

SUPREME COURT OF NIGERIA
FRIDAY 17TH JUNE, 2016. SC. 185/2005
CORAM: W. S. N. ONNOGHEN, O. RHODES-VIVOUR,
K. B. AKA'AH, K. M. O. KEKERE-EKUN,
C. C. NWEZE, JJSC

B. B. APUGO & SONS LIMITED APPELLANT
AND
ORTHOPAEDIC HOSPITAL
MANAGEMENT BOARD (OHMB) RESPONDENT

ACTIONS - Locus standi - Meaning - It is the legal capacity of a party to institute action in court - And a plaintiff assuming locus must have sufficient interest in the suit (H1)

CONTRACTS - Privity of - Only parties to a contract can maintain action on it - As stranger to a contract can neither sue nor be sued thereon - Even if the contract is made for his benefit (H2)

CONTRACTS - Breach - Locus standi - Respondent having demonstrated sufficient locus cannot be referred to as stranger - Hence it can seek for redress for breach of contract against appellant (H3)

CONTRACTS - Obligation - Performance of - Appellant having taken benefit under the contract - Cannot avoid its obligations therein on the ground that the contract is void (H4)

JURISDICTION - Admiralty - Contract - Breach - The claim here is for special and general damages - As such the fact of conveying the goods by sea - Does not bring the claim within admiralty jurisdiction of FHC (H5)

LOCUS STANDI - Legislation - Enactment of - Existing right of a party when new law is passed - Transferring jurisdiction of a court to another is not lost - Where proceedings were on going prior to the enactment (H6)

COURT PROCESSES - Service of - Issuance and service of process

2932 B.B. Apugo & S. Ltd. v. Orthopaedic H. M. B. (2016) 6 KLR
is fundamental to exercise of jurisdiction - As any defect would amount to breach of a party's right to fair hearing (H7)

WRIT OF SUMMONS - Issuance of - Leave - Anambra HC Rules 1988 O. 5 r. 18 - Leave is not required for service of writ outside jurisdiction - Save as provided in O. 7 r. 19(2) on defendant outside Nigeria (H8)

CONTRACTS - Terms - Liability - Agency - Although agent of a disclosed principal is not personally liable - But appellant failed to prove existence of any such relationship as to avoid liability (H9)

DAMAGES - Special damages - Proof - Evidence led clearly established respondent's entitlement - As it pleaded and proved value of items paid for but were not delivered by appellant (H10)

EVIDENCE - Admissibility - Inadmissibility of statement made at pendency of proceedings s. 91 (3) EA - Is subject to facts of each case - Documents in issue were rightly relied upon here - In awarding damages (H11)

APPEALS - Grounds - Validity - Ground 6 and issue 6 predicated thereon is incompetent - As there is no application by appellant - Challenging the striking out of the name of the bank (H12)

FACTS

Before the High Court of Enugu State, plaintiff/respondent commenced this action against defendant/appellant, claiming special damages for the sum of 64,000 (Sixty-Four Thousand Pounds Sterling) being the value of the goods which appellant failed to order for and deliver, but for which appellant had been paid in full. Upon being served with the originating processes, appellant filed a statement of defence and counter claim. Appellant's bank, Allied Bank Limited sought and obtained an order of the trial Court striking its name from the suit on the ground that it was not a necessary party thereto. The matter between the parties is that respondent entered into two contracts (Exhibits A and B) with appellant for the supply, delivery and installation of certain hospital equipment from SIEMENS

Aktiengesellschaft (AG) in Germany. The contract sum was paid in full and appellant accordingly opened Letters of Credit with his bank. It later transpired that the Letters of Credit were only procured in respect of some of the goods. When the goods in respect of which the Letters of credit were opened arrived, appellant demanded further payment before it would release the goods.

Appellant's refusal to release the goods led to the institution of this action. At the trial, appellant in its defence contended that it had procured and delivered all the equipment ordered by respondent and had in fact incurred additional expenses within the contemplation of the parties at the time the contract was entered into. That a review of the contract value was necessitated by the fluctuation in the cost of foreign exchange. It also contended that with regard to the first contract, Exhibit A, it was an agent of a disclosed foreign principal. It also refuted respondent's claim that it engaged third party to install and rehabilitate the equipment. Each party called one witness and closed its case. In its judgment, the court decided in favour of respondent. Aggrieved, appellant appealed to the Court of Appeal, Enugu. The appeal was dismissed, thus leading to an appeal by appellant to the Supreme Court.

ISSUES FOR DETERMINATION

"(1) Whether in all the circumstances of this case, the Court has jurisdiction to entertain the case of the plaintiff?"

(2) Whether the Courts below did not misapply the legal principle of agency in the circumstances of this case and whether they can rightly rely on extraneous matters to vary the contents of a written document?"

(3) Whether the Court of appeal was not in error in affirming the award of #64,000.00 (pounds) when in all the circumstances of this case, plaintiff did not prove its entitlement to such money?"

(4) Whether the Court of Appeal was right in its resolution of the issue of want of procedural jurisdiction instead of lack of legal jurisdiction of the trial Court?"

(5) Whether the Court of Appeal was not in error when it held that S.91(3) Evidence Act cannot operate against Exhibits F-F1?"

(6) Whether there was an aspect of the respondent's claim that could not be justly determined in the absence of Nigeria Deposit Insurance Corporation.

HELD (Unanimously dismissing the appeal per
KEKERE-EKUN JSC)

Locus standi - Meaning

- B 1. I shall consider the issue of the locus standi of the respondent first. Locus standi is the legal right of a party to an action, to be heard in litigation before a Court or tribunal. The term connotes the legal capacity of instituting or commencing an action in a competent Court of law or tribunal without any inhibition, obstruction or hindrance from any person or body whatsoever. It is also the law that to have locus standi to sue, the plaintiff must have sufficient interest in the suit. For instance, one of the factors for determining sufficient interest**
C is whether the party seeking redress would suffer some injury
D or hardship from the litigation. (p. 2953 B)

CONTRACTS - Privity of

- E 2. It is settled law that as a general rule, only parties to a contract can maintain an action thereunder. In other words, only parties to a contract can sue and be sued on it and a stranger to a contract can neither sue or be sued thereon, even if the contract is made for his benefit.**
F The reasoning behind this principle is the fact that the third party would not have furnished consideration for the contract. (p. 2953 E)

CONTRACTS - Breach - Locus standi

- G 3. Both documents were signed, sealed and delivered not by or on behalf of the National Orthopaedic Hospital Enugu but “for and on behalf of the ORTHOPAEDIC HOSPITALS MANAGEMENT BOARD,” a body duly established by the OHMB Act Cap. 341 LFN 1990 as a body corporate with perpetual succession and a common seal. See Section 1 (1) & (2) of the OHMB Act (supra).**

Having regard to the fact that the OHMB had undertaken certain obligations under the contracts, and duly affixed its common seal thereto, it is my considered view that it would

not be correct to state, as contended by the appellant, that it was a stranger to the contracts. I am of the view that the OHMB has demonstrated sufficient locus in the circumstances of this case to enable it seek redress for breach of contract against the appellant. (p. 2955 A)

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CONTRACTS - Obligation - Performance of

4. Furthermore, the appellant having taken benefit under the contract, i.e. receiving payment from the respondent for the full value of the goods to be supplied and installed, it does not lie in its mouth to seek to avoid its obligations under the contract, voluntarily entered into, on the ground that the contract is void. See: Okechukwu Vs Onuorah (2001) 12 SC (Pt.1) 106; (2000) 15 NWLR (Pt.691) 597 @ 610 E – G, where it was held that “a party who induced the other party to enter into a contract, which contract provides benefits for the inviting party, which he has utilized without complaint, he cannot be found to deny the validity of that contract.” Such conduct is against public policy. (p. 2955 E)

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JURISDICTION - Contract - Breach

5. Having given careful consideration to the respondent’s claim as reproduced above, I agree with learned counsel for the respondent that the claim is simply one for special and general damages for breach of contract to supply and install equipment. The mere fact that the goods were to be conveyed to Nigeria by sea or air does not bring the claim within the admiralty jurisdiction of the Federal High Court. Notwithstanding the opening of letters of credit in respect of the importation of the goods, there is no dispute between the parties on the actual conveyance of the goods. Simply put, appellant failed to supply all the equipment for which the respondent had made full payment in advance. Furthermore the respondent incurred additional expense in installing the equipment that was delivered upon the appellant’s failure to fulfill its own part of the contract to install same. I therefore hold that the claim did not fall within the exclusive admiralty jurisdiction of the Federal High Court. (p. 2960 H)

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LOCUS STANDI - Legislation - Enactment of

6. In any event, even if the suit was an admiralty matter, at the time the suit was filed on 5th July 1988, by virtue of Section 7 of the Federal High Court Act 1976 and Section 236 (1) of the 1979 Constitution, which conferred unlimited jurisdiction on State High Courts, the Federal and State High Courts exercised concurrent jurisdiction in admiralty matters. On the combined effect of Decrees 59 & 60 of 1991 and Decree 107 of 1993 with regard to the exclusive admiralty jurisdiction of the Federal High Court, this Court has held in a plethora of cases that the vested rights of a party in existence at the time a new law is passed transferring jurisdiction of a Court to another, will not be lost where proceedings in the case were on-going before the enactment of the law. This is because there is a general presumption against retrospective legislation. The Courts guard their jurisdiction jealously and lean against giving statutes retrospective application unless a retrospective effect is indicated in clear and express jurisdiction terms.

