into writing pursuant to which an agreement for an Assignment was prepared dated 4th April 1992 and signed by the plaintiff and Managing Director of the defendant, Mr. V. P. Vaswani. The Plaintiff shall rely and tender at the trial the Original of the said Agreement which is hereby pleaded. ^E

9. The plaintiff states that even though the said Agreement was executed by both parties in March 1992, the defendant never paid the said sum of N5 million but paid in installments certain sums of money relating to the balance of N1 million meant for specific purpose”. ^F

In reaction to these paragraphs, the Defendants in their Statement of Defence as amended and Counter Claim dated April 22, 1997 in Paragraphs 3 and 4 state as follows: ^G

“3. In further defence to Paragraphs 3, 4, 5, and 6 of the Amended Claim the Defendant states that it never entered into any written or oral Agreement with the Plaintiff to pay N5 million for the property in question but N900,000.00 (Nine Hundred Thousand Naira only) for this the Defendant shall... on the Agreement dated the 26th of March 1992 ^H

3A In ALTERNATIVE or ADDITION to Paragraph 3 hereof, the Defendant states that any document and/or signatures of its agents

purports to convey an impression that the Defendant entered into any written or oral agreement with the Plaintiff to pay N5m for the property in question is a forgery.

4. *The defendant admits that the transaction for the assignment of the property in question was made subject to the consent of the Governor of Ogun State but this was in accordance with the Agreement dated the 26th of March 1992 and not any one dated the 4th, of April, 1992'.*

AND for the Counterclaim they plead. in Paragraphs 2 and 3 thus:

2. *The Defendant states that the plaintiff guaranteed that it (the Defendant) would have possession of the property in question on or before 4 months from the date the first payment in respect of the transaction for the assignment of the property was made. The defendant shall for this rely an the Agreement dated the 28th of March 1992 and the plaintiff's letter dated the 31st March, 1992.*

3. *The Defendant states that the first payment was made by the bank draft (issued In favor of Union Bank of Nigeria Plc) (simply referred to hereinafter as union Bank") on the 31st of March 1992, through the plaintiff himself - to redeem the indebtedness of the plaintiff to the bank and to secure the release of the Registered title document - to the defendant."*

The plaintiff filed a reply to the Amended Statement of Defence and Defence to the Counter-claim in which he pleads in Paragraphs 2 and 3 thus.-

"2. *In denial of Paragraph 3 of the Amended Statement of Defence and Counter Claim, the plaintiff maintains that the only valid Agreement between him and the defendant in relation to the subject-matter of this suit is the one dated 4th April 1992 duly signed by both parties. The plaintiff avers that after the said Agreement was executed, the Managing Director of the defendant complained that the agreed purchase price of N5 million for the land as contained in Clause I of the Agreement would attract payment of substantial amount of money as stamp duties in favour of the Ogun State Government when processing the papers for Certificate of Occupancy and MR. SEUN AKINBIYI, the defendant's Solicitor who prepared the Agreement mooted an idea that another Agreement be prepared by him which would show smaller consideration for the purchase of*

the land and which would attract nominal amount of money for stamp duty which led to the preparation of another Agreement of N900,000:00 pleaded in Paragraph 3 of the Amended Statement of Defence and Counter claim. Mr. Akinbiyi attested the said Agreement.

3. The plaintiff avers that in order not to be outwitted in the game, he insisted that a clause be inserted in the Agreement of the 4th April, 1992 that the Agreement of 4/4/92 rendered any other one null and void which was duly inserted before both parties signed.”

AND in Paragraph 2 of the Defence and Counter-Claim, he pleaded thus:-

“2. In defence to Paragraphs 3, 4 and 5 of the Amended Claim the Defendant states that the plaintiff started exerting pressure on its Managing Director (Mr. V.P Vaswani) to purchase the property in question at least 2 months before March, 1992, because the plaintiff was in a financial mess.”

From above, there is no doubt that the Agreements dated April 4, 1992 and March 26, 1992 are germane to the claims of both parties. The crux of the matter therefore firstly to determine what are these Agreements. According to the pleadings of both parties, the Agreements are intended to transfer the interest in all that parcel of land covered in part by instruments Registered as No. 31 at page 31 in Volume 8 of the Land Registry, Abeokuta to the defendant for valuable consideration. There is no doubt that without these agreements, the claims of both parties are like a trunk with stems out without any root and thus the trunk cannot stand. Now secondly, what is the nature of these Agreements? According to Section 2 of the Land Instrument Registration Law, Cap 53, Vol III, Laws of Ogun State of Nigeria, 1978, an instrument means. Inter alia:-

“a document affecting land in the State whereby one party (hereinafter called the grantor) confers, transfers, limits, charges or extinguishes in favour of another party (hereinafter called the grantee) any right or title to or interest in land in the State...”