The suit in this case was filed on 5th July 1988. Proceedings in terms of exchange of pleadings and the hearing of various applications had begun before 17/11/1993 when Decree 107 of 1993 came into effect. Not being of retrospective effect, it did not oust the Jurisdiction of the Court to entertain the suit. Thus, whichever way one looks at it, the High Court of Enugu State had the requisite jurisdiction to entertain the suit. (p. 2961 D)

COURT PROCESSES - Service of

7. It is quite correct, as observed by the Lower Court that the issuance and service of Court processes is basic and fundamental and is a condition precedent to the exercise of the Court's jurisdiction. Since the purpose of the issuance and service of Court processes on a party is to bring the said processes to his notice to afford him an opportunity to react thereto, any defect would amount to a breach of the affected party's right to fair hearing and would render the proceedings a nullity. (p. 2963 C)

WRIT OF SUMMONS - Issuance of - Leave

8. Order 5 Rule 18 above states clearly that “leave shall not be required for the issue of any writ of summons”. The provision is clear and unambiguous and does not require any interpretation. The proviso thereto provides that leave for service of a writ outside jurisdiction is only required in the circumstances stated in Order 7 Rule 19 (2), which only requires leave to serve a writ on a defendant who is “out of Nigeria.” In other words, even where the defendant resides outside Anambra State but within Nigeria, leave would not be required to effect service on him.

I am therefore in full agreement with the Lower Court that under the Anambra State High Court Rules 1988, applicable in Enugu State, it is not a condition precedent that leave of Court must be sought and obtained before the issuance of a writ or summons for service outside the jurisdiction of the High Court of Enugu State.

Issues 1 and 4 are accordingly resolved against the appellant. (p. 2963 F)

CONTRACTS - Terms - Liability

9. The law is that an agent of a disclosed principal is ordinarily not personally liable on a contract he enters into on behalf of the said principal.

In my humble view, the concurrent findings of the two Lower Courts are unassailable on this issue. I agree with both Courts that Exhibit A could not constitute evidence of an agency relationship between the appellant and Siemens AG. Furthermore, having tried to persuade the Court of the said relationship through Exhibit J, the appellant cannot approbate and reprobate by arguing that the Court ought not to have considered the document. As held in *Asafa Food Factory vs. Alraine (Nig) Ltd. (supra)*, whether the appellant acted as the agent of a disclosed principal is to be determined by the nature and terms of the contract and the surrounding circumstances of the case. The Court below and the trial Court were right to have considered the surrounding circumstances of this case

in determining whether such a relationship existed or not. They came to the right conclusion that the appellant failed to establish same. The concurrent findings of the two Courts have not been shown to be perverse and shall not be interfered with by this Court. This issue is accordingly resolved against the appellant. (pp. 2967 A/2969 D)

DAMAGES - Special damages - Proof

10. The law is trite that special damages must be strictly proved by the person who claims to be entitled to them. The nature of the proof depends on the circumstances of each case.

From the elaborate pleadings in the said paragraphs it is beyond dispute that the special damages claimed were specifically pleaded. The respondent also pleaded clearly that it was given the particulars of the items not ordered by the appellant but for which the appellant had been paid in full by Siemens AG. The appellant's contention is that the three items referred to were lumped together and that they ought to have been itemised individually. The figure of 64,000.00 (Sixty-Four Thousand Pounds Sterling) was based on Exhibit D.

I am of the view that the concurrent findings of the two Lower Courts in this regard cannot be faulted. The respondent pleaded and proved the value of the items paid for but neither ordered nor delivered by the appellant. The evidence led was credible and clearly established the respondent's entitlement thereto. This issue is accordingly resolved against the appellant.
(pp. 2972 B/2973 C/2974 C)

DAMAGES - Award - Entitlement to

11. As often reiterated by this Court, cases are decided on the basis of their own peculiar facts. When deciding whether a person is a "person interested" within the contemplation of Section 91(3) of the Evidence Act, the Court usually takes all the facts and surrounding circumstances into account. For instance, in *NSIT v. Klifco* (supra), the Court considered the fact that the Director who certified the Certificate of Indebtedness, Exhibit L, was only performing his statutory duty as provided by Section 38 of the National Provident Fund Act. In

Apena v. Aiyetobi (1989) 4 NWLR (Pt. 95) 85, a Court of Appeal decision cited with approval in several cases by this Court, it was held per Apata, JCA, that there must be a real likelihood of bias before a person making a statement can be said to be a “person interested”.

It is also not in dispute that by the terms of the agreement between the parties, the respondent was to install the equipment once delivered. It failed and/or refused to do so, which caused the respondent to procure a third party to carry out the installation. The agreement between the respondent and the third party is what gave rise to Exhibits F and F1. The Court below, considered the peculiar facts of the case and held at pages 423-424 of the record as follows:

“The trial Court accepted the evidence that the respondent expended a total sum of N120,450 to install the supplied equipment. The sum of N120,450 was properly awarded as loss flowing directly from the breach of contract by the appellant. This Court agrees with the award. Installation of the equipment cannot be earlier than the date the Court order was made. Section 91(3) of the Evidence Act cannot operate against Exhibits F and F1. The respondent was entitled to the amount to mitigate their loss. Award of damages is a matter for the trial Court, consequently, the appellate Court will not interfere with it save for certain reasons particularly where the trial Court failed to take into account relevant matters in making its award, which is not the position in this case.”

I am inclined to agree with the Court below, that Section 91 (3) of the Evidence Act could not be called in the appellant’s aid in the circumstances of this case. The appellant has not advanced any cogent reason to warrant the interference by this Court in the concurrent findings of fact by the two Lower Courts. (pp. 2976 B/2977 B)

APPEALS - Grounds - Validity

12. As rightly pointed out by learned counsel for the respondent, the decision of the trial Court striking out the name of Allied Bank Nig. Ltd., was an interlocutory decision made on 25/4/90 upon an application by the said bank. It is settled law

that a necessary party to a suit is one who is not only interested in the dispute but one whose presence is essential for the effective and complete determination of the claim before the Court. The learned trial Judge considered all the material before him before agreeing with the applicant that its name should be struck off the suit. If the appellant was dissatisfied with the decision, it ought to have appealed against it within 14 days thereof as prescribed by Section 24 (2) (a) of the Court of Appeal Act. Not being an issue of law alone, the appellant required leave of the trial Court or of the Court of Appeal to appeal against it. See Sections 241 and 242 of the 1999 Constitution. There is nothing in the record to show that such leave was sought and/or obtained. There is also no application before this Court for leave to appeal against the said interlocutory decision. I therefore agree with learned counsel for the respondent that Ground 6 and issue 6 predicated thereon are incompetent and are hereby struck out.
(p. 2979 D)

NOTABLE POINTS OF INTEREST

KEKERE-EKUN JSC

1. Jurisdiction – Fundamental nature of

The issue of jurisdiction is no doubt fundamental to any adjudication. It is a threshold matter, which goes to the competence of the Court to hear and determine a suit. Where the Court lacks jurisdiction, the entire proceedings, no matter how well conducted, would amount to a nullity and liable to be struck out. It is also trite that our Courts of law are creations of statute. Thus their respective jurisdictions are spelt out in the relevant statutory enactments. I think it is necessary to examine the respondent's claim to determine whether in fact it is an admiralty matter.

In order to determine the jurisdiction of the Court, it is the plaintiff's claim as endorsed on the writ of summons and statement of claim that would be considered by the Court. (p. 2956 A)

2. Award of damages – Purpose of

The object of an award of damages is to compensate a person for the injury he has sustained by reason of the act or default of another,

whether the act or default is a breach of contract or tort. The measure of damages on the other hand, is an amount that would reflect what would put the injured party in the same position as he would have been had the injury not occurred. (p. 2972 D)

3. Damages – Appellate court does not interfere

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It is also trite that an appellate Court would not interfere with an award of special damages unless the award is based on some wrong principle of law, or where the amount awarded is so high or so low as to make it an entirely erroneous estimate of the damage suffered by the claimant. (p. 2972 G)

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REPRESENTATION

Seun Ajayi, Esq. with him, Messrs P. A. Abah, Omosanya Popoola, B. A. Oyun, Thomas Ojo, B. E. Oguntoye (Miss), O. T. Olujide-Poko and K. K. Bello (Miss), for the Appellant
Ahmed Adetola-Kazeem, Esq., for the Respondent

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CASES REFERRED TO

Onagoruwa v. State (1992) 2 NWLR (pt. 221) 33

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NDIC v. C.B.N. (2002) 7 NWLR (pt. 766) 272

U.B.A. Plc v. BTL Ind. Ltd. (2004) 18 NWLR (pt. 904) 180

S.P.D.C. Nig. Ltd. v. Abel Isaiah (2001) 11 NWLR (pt. 723) 168

Olutola v. University of Ilorin (2004) 18 NWLR (pt. 905) 416

Adah v. N.Y.S.C. (2004) 13 NWLR (pt. 1891) 465

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A.G. Lagos State v. Dosunmu (1983) 3 NWLR (pt. 111) 25

Chidoka v. F.C.F.C. (2013) 5 NWLR (pt. 1345) 144

Ibrahim v. Osim (1988) 3 NWLR (pt. 82) 257

Tukur v. Govt. of Gongola State (1989) 4 NWLR (pt. 117) 549

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Bronik Motors Ltd. v. WEMA Bank Ltd. (1983) 6 SC 158

Savannah Bank Nig. Ltd. v. PAN Atlantic Shipping & Transport Ltd. (1987) NSCC Vol.18 (pt. 1) 67

I.G.P. v. Aighiremolen (1999) 13 NWLR (pt. 635) 443

Minister of Works v. Tomas (Nig.) Ltd. (2001) 10 NWLR (pt. 721) H 295

Olutola v. University of Ilorin (2004) 18 NWLR (pt. 905) 416

STATUTES & RULES REFERRED TO

Court of Appeal Act, s. 24(2)(a)

Constitution of the Federal Republic of Nigeria 1999, ss. 241, 242

High Court Laws Cap. 61 Laws of Eastern Nigeria 1953, s. 22(2)

Federal High Court Act (as amended by Decree No.60 of 1991), s.

B 7(a)-(u)

Interpretation Act Cap. 192 LFN 1990, s. 6(1)

High Court Rules of Anambra State 1988, O. 5 r. 18, O. 7 r. 19(2)

LEAD JUDGMENT BY KEKERE-EKUN JSC

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This is an appeal against the judgment of the Court of Appeal, Enugu Division, delivered on 7th July 2005 dismissing the appellant's appeal and affirming the decision of the Enugu State High Court delivered on 20th December, 2000.

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The facts that gave rise to this appeal are as follows: On 8th July 1987, the National Orthopaedic Hospital, Enugu entered into two contracts Exhibits A and B, with the appellant for the supply, delivery and installation of (a) X-Ray equipment and spare parts and (b) Prosthetic and Orthopaedic equipment from SIEMENS

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Aktiengesellschaft (AG) in Germany. In order to facilitate the procurement of letters of credit by the appellant from SIEMENS Aktiengesellschaft of Germany, the contract sum was paid in full. The appellant accordingly opened Letters of Credit with his bank, Allied Bank of Nigeria Limited. It later transpired that the Letters of

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Credit were only procured in respect of some of the goods.

When the goods in respect of which the Letters of credit were opened arrived, the appellant demanded further payment before it would release the goods. The appellant's refusal to release the goods led the respondent to institute an action against the appellant and its bankers vide a writ of summons filed on 5/7/1988.

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Upon being served with the originating processes, the appellant filed a statement of defence and counter claim. The appellant's bank, Allied Bank Limited, sought and obtained an order of the trial Court striking its name from the suit on the ground that it was not a necessary party thereto and no reasonable cause of action had been disclosed against it. Pursuant to orders made by the trial Court and affirmed by the Court of Appeal, the appellant was ordered to release the procured goods to the respondent. At the trial Court, the

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respondent made a claim against the appellant for the sum of 64,000 (Sixty-Four Thousand Pounds Sterling) being the value of the goods which the appellant failed to order from SIEMENS but for which it had been paid in full. Pursuant to the order of the Court of Appeal, the appellant eventually delivered the portion of the goods it had ordered and received but failed to install them. The respondent was therefore compelled to engage a third party to install the equipment at its hospital at Enugu. Consequently, it sought and obtained leave to amend its claims to include the cost of installation against the appellant.

In its defence, the appellant contended that it had procured and delivered all the equipment ordered by the respondent and had in fact incurred additional expenses within the contemplation of the parties at the time the contract was entered into. That a review of the contract value was necessitated by the fluctuation in the cost of foreign exchange. It also contended that with regard to the first contract, Exhibit A, it was an agent of a disclosed foreign principal. It also refuted the respondent's claim that it engaged third party to install and rehabilitate the equipment.

Each party called one witness and closed its case. After considering the addresses of learned counsel, the learned trial Judge on 20th December 2000, entered judgment in the respondent's favour as follows:

"(1) The sum of 64,000 (Sixty-Four Thousand) Pounds Sterling being the value at the time the breach occurred of one HT Transformer and two X-Ray Tubes Code No. 72-13-549.

(2) N120,950 being the cost of the installation of supplied equipment.

(3) The claim for 30% Interest was not established and is hereby dismissed.

(4) The claim for 17,500 pound sterling being the cost of one X-Ray tube model P/25/11 was not established and it is hereby dismissed."

The appellant was dissatisfied with the judgment and appealed to the Court below, which on 7/7/2005 dismissed the appeal hence the further appeal to this Court.

The parties before us have duly filed and exchanged briefs of argument in compliance with the Rules of this Court.

At the hearing of the appeal on 21/3/2016, SEUN AJAYI, ESQ. leading Messrs P.A. Abah, Omosanya Popoola, B. A. Oyun, Thomas Ojo, B. E. Oguntoye (Miss), O. T. Olujide-Poko and K. K. Bello (Miss) adopted and relied on the appellant's Amended Brief of Argument which was deemed filed on 22/1/2008 and the appellants Reply brief B filed on 10/2/2016. He urged the Court to allow the appeal.

In similar vein, AHMED ADETOLA-KAZEEM ESQ, adopted and relied on the respondent's Amended Brief of Argument which was deemed filed on 19/1/2016 and urged Court to dismiss the appeal.

C In the appellant's brief settled by L. O. FAGBEMI, S.A.N., six issues were formulated from the 12 grounds of appeal contained in the Amended Notice of Appeal deemed filed on 22/1/2008. The issues are:

D *"(1) Whether in all the circumstances of this case, the Court has jurisdiction to entertain the case of the plaintiff? (Grounds 7, 8 and 9 of Amended Notice of Appeal).*

E *(2) Whether the Courts below did not misapply the legal principle of agency in the circumstances of this case and whether they can rightly rely on extraneous matters to vary the contents of a written document? (Grounds 2 and 13 of the Amended Notice of Appeal).*

F *(3) Whether the Court of appeal was not in error in affirming the award of #64,000.00 (pounds) when in all the circumstances of this case, plaintiff did not prove its entitlement to such money? (Grounds 3, 11 and 12 of the Amended Notice of Appeal).*

G *(4) Whether the Court of Appeal was right in its resolution of the issue of want of procedural jurisdiction instead of lack of legal jurisdiction of the trial Court? (Ground 4 of the Amended Notice of Appeal)*

(5) Whether the Court of Appeal was not in error when it held that S.91(3) Evidence Act cannot operate against Exhibits F-F1? (Ground 5 of the Amended Notice of Appeal).

H *(6) Whether there was an aspect of the respondent's claim that could not be justly determined in the absence of Nigeria Deposit Insurance Corporation. (Ground 6 of Amended Notice of Appeal)."*

The respondent also formulated six issues for determination as follows:

“(1) Whether in all circumstances of this case, the trial Court had jurisdiction to entertain the case of the plaintiff/respondent. (Grounds 7, 8 and 9 of the Amended Notice of Appeal)

(2) Whether the Courts below correctly applied the legal principle of agency in the circumstances of this case. (Grounds 2 and 13 of the Amended Notice of Appeal) B

(3) Whether, having regard to the pleadings and evidence led at the trial the Court of appeal rightly affirmed the trial Court’s decision awarding to the plaintiff/respondent the sum of 64,000.00 (sixty-four thousand pound sterling) as claimed in the Amended Statement of Claim. (Grounds 3, 10 and 11 of the Amended Notice of Appeal) C

(4) Whether it is a condition precedent to first seek the Leave of the Court in Enugu State before the issue of a Writ of Summons intended to be served outside the jurisdiction of the Court and whether such failure renders the trial and subsequent judgment thereon a nullity. (Ground 4 of the Amended Notice of Appeal) D

(5) Whether the Court of Appeal was right having regards to the pleadings and evidence led at the trial in affirming the decision of the Lower Court awarding the sum of N120,450.00 (one hundred and twenty thousand, four hundred and fifty Naira) to the plaintiff/respondent being cost of installation of equipment. (Ground 5 of the Amended Notice of Appeal) E

(6) Whether Allied Bank of Nigeria Ltd was a necessary party to this suit having regard to the claim of the respondent and whether there was any aspect of the respondent’s claim that could not be justly determined in the absence of Nigeria Deposit Insurance Corporation. (Ground 6 of the Amended Notice of Appeal)” F

The issues formulated by both parties are substantially the same. I shall resolve the appeal on the issues formulated by the appellant. Issues 1 and 4 deal with the jurisdiction of the trial Court to entertain the suit. I shall consider them together. I shall consider the remaining issues serially. G

Issues 1 and 4

Learned senior counsel for the appellant, L. O. FAGBEMI, H ESQ., SAN, argued the first issue under three heads, namely:

- (i) Locus standi of the plaintiff;
- (ii) Nullity and unenforceability of the contract agreement; and
- (iii) Provisions of Act No.59 of 1991 and Decree 107 of 1993.

Learned counsel submitted that jurisdiction is the live wire of any adjudication and that the absence of jurisdiction renders the proceedings a nullity. See: *Onagoruwa Vs The State* (1992) 2 NWLR (Pt.221) 33 @ 48; *NDIC Vs C.B.N. (2002) 7 NWLR (Pt.766) 272*. He referred to Section 6(6)(b) of the 1979 Constitution, which was the law in force when the suit was instituted, which provides for the manner in which the judicial powers of the Court may be exercised and submitted that any party who brings a complaint to Court must show that the issue in contention affects him personally. He submitted, relying on *U.B.A. Plc Vs BTL Ind. Ltd. (2004) 18 NWLR (Pt.904) 180* that only a party to a contract can enforce it. He submitted further that even where a contract is made for the benefit of a third party, the third party cannot enforce it, not being a party thereto.

Learned senior counsel submitted that the respondent is a creation of statute with perpetual succession and a common seal. He referred to Section 1 of the *Orthopaedic Hospitals Management Board Act. Cap. 341 Laws of the Federation of Nigeria 1990*, (hereinafter referred to as the *OHMB Act*). He submitted that the contracts in this case, Exhibits A and B were made and executed by the National Orthopaedic Hospital, Enugu purportedly acting on behalf of the Orthopaedic Hospitals Management Board (hereafter referred to as *OHMB*). He submitted that the National Orthopaedic Hospital Enugu, not being a legal entity with perpetual succession and a common seal, lacked the vires to enter into the agreements that culminated in Exhibits A & B and could not act on behalf of another legal entity. He relied on the well known adage that you cannot put something on nothing and expect it to stand. See: *McFoy Vs U.A.C, (1951) 3 ALL ER 1169*. He argued that in the circumstances the plaintiff/respondent lacked the locus standi to enforce the agreements to which it was not a party.

Another ground for attacking the jurisdiction of the trial Court to entertain the respondent's claims is that the jurisdiction of the Court had been ousted by the provisions of the *Admiralty Jurisdiction Decree No.59 of 1991* (hereinafter referred to as *Decree 59 of 1991*) which came into force on 30/12/1991 and which expanded the exclusive jurisdiction of the Federal High Court to include admiralty matters. He referred to Section 1(1) (h), 19 and 20 thereof, which provide as follows:

“1. (1) The admiralty jurisdiction of the Federal High Court includes the following, that is -

(h) any banking and letters of credit transactions involving the importation or exportation of goods to and from Nigeria in a ship or an aircraft, whether the importation is carried out or not...