There is therefore no doubt that the two Agreements are instruments. Section 16 of the Law, supra, reads:

“No instrument shall be pleaded or given in evidence in any Court as affecting any land unless the same shall have been registered in the proper office as specified in Section :-

Provided that a Memorandum given in the State executed before the 1st day of July 1944 and not Registered under this Law may be pleaded and shall not be inadmissible in evidence by reason only of not being so registered.”

The two Agreements are executed after 1st day of July, 1944 thus the provision is not applicable. The crux of the matter is that these Agreements were not pleaded but evidence was led on them. In *Akintola v. Solano (1986) 2 NLR (pt. 24) 601*, the Court held that it is the law that any transaction having been reduced into writing, no oral evidence of the transaction would be allowed and once the writings are specifically pleaded as a Conveyance, as in this case, it has to be to be registered to be allowed to be pleaded, let alone to be given or admitted, in evidence. If the conveyance is not registered but pleaded, it is incumbent on the Court to strike out the relevant paragraphs of the pleadings. See also *Patrick Ossai v. Victor Nwajide and Anor. (1975) 4 SC 207* and *Ojugbele v. Olasoji (1982) 4 SC 31*.

From above, the relevant paragraphs dealing with the Agreements of both April, 4, 1992 and March 26, 1992 ought to be struck out. Therefore the following Paragraphs 5, 6, 7, 8, 9, 10, 11 and 12 of the Statement of Claim which read thus:

“5. The plaintiff avers that by the said agreement, it was expressly agreed by both parties that the said Agreement rendered any other on null and void.

6. The plaintiff states that the Clause 1 of the said Agreement is the consideration for the transfer of the plaintiff’s interest in the said parcel of land to the defendant is N5 million.

7. It was also agreed by both parties that the Assignment of the plaintiff’s interest in the said parcels of land is subject to the consent of the Governor of Ogun State of Nigeria having regard to the provisions of the Land Use Decree No. 6 of 1978.

8. The plaintiff further pleads that by Clause 1c of the said Agreement, a total sum of N4 million was to be paid embloc by the defendant to the plaintiff at the time of signing of the said Agreement while the balance of N1 million was to be paid in installments for specific purposes mentioned in the Agreement.

9. The plaintiff states that even though the said Agreement was

executed by both parties in March 1992, the defendant never paid the said sum of N4 million, but paid in installments certified sums of money relating to the balance of N1 million meant for specific purposes.

10. The plaintiff specifically pleads that the consent of the Governor of Ogun State to the said Agreement was never had and obtained up till now.

11. The plaintiff shall contend at the trial of this suit that the payment by the defendant of the sum of 4 million embloc at the time the said Agreement was signed is a Fundamental Terms of the Agreement and its non payment to the plaintiff entitled the plaintiff to treat the Agreement as at an end.

12. By a letter dated 13th of July 1992 Ref No. AFO/45/92 written by the plaintiffs Solicitors to the defendant, the Plaintiff complained of the non-adherence to the Terms of the Agreement and by a letter dated 20th July 1992 written by the defendant s Solicitors, the defendant denied any breach of the Agreement."

And Paragraph 4 of the Amended Statement of Defence and! Paragraph 9(1) of the Counter-Claim are to be struck out. They are accordingly struck out. Consequently, Paragraphs 2 3, 6 and 10 of the Reply to the Amended Statement of Defence and Defence to Counter-claim and Paragraph 3 of the Reply to Defence and Counter-claim and thus irrelevant and struck out.

From above, evidence led an these pleadings is irrelevant and is accordingly struck out. What is now left in the claim of the plaintiff and the counter-claim of the defendants are mere empty shields. This means that both parties have not discharged the burden on them in their respective claims and their claims should be dismissed."

As stated earlier in this judgment both parties were dissatisfied with the above judgment and appealed against same to the lower Court. The lower Court after looking closely at the issues formulated in the appeals for determination came to the conclusion that the present respondent's issue three was sufficient to dispose of the appeals and therefore proceeded to determine same. At page 186 of the record, the lower Court held thus:

"I wish to restate that in view of the ultimate decision to be reached hereinafter, a resolution of the Plaintiff/Appellants issue three suffice to determine the appeal. And the issue is the proprietary or

otherwise of the learned trial Judge raising the issue of non-registration of Exhibit 'A1' and 'B' and based thereon dismissing the claim and counter-claim without affording the parties the right of being heard"

B There is no appeal against the preference of the present respondent's issue three by the lower Court in resolving the issues in the appeals to those of the present appellant.