19. Notwithstanding the provisions of any other enactment or law, the Court shall, as from the commencement of this Decree, exercise exclusive jurisdiction in admiralty causes or matters, whether civil or criminal.

20. Any agreement by any person or party to any cause/matter or action which seeks to oust the jurisdiction of the Court shall be null and void, if it relates to any admiralty matter falling under this Decree...”

Referring to several paragraphs of the respondent’s final amended statement of claim, portions of the contract agreements, import duty exemption certificates and marine insurance certificates, which were in the evidence before the trial Court, he submitted that the subject matter of the dispute is an admiralty matter. He also referred to relevant portions of the testimony of the respondent’s witness at pages 224 - 225 of the record.

He submitted that the Court below failed to consider and apply the clear provisions of the law in this case. He submitted further that the Court of Appeal erred in holding that Section 230 of the Constitution (Suspension and Modification) Decree NO.107 of 1993 (hereinafter referred to as Decree 107 of 1993) restored the Admiralty jurisdiction of the Federal High Court and thereby repealed the provisions of the Federal High Court Amendment (Date of Commencement) Decree No.60 of 1991 (hereinafter referred to as Decree 60 of 1991). He argued that the Lower Court also erred in holding that Decree No.107 of 1993 did not contain any abatement provision nor was it made retrospective and did not therefore affect pending legal proceedings. He is of the view that Decree No.107 of 1993 did not repeal Decree No.60 of 1991, which contained abatement provisions. He contended that the Federal High Court Amendment (Date of Commencement) Decree No.16 of 1992 suspended the commencement date of Decree No.60 of 1991. He referred to Section 7(1) (a) & (9), (3) and 6 (b) of Decree No.60 of 1991 and submitted that the combined effect of Section 1(1) (h) of Decree

No.59 of 1991 and Section 7(1) and (3) of Decree NO.60 of 1991 is that banking letters of credit transactions involving a bank's foreign department and importation of goods into Nigeria are, by operation of law, admiralty matters within the exclusive jurisdiction of the Federal High Court. He submitted that the jurisdiction of the Enugu State High Court abated on 26/8/93 when Decree No.60 of 1991 came into operation. He contended that the Lower Court ought to have been guided by the decisions of this Court in *S.P.D.C. Nig. Ltd. vs. Abel Isaiah* (2001) 11 NWLR (Pt.723) 168 @ 179 & 180, *Olutola vs. University of Ilorin* (2004) 18 NWLR (Pt.905) 416 - 471; *Adah v. N.Y.S.C.* (2004) 13 NWLR (Pt.1891) 465 - 466, which were cited before it. Applying the decision in *S.P.D.C. Nig. Ltd. Vs Isaiah* (supra), learned counsel submitted that suit No.E/288/88 was still pending in the State High Court as at 17/11/1993 when Decree No.107 was enacted and that the jurisdiction of the Court ceased as of that date.

With regard to issue 4, learned counsel for the appellant submitted that notwithstanding the fact that the appellant resided outside the jurisdiction of the Court, the plaintiff (respondent herein) failed to seek and obtain leave before the writ was issued although it did obtain an order on 8/7/88 to serve the writ outside the Court's jurisdiction. He argued that leave to cause the writ to issue outside jurisdiction is a condition precedent to the competence of the Court to hear the matter. Relying on *A.G. Lagos State vs. Dosunmu* (1983) 3 NWLR (Pt.111) 25, he submitted that any such defect in competence is not intrinsic to but extrinsic to adjudication. For the relevant substantive law, he referred to Section 22(2) of the High Court Law Cap. 61 Laws of Eastern Nigeria 1953, which provides:

"The Court shall have jurisdiction to hear and determine any civil cause or matter other than one referred to in Subsection (1) in which the defendant or one of the defendants resides or carried on business within the jurisdiction of the Court."

Citing the case of *Laibru Ltd. Vs Building & Civil Eng. Contractors* (1962) 1 ALL NLR 385 @ 392, he submitted that since the Anambra State High Court Law is silent on whether a plaintiff must seek and obtain leave to cause a writ of summons to issue for service outside jurisdiction, the Court ought to have had recourse to the law and practice in England as at 30/9/1960. He relied on the case of

Nwabueze Vs Obi-Okoye (1988) 4 NWLR (Pt.91) 664 @ 608 in support of his contention that failure to seek the required leave deprived the Court of jurisdiction to hear the suit. He submitted that the want of jurisdiction in this case is an issue of substantive law or inherent powers of the Court and not procedural law dealt with under the Rules of Court as done by the Lower Courts. He referred to: *State Vs Onagoruwa* (supra) @ page 11 lines 35 - 40. B

He submitted that failure of the respondent to first seek leave before causing the writ of summons to issue was fatal and deprived the Court of jurisdiction to entertain the suit. He contended further that the Lower Court wrongly ignored Supreme Court decisions on the point and placed procedural rules of Court above substantive law. C

In reply to the submissions on the locus standi of the respondent to sue on the contracts in question, AHMED ADETOLA-KAZEEM ESQ. referred to Section 6 of the OHMB Act, which provides for the management committees of the various hospitals under the Board. He noted that Sub-section (1) thereof provides that committees shall exercise powers delegated by the Management Board for the effective day-to-day administration of the various hospitals. He urged the Court to hold that Exhibits A & B fall within the day-to-day activities of the respondent and were therefore made pursuant to the provisions of Section 6 of the OHMB Act. D E

He submitted further that, assuming without conceding that the appellant is correct in its assertion that the respondent lacked the legal capacity to execute the contract, it cannot take advantage of any irregularity in which it acquiesced. He referred to: *Hydro-Quest (Nig.) Ltd. Vs Bank of the North Ltd*, (1994) 1 NWLR (Pt.318) 41. He argued further that there is a plethora of decisions of this Court to the effect that a party who has taken benefit from a contract cannot turn around to evade his obligation on the basis of purported illegality. He referred to: *Chidoka Vs F.C.F.C.*, (2013) 5 NWLR (1345) 144 @ 163; *Ibrahim Vs Osim* (1988) 3 NWLR (Pt.82) 257 @ 279. F G

On the jurisdiction of the trial High Court to entertain the suit, H learned counsel submitted that the appellant's claim as endorsed on the writ of summons does not qualify for any of the items listed under Section 7(a) - (u) of the Federal High Court Act as amended by Decree No.60 of 1991. He submitted that it is a fundamental prin-

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 ciple of law that it is the plaintiff's claim before the trial Court that determines its jurisdiction to determine the suit. He cited the case of *Tukur Vs Government of Gongola State* (1989) 4 NWLR (Pt.117) 549. He submitted that the plaintiffs claim was for special damages for breach of contract as per Exhibits A & B. He noted that Decree No.60 of 1991 was suspended by Decree No.16 of 1992 and made null any decision based thereon. He submitted further that in 1993, Section 230 of the Constitution (Suspension and Modification) Decree No.107 restored the jurisdiction of the Federal High Court pertaining to Admiralty Matters and impliedly repealed Decree No.60 of 1991. In support of this argument, he relied on: *OHMB Vs Umaru Garba* (2002) 14 NWLR (Pt.788) 538.

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 He contended that even if it is assumed (without conceding) that the claim falls within Decree No.60 of 1991 or Decree No.59 by virtue of Section 236 of the 1979 Constitution, the trial High Court still had jurisdiction to entertain the suit, which was commenced on 5th July, 1988. He cited *Bronik Motors Ltd. Vs WEMA Bank Ltd.* (1983) 6 SC 158 and *Savannah Bank Nig. Ltd. Vs PAN Atlantic Shipping & Transport Ltd.* (1987) NSCC Vol.18 (Pt.1) 67. He noted that the commencement date of Decree No.107 was 17th November 1993 and that it did not contain any abatement provision, unlike Decree No.60 and was not stated to take effect retrospectively. He argued that the plaintiff acquired its right to sue at the Enugu State High Court at the time the cause of action accrued, before 17th November 1993 when Decree No.107 came into effect and that the promulgation of the Decree could not affect pending legal proceedings so as to deprive the trial High Court of jurisdiction. He referred to Section 6(1) of the Interpretation Act Cap. 192 LFN and *OHMB Vs Garba* (supra).

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 Learned counsel submitted that the appellate Courts have always construed the provisions of Section 230 of the 1979 Constitution as amended by Decree No.107 (now Section 251 of the 1999 Constitution) strictly. He submitted that consequently, any matter or subject not specifically mentioned is regarded as excluded from the jurisdiction of the Federal High Court. In support of this submission he cited: *I.G.P Vs Aighiremolen* (1999) 13 NWLR (Pt.635) 443; *Minister of Works Vs Tomas (Nig.) Ltd.* (2001) 10 NWLR (Pt.721) 295 and *Olutola Vs University of Ilorin* (2004) 18 NWLR (Pt.905) 416.

He submitted that the authority of *Shell Petroleum Dev. Co. Ltd. Vs Isaiah* (2001) 11 NWLR (Pt.723) 1 is inapplicable to the facts of this case because the issue of whether the statute contained an abatement clause and the provisions of Section 6(1) of the Interpretation Act were not considered by this Court in the said case. He stated that the issue was adequately dealt with in *OHMB Vs Garba* (supra) and *Onuorah Vs K.R.PC* (2005) 6 NWLR (Pt.921) 393, (2005) 2 SC (Pt.II) 1. He urged the Court to follow the two latter decisions.

On whether an action for breach of contract for supply of goods conveyed by sea is an admiralty action, he referred to: *Chevron (Nig.) Ltd, Vs Lonestar Drilling Ltd.* (2007) 14 NWLR (Pt.1059) 168.

On the issue of failure to seek leave prior to the issuance of the writ intended for service outside jurisdiction, learned counsel for the respondent submitted that seeking leave is not a condition precedent to the issuance of a writ intended to be served outside jurisdiction. He referred to the *Anambra State High Court Law, 1987* and the *Anambra State High Court Rules 1988* applicable in *Enugu State* at the time the suit was instituted. He referred to *O. 5 Rule 18, O. 7 Rule 19* and *O. 9 Rule 17* of the *Anambra State High Court Rules* (supra). He contended that assuming without conceding that obtaining leave to issue the writ intended for service outside jurisdiction is a condition precedent (not conceded), to the exercise of the Court's jurisdiction, the appellant had waived its right to object having neglected to plead the alleged non-compliance in its statement of defence as required by *Order 9 Rule 17* of the Rules and having filed several processes and participated in the trial up to judgment. He cited the case of: *Kossen (Nig.) Ltd. Vs Savannah Bank Nig. Ltd.* (1995) 9 NWLR (Pt.420) 439 @ 451 D. He submitted that the case of *Nwabueze Vs Obi-Okoye* (supra) could be distinguished on the following grounds:

- (i) The case was decided based on the *High Court Law Cap. 61 Law of Eastern Nigeria 1963*, which had no provision like *O. 5 Rule 18* of the *Anambra State High Court Rules* (supra) and
- (ii) In *Nwabueze's* case and other similar cases, the defendant(s), without first taking steps in the suits promptly applied to the trial Court to set aside the proceedings.

He urged the Court to rely on the authority of *Odua Vs Talabi*

2952 B.B. Apugo Ltd. v. Orthopaedic H.M.B. (2016) 6 KLR K-Ekun JSC
(1997) 10 NWLR (Pt.523) 1; (1997) 7 SCNJ 600 in holding that the appellant had waived its right to complain against any procedural irregularity at this stage.

In reply on points of law, learned counsel for the appellant submitted that there is nothing on the face of Exhibits A & B to show that the contractual documents were entered into by the management committee. He also submitted that the said contracts were not made in the name recognized by the law setting up the 1st respondent i.e. the OHIMB Act. He asserted that nothing in the circumstances of this case could clothe the National Orthopaedic Hospital Enugu with the legal competence to contract as in Exhibits A & B. Relying on *F.G.N. Vs Zebra Energy Ltd.* (2002) 18 NWLR (Pt.798) 162 @ 200 - 201 he submitted that the law is clear that where a statute prescribes a certain way of carrying out a duty, that mode and no other should be employed in carrying out that duty.

On whether the appellant's claim is an admiralty matter or not, learned counsel referred to the case of *Integrated Timber and Plywood Products Ltd. Vs U.B.N. Plc* (2006) 12 NWLR (Pt.995) 483 @ 508 C - E: (2006) LPELR-1519 SC 1 @ 24 D E. He maintained that the claims in the instant appeal fall within the exclusive jurisdiction of the Federal High Court.

On the applicability of Decree No.107 of 1993 to the jurisdiction of the trial Court and the reliance which the Court placed on the authority of *OHMB Vs Garba* (supra), learned counsel argued that the case does not represent the extant position of the law. To buttress his submission, he relied on *Olutola Vs University of Ilorin* (2004) 18 NWLR (Pt.905) 416 @ 455 D - F. He contended that although the Enugu State High Court might have had the requisite jurisdiction to entertain the action when it was filed in the registry of the Court on 5/7/1988, the Court lacked the jurisdiction to continue with the hearing as from 17th November 1993 when Decree No.107 of 1993 came into effect.

He urged that although the decisions in *OHMB Vs Garba* (supra) and *Olutola Vs Unilorin* (supra) appear to be in conflict, this Court should follow the decision in *Olutola's* case, being later in time. He also submitted that the case of *Chevron (Nig.) Ltd. Vs Lonestar Drilling (Nig.) Ltd.* (supra) relied upon by learned counsel for the respondent is distinguishable from the instant case because whereas

in Chevron's case what was involved was a contract for the supply of goods simpliciter, the instant case involves an importation contract.

He maintained that as at 20th December 2000 when judgment was given in the suit, Decree No. 60 of 1991 was in existence and effectively ousted the jurisdiction of the trial Court.

Resolution of Issues 1 & 4

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I shall consider the issue of the locus standi of the respondent first. Locus standi is the legal right of a party to an action, to be heard in litigation before a Court or tribunal. The term connotes the legal capacity of instituting or commencing an action in a competent Court of law or tribunal without any inhibition, obstruction or hindrance from any person or body whatsoever. It is also the law that to have locus standi to sue, the plaintiff must have sufficient interest in the suit. For instance, one of the factors for determining sufficient interest is whether the party seeking redress would suffer some injury or hardship from the litigation. See: Inakoju Vs Adeleke (2007) 4 NWLR (Pt.1025) 423 @ 601 - 602 H - B: Thomas Vs Olufosoye (1986) 1 NWLR (Pt.18) 669; Senator Abraham Adesanya Vs President of the Federal Republic of Nigeria & Anor. (1961) 5 SC 112; Iteogu Vs L.P.D.C. (2009) 17 NWLR (Pt.1171) 614.

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It is settled law that as a general rule, only parties to a contract can maintain an action thereunder. In other words, only parties to a contract can sue and be sued on it and a stranger to a contract can neither sue or be sued thereon, even if the contract is made for his benefit. See: Basinco Motors Ltd. Vs Woermann-Line & Anor. (2009) 13 NWLR (Pt.1157) 149; Dunlop Pneumatic Tyre Co. Ltd. Vs Selfridge & Co. Ltd. (1915) AC 847; Rebold Ind. Ltd. Vs Magreola (2015) LPELR SC.259/2007. ***The reasoning behind this principle is the fact that the third party would not have furnished consideration for the contract.*** See: Owodunni Vs Registered Trustee of C.C.C. (2000) 10 NWLR (Pt.675) 315 @ 339 D.

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Now, it is the appellant's contention that the National Orthopaedic Hospital, Enugu is not a juristic person and therefore lacks the legal capacity to enter into the agreements, Exhibits A & B and that the said agreements are accordingly null and void. Secondly, it is the appellant's contention that the respondent, the Orthopaedic Hospi-

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2954 B.B. Apugo Ltd. v. Orthopaedic H.M.B. (2016) 6 KLR K-Ekun JSC
tals Management Board not being a party to either of the agree-
ments, lacks the locus standi to institute any action based on those
contracts.

I have carefully perused Exhibits A & B reproduced at pages
15 - 21 and 22 - 23 of the record respectively. Curiously, Exhibit A is
B missing in the first part of the attestation clause. Luckily the entire
agreement is reproduced in the judgment of the trial Court at pages
265 - 267 of the record. As noted earlier, Exhibits A & B were stated
to be between the National Orthopaedic Hospital Enugu, “acting for
and on behalf of the Orthopaedic Hospitals Management Board,
C Lagos”, on the one hand and Messrs. B. B. Apugo & Sons Ltd. of
No. 1 Garrage, Bende Road, Umuahia Ibeku, Imo State on the other.

In Exhibit A (pages 266 - 267 of the record) the following
clause can be found:

D “THE ORTHOPAEDIC HOSPITALS MANAGEMENT BOARD/
NATIONAL ORTHOPAEDIC HOSPITAL ENUGU, shall on her part:

(1) On signing the contract, provide the full cash specified above
(N1,132,915.00) one million, one hundred and thirty-two thousand,
nine hundred and fifteen naira only, to the Allied Bank of Nigeria
E Limited, Aba in favour of Messrs B.B. Apugo & Sons Ltd/Siemens
Aktiengesellschaft of Western Germany. This is in consideration of
the fact that the company/contractor shall require cover for foreign
exchange transactions as stipulated by the Central Bank of Nigeria.

F (2) Provide the company/contractor necessary documents for
exemption from Import Duty of the spare parts or order.

(3) Provide accommodation for not more than 50 days in a
hotel for the engineers/technicians who shall carry out the rehabilita-
tion/repair work on the X-Ray machine.”

G In Exhibit B (page 23 of the record) under a similar clause, the
ORTHOPAEDIC HOSPITALS MANAGEMENT BOARD/NATIONAL
ORTHOPAEDIC HOSPITAL, ENUGU covenanted to do the follow-
ing:

H “(1) On signing the Contract Agreement, provide the full cash
specified above (N409,708.00) to the Allied Bank of Nigeria Lim-
ited, Aba, in favour of Messrs B. B. Apugo & Sons Limited. This is in
consideration of the fact that the Company/Contractors shall require
cover for foreign exchange transactions stipulated by the Central Bank
of Nigeria.

(2) Provide the Company/Contractor necessary documents for exemption from import duty on the goods on order.

(3) Provide firm base and housing where necessary for the installation of the equipments requiring such installation.”

Both documents were signed, sealed and delivered not by or on behalf of the National Orthopaedic Hospital Enugu but “for and on behalf of the ORTHOPAEDIC HOSPITALS MANAGEMENT BOARD,” a body duly established by the OHMB Act Cap. 341 LFN 1990 as a body corporate with perpetual succession and a common seal. See Section 1 (1) & (2) of the OHMB Act (supra).

Having regard to the fact that the OHMB had undertaken certain obligations under the contracts, and duly affixed its common seal thereto, it is my considered view that it would not be correct to state, as contended by the appellant, that it was a stranger to the contracts. I am of the view that the OHMB has demonstrated sufficient locus in the circumstances of this case to enable it seek redress for breach of contract against the appellant.