C In resolving the said issue three, the lower Court went through the pleadings and relevant exhibits and the record as well as the applicable law and came to the conclusion that the trial Court was in error in raising the issue in question suo motu and basing its decision to dismiss the claim and counter-claim thereon without hearing the parties on the matter. At page 188 of the record the lower Court concluded the resolution of three issue thus:

D *"I hold that the error committed by the Learned Trial Chief Judge occasioned a miscarriage of justice and constituted a breach of the provisions of Section 36(1) of the 1999 Constitution And the breach renders the judgment and the entire proceedings null and void."*

E ***It must be noted that there is no appeal against the finding by the lower Court that the error of the trial Court "occasioned a miscarriage of justice and constituted a breach of the provisions of Section 36(1) of the 1999 Constitution."***
 F ***The fact that there is no appeal against the above finding by the lower Court means that the finding remains valid and subsisting and binding on the parties.***

G ***The next question is: what does Section 36(1) of the 1999 Constitution as amended which the decision of the trial Court is said to have offended provide? It enacts as follows -***

H ***"In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a Court or other Tribunal established by law and constituted in such manner as to secure it independence and impartiality"***

The above provision is a constitutionally guaranteed right to fair hearing of every party to any litigation in our Courts or Tribunals.

What then is the consequence of a breach of the rights of fair hearing as guaranteed under the provision of Section 36(1) of the 1999 Constitution as amended?

It is settled law that a breach of constitutional right of fair hearing in any trial or investigation nullifies such trial or investigation and decision taken thereon is also a nullity. The breach of the rights of fair hearing in any proceeding therefore vitiates the entire proceedings. It follows, therefore, that once an Appellate Court finds, as in this case, that there is a breach of the right of fair hearing in the proceeding in issue, it must allow the appeal having no other alternative in the matter.

In the instant case, appellant agrees that there was a breach of the right of a fair hearing but that the effect of nullity resulting from the breach must be limited to the erroneous decision on inadmissibility of Exhibits “A” - “A1” and “B” which should have no effect on the other aspect of the proceedings!! This is clearly misconceived having regard to the effect of breach of the right of a fair hearing.

Apart from the brief, the trial Judge did not go any further to evaluate the evidence before the Court, be it oral or documentary. It is true Appellate Court is in as much as a good position as the trial Court in evaluation of documentary evidence or oral evidence in which the demeanor of the witness is not in issue or where the Court is not called upon to prefer one version of oral testimony as against the other by believing same.

What is the view of the lower Court on the other issues presented for determination, apart from the present respondent’s issue three, and why the Court could not interfere? The answer is at pages 188 and 189 of the record where the Court held as follows-

“it is clear from the above that there was from the plaintiff, some oral evidence or circumstances leading to the making of Exhibit ‘B’. The evidence was crucial as its acceptance or rejection is crucial to the determination of the main issue in finding contest. The learned trial judge did not however make a finding of whether Exhibit ‘B’ was made merely for the purpose of stamp duties. And this Court, in its Appellate jurisdiction cannot make a finding on it since its

determination necessarily involves the credibility of the witnesses. In other words, because of our handicap of not hearing, seeing and watching the demeanor of the witnesses, we are not in as vantage a position as the trial Court to evaluate the totality of the evidence presented to the trial Court. In the circumstances an order of retrial
B would best ensure the justice of the case.”

I cannot agree more with the views of the lower Court expressed above. **The decision as to which version of the case of the parties as regard the transaction involving the exhibits forming the foundation of the claim and counter-claim should be preferred by the Court cannot be reached without considering the credibility of the witnesses for the parties. It is a case of the oath of the plaintiff against that of the defendant and the Court must of necessity believe one against the other.**
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D **In the circumstance the law is settled that it is the duty of the trial Court which heard the witnesses testify that is in a better position to evaluate their testimonies and assign probative value thereto.** See *Karibo vs. Grend* (1992)3 NWLR (pt. 230) 425 at 441; *Okedare vs. Adebara* (1994) 6 NWLR (pt. 349) 157 at 188.
E *Udensi vs Odusote* (2003) 6 NWLR (pt 817) 545 at 557.