Furthermore, the appellant having taken benefit under the contract, i.e. receiving payment from the respondent for the full value of the goods to be supplied and installed, it does not lie in its mouth to seek to avoid its obligations under the contract, voluntarily entered into, on the ground that the contract is void. See: Okechukwu Vs Onuorah (2001) 12 SC (Pt.1) 106; (2000) 15 NWLR (Pt.691) 597 @ 610 E – G, where it was held that “a party who induced the other party to enter into a contract, which contract provides benefits for the inviting party, which he has utilized without complaint, he cannot be found to deny the validity of that contract.” See also: E. A. Industries Ltd. & Ors Vs NERFUND (2009) 8 NWLR (Pt.1144) 535 @ 592 C; Inyang Vs Ebong (2002) 2 NWLR (Pt.751) 284 @ 333 - 334. **Such conduct is against public policy. I hold that in the circumstances of this case, the respondent had the locus to institute the action.**

It is the appellant’s further contention that the respondent’s claims fall within the admiralty jurisdiction of the Federal High Court by virtue of Decree No. 59 of 1991. I have summarised the argu-

ments of both learned counsel on this issue.

The issue of jurisdiction is no doubt fundamental to any adjudication. It is a threshold matter, which goes to the competence of the Court to hear and determine a suit. Where the Court lacks jurisdiction, the entire proceedings, no matter how well conducted, would amount to a nullity and liable to be struck out. See: *Obiuweubi Vs C.B.N.* (2011) 7 NWLR (Pt.1247) 465; *Madukolu Vs Nkemdilim* (1962) 3 SCNLR 341; *Bronik Motors Ltd. & Anor. Vs Wema Bank Ltd.* (1983) 1 SCNLR 296.

It is also trite that our Courts of law are creations of statute. Thus their respective jurisdictions are spelt out in the relevant statutory enactments. I think it is necessary to examine the respondent's claim to determine whether in fact it is an admiralty matter.

In order to determine the jurisdiction of the Court, it is the plaintiff's claim as endorsed on the writ of summons and statement of claim that would be considered by the Court. See: *Tukur Vs Government of Gongola State* (1989) 4 NWLR (Pt.117) 592; *Adeyemi v. Opeyori* (1976) 9 - 10 SC 31.

In paragraphs 4, 5, 6, 7, 25, 16, 17, 18, 19 & 20 of the Final Amended Statement of Claim, the respondent (as plaintiff) pleaded as follows:-

"4. On 8th July 1987, the plaintiff and the defendant executed in Enugu, two agreements, in relation to the Orthopaedic Hospital, Enugu (hereinafter referred to as "the said Hospital") respectively as follows:-

(1) In respect of the first agreement:

(a) that the defendant shall procure and import from Siemens, AG of West Germany, X-Ray machines and spare parts specified in the annexure to the said agreement and supply and deliver to the said Hospital within 90 days of the agreement and effect installation and repairs as may be necessary within 30 days of delivery at a total cost to the Board of N1,132,915 (One million, One Hundred and Thirty-two Thousand, Nine Hundred and Fifteen Naira);

(b) that the plaintiff shall pay the whole cash upon signing the contract to facilitate the immediate procurement of the necessary foreign exchange and the importation of the goods by the defendant.

(2) In respect of the second agreement:

(a) that the defendant shall procure and import from a repu-

table overseas supplier prosthetic/orthotic equipments specified in the annexure to the said agreement, deliver and where necessary install same in the said Hospital within 90 days of the agreement at a total cost of N409,708.00 (Four Hundred and Nine Thousand/ Seven Hundred and Eight Naira);

(b) that the plaintiff shall pay the whole cash upon the signing of the agreement to facilitate the immediate procurement of the necessary foreign exchange and the importation of the said goods by the defendant.

5. It is a condition of the agreements aforesaid that the defendant shall obtain a guarantee from the Bank to the plaintiff to the effect that the Bank shall expedite action on the opening of the necessary letters of credit.

6. Immediately upon the signing of the said contracts, the plaintiff paid a total sum of N1,542,623.00 (One million, Five hundred and Forty-Two Thousand, Six Hundred and Twenty-Three Naira) to the defendant's account with the Bank at its Aba Branch.

7. Contrary to the undertaking of the defendant to expedite two opening of letters of credit for the importation of all the goods covered by the agreement aforesaid, the defendant opened three letters of credit through the Bank for only part of the goods as follows:-

1. Letter of Credit No. LG/FEN4/ABA/26/659 dated 13/8/87 for DM86,472.23 at the rate of N2.2377 to 1 DM making a total Naira value of N193,499.85 for the goods covered by the Agreement particularized in paragraph 4 (2) hereof.

The plaintiff will rely on Form M8 Application to Purchase Foreign Currency, No. MB 729905 at the trial.

2. Letter of Credit No. IG/FEM/ABA/26/769 dated 15/9/87 for N61,236 at the rate of N6.7957 to the pounds sterling making a total Naira value of N416,155.07 for part of the goods covered by the Agreement particularized in Paragraph 4(1) hereof. The plaintiff will rely on Form 'M8' Application to Purchase Foreign Currency No. MB 729907 at the trial.

3. Letter of Credit No. LG/FEM/ABA/125/819 dated 2/10/87 for N30,527 at the rate of N7.0250 to the pounds sterling making a total Naira value of N214,452.17 for a further part of the goods covered by the Agreement particularized in paragraph (4) (1) hereof.

The plaintiff will rely on Form 'M' Application to purchase Foreign Currency No. MB.729909 at the trial.

15. *Following the order of the Court of Appeal given on 10/7/89 and clarified on 19/1/90, the defendant delivered in the premises of the Enugu Hospital of the plaintiff on 12/2/90 all the goods ordered except the following items:*

1. *(One) HT Transformer Code No. 16-13-819*
2. *(Two) X-Ray Tube Code No.72-13-549*
3. *(One) X-Ray Tube B125/II Code No.11-28-875*

16. *The overseas suppliers have declined to carry out necessary work/installation until the entire order has been completed. In order to minimise delay the plaintiff has contracted a local contractor to carry out the said repair/installation work. The plaintiff has so far spent about N200,000.00 (Two Hundred Thousand Naira) on the repair/installation work to defendant.*

17. *The one (1) No. HT Transformer Code No.16-13-819 and two (2) Nos. X Ray Tubes Code No. 72-13-549 aforesaid were those Siemens AG informed the plaintiff were yet to be ordered by the defendant, but the defendant has also failed to deliver her account for one (1) No. X-Ray Tube B125/II Code No, 11-28-875, which had already been ordered by the defendant.*

18. *The plaintiff will contend that the failure of the defendant.*

(a) *to deliver all the items already ordered between 1987 and February 1990;*

(b) *deliver one (1) No. X-Ray Tube B125/II Code No. 11-28-875 already ordered at all.*

(c) *to order and deliver one (1) No. HT Transformer Code No. 16-13-819 and two (2) Nos. X-Ray Tubes Code No. 72-13 540; as contracted, amount to a breach of contract.*

19. *By the defendant's breach of contract aforesaid, the plaintiff has suffered loss and damages:*

(a) *Cost of importing the items yet to be ordered by the defendant namely one (1 No.) HT Transformer Code No. 16-13-819 and two (2 Nos.) X-Ray Tubes Code No.72-13-549 (#64,000.00) sixty four thousand Pounds Sterling or its equivalent in Nigerian Currency at prevailing exchange rate.*

(b) *Cost of importing One (1 No.) X Ray Tube P12511, Code No. 11 - 28 - 875 (to be ascertained at the trial)*

(c) *Bank, handling and transportation charges N70,000.00*

(d) *Loss of revenue that could have been generated from the use of the three (3) faulty X Ray Machines from January 1988 to 1990 at an average revenue of N3,000.00 per month - N90,000.00*

(e) *Amount spent on installing and/or carrying out repair work with the Prosthetic/Orthotic Equipment and X-Ray Spare Parts so far supplied by the defendant - N200,000.00* B

20. *WHEREOF the plaintiff claims against the defendant special damages as follows:*

(a) *The sum of #64,000.00 (Sixty-Four Thousand Pounds Sterling) or its equivalent in Nigeria Currency at prevailing exchange rate being the cost of importing the items yet to be ordered and supplied by the defendant that is to say One (1 No.) HT Transformer Code No.15-13-819 and Two (2 Nos) X-Ray Tubes Code No. 72-13-549;* C

(b) *The sum of 17,500 (Seventeen Thousand, Five Hundred Pounds Sterling) or its equivalent in Nigerian currency at prevailing exchange rate being cost of one (1 No.) X-Ray Tube D/25/11 Code No.11 28-875 ordered by the defendant on the account of the plaintiff but which the defendant failed to deliver to the plaintiff;* D

(c) *The sum of N360,000.00 (Three Hundred and Sixty Thousand Naira) representing expenses incurred and losses suffered by the plaintiff as a result of the breach of the defendant's obligations to the plaintiff under the contract and interest on the said sum at the rate of 30% per annum from the date of the Writ of Summons until judgment and thereafter at the rate of 4% per annum until payment."* E

In the case of I.T.P.P. Ltd. Vs U.B.N. Plc (2006) 12 NWLR (Pt.995) 483 this Court had cause to consider the provisions of Section 1 (1) (h) of Decree No. 59 of 1991 which provides as follows: G

"1 (1) *The admiralty jurisdiction of the Federal High Court (in this Decree referred to as the Court) includes the following, that is -*

(h) *any banking or letter of credit transaction involving the importation or exportation of goods to and from Nigeria in a ship or an aircraft, whether the importation is carried out or not and notwithstanding that the transaction is between a bank and its customer".* H

In that case, the plaintiff's claim before the Federal High Court was as follows:

“Sometime in 1990, the defendant while carrying on its banking business forwarded to the plaintiff an irrevocable documentary letter of credit No.16167/65626 established in Belgium and by a letter dated 12/10/90 the defendant confirmed the authenticity of the letter of credit. Pursuant to the defendant’s advice and confirmation
 B the plaintiff adopted the letter of credit and exported iroko furniture components worth DM/28,527 to one C.I.E. Dubios Stockmanns in Belgium. In spite of repeated demands the plaintiff has received no payment of its goods. Wherefore the plaintiff claims against the defendant the sum of N120,000,000 special and general damages.”

C In determining whether the subject matter fell within the admiralty jurisdiction of the Federal High Court, His Lordship, Niki Tobi, JSC @ 50B - 509 H- B opined this:

“All that the defendant did was the confirmation of the authenticity of the plaintiff’s letter of credit No.16167/65626. This was
 D done by the defendant’s letter dated 12/10/90. ...What is the content of admiralty in the letter of confirmation dated 12/10/90? Has the letter anything to do with shipping, aircrafting, transportation of property at sea and marine commerce and marine navigation in typical
 E marine affairs.”

He observed that the provisions of the law are not to be considered in vacuo but the context of the claim before the Court. The Court concluded that what was between the parties was simply a contractual relationship which had no admiralty content. It was also
 F held that there was nothing in the statement of claim that conveyed that a shipping transaction was contemplated between the parties. In Chevron (Nig) Ltd. Vs Lonestar Drilling (Nig.) Ltd. (2007) 16 NWLR (Pt.1059) 168 @ 185 D-F & 187 G-H, this Court made the position
 G clearer when it affirmed the judgment of the Court below, which held that an action for breach of contract for the supply of goods conveyed by sea is not an admiralty action. It held that the mere fact that the transaction between the parties giving rise to the plaintiffs claim involved the conveyance of a rig purchased from India to Nigeria
 H by sea did not give the transaction the character of an admiralty action. The judgment of the Court below, wherein it was held that the State High Court had jurisdiction to entertain the suit was affirmed.

Having given careful consideration to the respondent’s

claim as reproduced above, I agree with learned counsel for the respondent that the claim is simply one for special and general damages for breach of contract to supply and install equipment. The mere fact that the goods were to be conveyed to Nigeria by sea or air does not bring the claim within the admiralty jurisdiction of the Federal High Court. See: Chevron (Nig) Ltd v. Lonestar Drilling Nig. Ltd. (supra). Notwithstanding the opening of letters of credit in respect of the importation of the goods, there is no dispute between the parties on the actual conveyance of the goods. Simply put, appellant failed to supply all the equipment for which the respondent had made full payment in advance. Furthermore the respondent incurred additional expense in installing the equipment that was delivered upon the appellant's failure to fulfill its own part of the contract to install same. I therefore hold that the claim did not fall within the exclusive admiralty jurisdiction of the Federal High Court.

In any event, even if the suit was an admiralty matter, at the time the suit was filed on 5th July 1988, by virtue of Section 7 of the Federal High Court Act 1976 and Section 236 (1) of the 1979 Constitution, which conferred unlimited jurisdiction on State High Courts, the Federal and State High Courts exercised concurrent jurisdiction in admiralty matters. On the combined effect of Decrees 59 & 60 of 1991 and Decree 107 of 1993 with regard to the exclusive admiralty jurisdiction of the Federal High Court, this Court has held in a plethora of cases that the vested rights of a party in existence at the time a new law is passed transferring jurisdiction of a Court to another, will not be lost where proceedings in the case were on-going before the enactment of the law. This is because there is a general presumption against retrospective legislation. The Courts guard their jurisdiction jealously and lean against giving statutes retrospective application unless a retrospective effect is indicated in clear and express jurisdiction terms. See: Ojokolobo Vs Alamu (1987) 3 NWLR (Pt.61) 377 @ 402 F – H; SPDC Nig. Ltd. Vs Anaro (2015) 12 NWLR (Pt.1472) 122 @ 179 B-F; 181-182 H-A; 186-187 D - E; 187-188 H-D.

The suit in this case was filed on 5th July 1988. Proceedings in terms of exchange of pleadings and the hearing of various applications had begun before 17/11/1993 when Decree 107 of 1993 came into effect. Not being of retrospective effect, it did not oust the Jurisdiction of the Court to entertain the suit. See: OHMB Vs Garba (2002) 14 NWLR (Pt.788) 538 @ 553 - 554 H - B, 556 B - D; SPDC Ltd. Vs Anaro (2015) 12 NWLR (Pt.1472) 123; Goldmark (Nig.) Ltd. Vs Ibafo Co. Ltd. (2012) 10 NWLR (Pt.1308) 291 @ 358 H - A. ***Thus, whichever way one looks at it, the High Court of Enugu State had the requisite jurisdiction to entertain the suit.***

With regard to the submissions of learned counsel for the appellant on failure of the respondent to seek leave to cause the writ of summons to issue for service outside jurisdiction, I have considered the provisions of Section 22(2) of the High Court Law Cap. 61 Laws of Eastern Nigeria 1963 as well as Order 5 Rule 18 and Order 7 Rule 19 of the High Court Rules of Anambra State 1988 applicable in Enugu State.

Section 22(2) of the Anambra State High Court Law of 1963 provides:

“The Court shall have jurisdiction to hear and determine any civil cause or matter other than one referred to in Sub-section (1) in which the defendant or one of the defendants resides or carries on business within the jurisdiction of the Court.”

It is the appellant’s contention that by virtue of this provision, the High Courts of Anambra State can ordinarily only exercise jurisdiction over persons resident within its jurisdiction. It is contended further that where the Law and Rules are silent on whether a plaintiff must first seek and obtain leave to cause the writ to issue outside jurisdiction of the Court, recourse must be had to the law and practice in England on 30th September 1960. Learned counsel relied on *Laibru Vs Building and Civil Engineering Contractors* (supra) and *Nwabueze Vs Obi-Okoye* (supra).

I am however in agreement with learned counsel for the respondent that the relevant Law and Rules of Court as at 6/7/1988 when the suit was filed are: The Anambra State High Court Law, 1987 and The Anambra State High Court Rules, 1988 applicable in Enugu State.

Order 5 Rule 18 and Order 7 Rule 19 of the Rules provide:

Order 5 Rule 18:

“Except as may be expressly provided by these rules or by a written law from time to time in force in relation to any class of suits, leave shall not be required for the issue of any Writ or Summons. Provided that leave for service out of Jurisdiction shall be required as prescribed in Order 7 Rule 19(2) of these Rules.” B

Order 7 Rule 19

“(1) Leave of the Court shall not be required for the service of a writ of summons or other process of Court, outside the State if the service is to be effected elsewhere within Nigeria.” C

“(2) Leave of the Court shall be obtained for the service of a writ of summons on a defendant out of Nigeria.” (Emphasis mine)

It is quite correct, as observed by the Lower Court that the issuance and service of Court processes is basic and fundamental and is a condition precedent to the exercise of the Court’s jurisdiction. Since the purpose of the issuance and service of Court processes on a party is to bring the said processes to his notice to afford him an opportunity to react thereto, any defect would amount to a breach of the affected party’s right to fair hearing and would render the proceedings a nullity. See: Skenconsult (Nig) Ltd. Vs Uke (1981) 1 SC 6; Ezomo Vs Oyakhire (1985) 1 NWLR Pt.2 195 Adegoke Motors Ltd. vs. Adesanya (1989) 3 NWLR (Pt.109) 250. D E

Order 5 Rule 18 above states clearly that “leave shall not be required for the issue of any writ of summons”. The provision is clear and unambiguous and does not require any interpretation. The proviso thereto provides that leave for service of a writ outside jurisdiction is only required in the circumstances stated in Order 7 Rule 19 (2), which only requires leave to serve a writ on a defendant who is “out of Nigeria.” In other words, even where the defendant resides outside Anambra State but within Nigeria, leave would not be required to effect service on him. F G H

I am therefore in full agreement with the Lower Court that under the Anambra State High Court Rules 1988, applicable in Enugu State, it is not a condition precedent that leave of Court must be sought and obtained before the issuance of a

writ or summons for service outside the jurisdiction of the High Court of Enugu State.

Issues 1 and 4 are accordingly resolved against the appellant.

Issue 2

B Whether the Court below did not misapply the legal principle of agency in the circumstances of this case and whether they can rightly rely on extraneous matters to vary the contents of a document.

C Arguing this issue, learned senior counsel for the appellant submitted that at all material time and to the respondent's knowledge, the appellant acted for and on behalf of a disclosed foreign principal, namely Siemens Aktiengesellschaft of Germany. He submitted that not only was the fact clearly stated in Exhibit A, but the respondent D also engaged in some correspondence with the foreign principal before and during the execution of the contracts. He referred to the letters at pages 16 - 20 and 34 - 45 of the record in this regard and also Exhibit D at page 224 of the record. He argued further that the respondent's witness, PW1, at page 232 of the records admitted that E the disclosed foreign principal agreed with the plaintiff/respondent to supply the equipment and that the appellant was merely a "conduit pipe."

F He submitted that the Lower Court labelled the appellant and the foreign principal as wrongdoers and proceeded from that erroneous premise to hold that the relationship of principal and agent has no application in the case of a wrongdoer. He submitted that tagging the appellant and a party not before it as wrongdoers was wrong in law and extraneous to the issue before the Court. Learned G senior counsel argued that this erroneous premise beclouded the Court's view and led it to misapply the principle of agency enunciated in the case of: Dommit Khonan Vs Elizabeth Fife John (1945) (1939) 15 NLR 12. He submitted that in the instant case, since the appellant only signed Exhibit A on behalf of a disclosed foreign principal and having regard to the evidence that the said disclosed principal H exchanged correspondence with the respondent, it is impossible to hold that the intention was not to bind the principal. Learned senior counsel submitted that the principal need not sign an agency agreement in order to be bound since an agreement could be oral or

implied. He submitted that in Khonan's case (supra), the foreign principal did not sign the agreement and it was not enough that the agent signed on his behalf to bind him. He reiterated the fact that in Exhibit A (page 15 of the record), the appellant signed for and on behalf of Siemens A.G. of West Germany. He rejected the finding of the Court below that Exhibit E, a letter written by the appellant to the respondent informing it that the equipment had arrived a long time ago and demanding payment, represented the contractual relationship between the parties. He submitted that no Court can make a contract for the parties and that where the words, terms and intents of a written contract are clear and unambiguous, they must be given their ordinary meaning. He referred to: *Ifezue Vs Mbadugha & Anor.* (1984) 5 SC 7 @ 101. He submitted that Exhibits A & B were tendered in Court through the respondent's witness as the written contract between the parties and contended that it is not legally permissible to go outside those documents to identify the contractual relationship between the parties as the Lower Court did. He submitted that the Court's duty is to interpret and enforce a contract agreement. In the event of a lacuna, the Court cannot fill in the gaps. He referred to: *Gurara Sec. & Fin. Ltd. Vs T.L.C. Ltd.* (1999) 2 NWLR (Pt.589) 29 @ 48.