In the circumstances of this case was the lower Court right in ordering a re-trial before another Judge? The answer to the question is obviously in the positive. In the case of *Eagle Super Pack (Nigeria) Ltd vs. African Continental Bank (2006) 12 S.C. 3 at 20* this Court held thus:
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“When an intermediate Appellate Court reaches a conclusion on one or some of the issues raised before it, it should normally proceed to consider the other issues bearing in mind that its conclusion may be set aside by a Higher Court in the hierarchy. There are recognized exceptions to this practice. Where an Appellate Court reaches the decision to send the case back to the trial Court for re-hearing, it should normally refrain from considering other issues as this may prejudice a fair determination of the issues at the re-hearing. Considering that the Court below later sent back the case for re-hearing, I do not accept that the failure to consider all the outstanding issues as an error.”
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In the circumstance I find no merit in the two issues un-

der consideration and consequently resolve same against appellant.

It is unfortunate that the lower Court gave the parties opportunity to have their matter/dispute resolved on the merit since the 19th day of December, 2005 when the Court made an order of retrial of the claim and counter-claim of the parties but rather than take the opportunity and save time, appellant preferred to go on appeal to this Court thereby further delaying the determination of the rights and obligations of the parties. It has taken about ten good years since the judgment of the lower Court. What a colossal waste of time and energy including money.

In conclusion, I find no merit whosoever in this appeal which is accordingly dismissed by me. The judgment of the lower Court in appeal No. CA/I/108/98 delivered on the 19th day of December, 2005 is hereby affirmed. There shall be costs of N200,000 against appellant and in favour of the respondent. Appeal dismissed.

OGUNBIYI JSC

I read in draft, the judgment of my learned brother Hon. Justice Onnoghen (JSC). I agree that the appeal is devoid of any merit and should be dismissed.

The learned trial Judge's reason for dismissing both the claim and counter - claim is the non -registration of Exhibits A - A1" and 'B'. It is clear also from the pleadings that the issue of the non - registration of the foregoing exhibits under Section 16 of the Land Instruments Registration Law Cap 53 Laws of Ogun State 1976 and the effect of such non - registration on the claim and counter - claim was not raised in the pleadings. The trial Chief Judge raised the issue suo motu and without hearing from either the parties/their counsel, proceeded to determine the case on that issue solely.

On appeal to the lower Court, it held the proceedings before the trial Court as fundamentally defective and a breach of the provision of Section 36(1) of 1999) Constitution as amended and as a consequence it rendered the entire proceedings at the trial Court a nullity. A retrial was thereupon ordered. The law is trite and well founded that an appeal is a continuation of the case at trial. In other words, a party cannot make out a case on appeal different from that

which was before the trial Court.

The lower Court at page 186 of the record of appeal held and said:

"I wish to restate that in view of the ultimate decision to be reached hereinafter, a resolution of the Plaintiff/Appellant's issues three suffices to determine the appeal. And the issue is the propriety or otherwise of the learned trial Judge raising the issue of non -registration of Exhibit "A1" and "B" and based thereon dismissing the claim and counterclaim without affording the parties the right of being heard." (emphasis supplied).

The appellant did not appeal against the said finding by the lower Court that a resolution of issue three is sufficient: at page 188 of the record also, the Court went further and pronounced that any attempt to resolve the several other issues raised in the brief of the parties would be a mere academic exercise in view of the order made for retrial. From the foregoing conclusion, it is obvious that Issue no. 2 raised by the appellant in this appeal is of no moment.

Significantly therefore, the principal issue before us is whether the retrial order made by the lower Court was proper in the circumstance of the case.

The breach of constitutional right to fair hearing is so fundamental that some cannot be watered down. The consequential effect is to render any proceeding conducted a nullity and of no effect. The duty of the lower Court is to review the proceeding conducted by the trial Court. This, the Court did and made an order rightly by ordering a retrial of the case. There cannot be any other order made in the circumstances. See the cases of Samuel Okedare Vs. Oba Ahmadu Adebara & Ors. (1994) N.W.L.R. (Part 349) 157 at 188 and Chief Udensi Vs. Dr. F. K. Odusote & Anr. (2003) No. LR. (Part 817) 545 at 557.

Judicial authorities are well settled that once a Court raises an issue suo motu, any proceeding conducted thereon without affording the parties opportunity to be heard would be a nullity. The retrial order made was a result of that breach by the trial Court and it goes to the root of the proceedings. The irregularity is fundamental and renders the entire trial a nullity.

My learned brother Onnoghen (JSC) has dealt with the appeal exhaustively. I therefore, adopt his reasoning and conclusion

arrived thereat as mine and also dismiss the appeal in terms of the leading judgment inclusive of the order made as to costs.

Appeal is also dismissed by me.

AKA'AH'S JSC

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I had the preview of the judgment of my learned brother, Onnoghen JSC. I am in complete agreement with his reasoning and conclusion that the appeal to this Court was unnecessary since the finding by the lower Court that the error committed by the learned trial Judge occasioned a miscarriage of justice and constituted a breach of the provisions of Section 36(1) of the 1999 Constitution was not appealed against. Such a finding rendered the judgment and indeed the whole proceedings null and void. The only appropriate order which follows and which the lower Court made is re-trial.

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The appeal therefore devoid of merit and I dismiss it. The order remitting the suit to the Ogun State High Court for trial de-novo stands. I abide by the order made on costs.

KEKERE-EKUN JSC

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I have had the opportunity to read in draft the judgment of my learned brother, Onnoghen, JSC just delivered. I agree with the reasoning and conclusion that the appeal lacks merit and should be dismissed.

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The law is settled that where a Court raises an issues suo motu and proceeds to decide that issue without first inviting the parties to address it, the proceedings are a nullity, no matter how well conducted for constituting a violation of the parties' right to fair hearing guaranteed by Section 36 (1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). See: Kuti Vs. Balogun (1978) 1 SC 53 @ 60; Stirling Eng. (Nig) Ltd Vs. Yahaya (2005) II NWLR (Pt.935) 181, Omokuwajo Vs FR.N, (2013) 9 NWLR (Pt. 1359) 300; Omoniyi Vs Alabi (2015) 6 NWLR (Pt, 1456) 572. In the instant case, the lower Court having found that the parties' right to fair hearing was breached and having declared the proceedings a nullity and ordered a retrial was quite right not to make any pronouncement on any of the other issues raised in the appeal. To do so would prejudice

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the retrial of the case.

It is for these and the fuller reasons advanced in the leading judgment that I also dismiss the appeal and affirm the judgment of the Court below delivered on 19/12/2005

I abide by the order for costs.

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NWEZE JSC

I had the opportunity of reading the draft of the leading judgment which my noble Lord, Onnoghen, JSC, just delivered now. I agree with His Lordship that this appeal is destitute of any redeeming feature and must, therefore, be dismissed.

My Lords, I find it rather nauseating that learned counsel, whose duty it is to guide and advise his client, could mislead him into pursuing this sort of frivolous and most damnable appeal: an appeal that is only remarkable for its irritation and vexation of the due administration of justice. Let me explain.

The lower Court, having found that the trial Court's error, in, suo motu, raising and resolving the issue of non-registration of Exhibits A- A1 and B, was a breach of the constitutional right to fair hearing, refrained from making any pronouncement on any other issue canvassed on the appeal before it.

As shown in the leading judgment, the appellant herein contended that, though the lower Court was right in its conclusion, it ought to have considered other issues in the self-same appeal which it had nullified.

With respect, this submission betrays counsel's misconception of the import of the said conclusion. I am, therefore, constrained to explain that, whereas a Court is entitled to raise an issue suo motu *Kraus T. Org. Ltd v UNICAL (2004) 25 WRN 1, 17*; it would be in error if it proceeds to resolve such an issue without affording the parties an opportunity of addressing it on the said issue, *Adegoke v Adibi (1992) 5 NWLR (pt 242) 410*; *Atanda v Lakanmi (1974) 3 SC 109*; *Odiase v Agho (1972) 3 SC 71*; *Kraus T. Org. Ltd v UNICAL (supra)*.

It cannot be otherwise for that approach would amount to a flagrant breach of the aggrieved party's right to fair hearing as entrenched in the Constitution, *Oje v Babalola (1991) 4 NWLR (pt*

185) 267; Ugo v Obiekwe (1989) 1 NWLR (pt 99) 566: an obvious miscarriage of justice, Owoso v Sunmonu (2004) 30 WRN 93, 106-107 or failure of justice, Ojo v Anibire (2004) 5 KLR (pt 177) 1205, 1207; that is, justice which is inconsistent with the law, Wilson v Wilson (1969) ANR 191 approvingly adopted in Ojo v Anibire (supra) 1214. Being a mockery of justice, such a judgment is bound to be set aside no matter how, brilliantly, conducted, Owoso v Sunmonu (supra).

Against this background, having found that the trial Court's judgment was tainted with a fundamental vice, it would be illogical to expect the lower Court to nibble at aspects of the said proceedings. As the old saying goes, *ex nihilo nihil venit*, Bello v The Diocesan Synod of Lagos and Ors (1973) LPELR -768 (SC) 45; also, expressed as *ex nihilo nihil fit* Management Enterprises Ltd v Otusanya (1987) LPELR -1834 (SC) 17; Nzom and Anor v Jinadu LPELR -2143 (SC) 44.

It is for these, and the more elaborate, reasons in the leading judgment that I, too, shall enter an order dismissing this appeal. I abide by the consequential orders in the leading judgment.

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