He maintained that Exhibit A spoke for itself in plain language and that the respondent did not contend that it was misled into signing it. He referred to Section 132(1) of the Evidence Act in support of his contention that no extraneous matters may be considered when interpreting the terms of an agreement. He also cited the case of *U.B.N. Ltd. Vs Ozigi* (1991) 2 NWLR (Pt.176) 622. He submitted that the Lower Courts were wrong to have considered Exhibit J in addition to oral evidence in determining the agency relationship between the appellant and Siemens A.G. of West Germany. He posited that Exhibits A & B alone represent the agreements between the parties and that Exhibit J, a letter written almost a month before the contracts were made, did not define the rights of the parties. He urged the Court to resolve this issue in the appellant's favour.

In reply to the appellant's contention that it acted as the agent of a disclosed foreign principal, learned counsel for the respondent submitted that the settled position of the law is that a person may decide to act for another as his agent and receive the benefit or bear

the liability of that arrangement. He submitted, relying on the case of Asafa Foods Factory Ltd. vs. Alraine (Nig) Ltd. (2002) 5 SCNJ 53 @ 67; (2002) 12 NWLR (Pt.781) 353, that the fact that a person is an agent and known to be so does not of itself necessarily prevent his incurring personal liability and that whether he does incur such liability is determined by the nature and terms of the contract and the surrounding circumstances. He referred to the dictum of this Court in that case to the effect that where a person contracts on behalf of a foreign principal, there is a presumption that he is incurring personal liability, unless a contrary intention appears. He cited the case of Stanley Yeung Kai Yung vs. Hong Kong and Shanghai Corporation (1981) AC 787 (P.C.)

He submitted that in the present appeal, there is nothing on the face of Exhibit A to show that the appellant would not be liable for any breach of the contract. He argued that the onus of proving that it is not liable rested squarely on the appellant who failed to proffer any evidence to rebut the presumption that it would not be liable for any breach. He urged this Court to uphold the finding of fact by the trial Court that the appellant was not an agent of Siemens of West Germany, as it claimed, but that it was appointed by the respondent and was therefore an agent of the respondent and liable for any breach of the contract between it and the respondent. He referred to Exhibits E & J at page 95 of the record.

Learned counsel submitted that having regard to all the circumstances of the case, there is nothing to negative the personal liability of the appellant. He urged the Court not to disturb the finding of the two Lower Courts and to resolve the issue in the respondent's favour.

In reply on points of law, learned senior counsel for the appellant sought to distinguish the case of Asafa Foods Factory Ltd. Vs Alraine (Nig.) Ltd (supra) from the facts of this case on the ground that in Asafa's case the respondent had taken possession of the goods in question and waybills issued in its name before the circumstance leading to the suit took place, whereas in the instant case, there is no evidence to show that at the time of the breach, the appellant was totally on its own. He also argued that Asafa's case was founded on tortious liability while the instant case is founded on breach of contract.

Resolution of Issue 2

The law is that an agent of a disclosed principal is ordinarily not personally liable on a contract he enters into on behalf of the said principal. See: Khonan Vs Elizabeth Fife John (1939) 15 NLR 12 @ 15; Okafor Vs Ezenwa (2002) 13 NWLR (Pt.784) 319; Niger Progress Ltd. Vs North East Line Corporation B (1989) 3 NWLR (Pt.107) 68 @ 83; Union Bank of Nig. Vs Edet (1993) 4 NWLR (Pt.287) 288. This Court further expatiated on the relationship between an agent and his principal and their respective liabilities in the case of Asafa Foods Factory Vs Alraine (Nig.) Ltd. C (supra) at 373 E - H as follows:

“It has been held that the fact that a person is an agent and is known to be so does not therefore of itself necessarily prevent his incurring personal liability. Whether he does so is to be determined by the nature and terms of the contract and the surrounding circumstances. Where he contracts on behalf of a foreign principal there is a presumption that he is incurring personal liability, unless a contrary intention appears. See: Rusholme etc Ltd. Vs S.G. Read & C (London) Ltd. (1955) 1 ALL ER 180 @ 183. In Stanley Yeung Kai Yung V. Hong Kong and Shanghai Banking Corpn. (1981) AC 787 (P.C.), E Lord Scarman, delivering the judgment of the Board observes at p.795:

“It is not the law that if a principal is liable, his agent cannot be. The true principle of the law is that a person is liable for his engagements (as for his torts) even though he is acting for another/unless he F can show that by the law of agency he is to be held to have expressly or impliedly negated his personal liability.”

The issue here is whether there was in fact any agency relationship between the appellant and Siemens AG and if there was, G whether there was any evidence before the Court to suggest that the appellant had expressly or impliedly negated its personal liability on the contracts. It is pertinent to note that the agreements, Exhibits A and B are between *“The National Orthopaedic Hospital, Enugu, acting for and on behalf of the Orthopaedic Hospitals Management Board”* on the one hand and *“Messrs B. B. Apugo”* simpliciter. Both documents were “signed, sealed and delivered” on the one hand *“for and on behalf of the Orthopaedic Hospitals Management Board”* and *“for and on behalf of B. B. Apugo and sons Ltd.”* on the other. H

It is true that in clause 1 it is stated that Messrs B. B. Apugo and Sons Ltd. are acting for and on behalf of Siemens AG of Western Germany. The learned trial Judge at pages 269 - 270 of the record dealt extensively with this issue. He rightly observed, in my view, that Exhibit A cannot create an agency relationship between the appellant B and Siemens AG when Siemens AG was not a signatory to the document. He noted also that while DW1 testified in one breath that he acted at all times as the agent of Siemens AG in the transactions, in another breath he testified that the plaintiff (respondent herein) dealt directly with Siemens and his only responsibility was handling the equipment after it arrived in Nigeria. It was the appellant that tendered Exhibit J, a letter written by the National Orthopaedic Hospital, Enugu appointing it as vendor between the Federal Ministry of Health Lagos and Siemens AG in connection with the purchase of X- C Rays, spare parts, etc. The learned trial Judge after observing that the appellant admitted under cross-examination that Exhibit J is the only document referable to a principal/agent relationship, rightly observed that the said document made by the respondent could not create an agency relationship between the appellant and a third party. The D Court went on to examine Exhibit E, also tendered by the appellant, a letter which it wrote to the respondent informing it of the arrival of the Orthotic/prosthetic and Siemens equipment, requesting a balance of N936,000.00 and stating that in the event that the respondent decided to import the remaining equipment on its own, it should E make available a certain amount of money to cover handling and extra payments made on the respondent's behalf. The learned trial F judge observed as follows at page 270 lines 10 - 19:

"It is clear the defendant was importing the said equipment on behalf of the plaintiff. The letter also recognises the distinct possibility of the plaintiff deciding to import directly and made monetary demand of the plaintiff should it so contemplate.

More importantly the defendant lumped together its demand for the Siemens equipment and the Orthotic/Prosthetic equipment. H From the foregoing it is clear that the defendant was never in fact an agent of Siemens AG but was in fact contracted to import and install Siemens X-Ray equipment.

I must admit that Exhibit A was most inelegantly drafted. But a close look will show that the parties to Exhibit A clearly referred to

themselves as the parties to the transaction. More importantly the DWI signed Exhibit A on behalf of the defendant with no reference whatsoever to Siemens AG.”

The Court below at pages 420-422 affirmed the above finding of the trial Court. At page 422, it concluded thus:

“The appellant in this case failed to establish any agency relationship between himself and Siemens AG of Germany. The appellant was in fact appointed by the respondent as agent of the latter, would therefore be liable for any breach of its contract with the respondent. The appellant failed to order some of the equipment from Siemens and also refused to deliver some of the equipment it received from Siemens to the respondent. There is nothing to negate the personal liability of the appellant. This issue is resolved in favour of the respondent.”

In my humble view, the concurrent findings of the two Lower Courts are unassailable on this issue. I agree with both Courts that Exhibit A could not constitute evidence of an agency relationship between the appellant and Siemens AG. Furthermore, having tried to persuade the Court of the said relationship through Exhibit J, the appellant cannot approve and reprobate by arguing that the Court ought not to have considered the document. As held in *Asafa Food Factory vs. Alraine (Nig) Ltd. (supra)*, whether the appellant acted as the agent of a disclosed principal is to be determined by the nature and terms of the contract and the surrounding circumstances of the case. The Court below and the trial Court were right to have considered the surrounding circumstances of this case in determining whether such a relationship existed or not. They came to the right conclusion that the appellant failed to establish same. The concurrent findings of the two Courts have not been shown to be perverse and shall not be interfered with by this Court. This issue is accordingly resolved against the appellant.

Issue 3

Whether the Court of Appeal was not in error in affirming the award of 64,000.00 (Sixty-Four Thousand Pounds Sterling) when in all the circumstances of this case, plaintiff did not prove its entitlement to such money.

In support of this issue, learned counsel for the appellant submitted that the respondent's claim for 64,000.00 (Sixty-Four Thousand Pounds Sterling) is in the nature of special damages, which must be strictly pleaded and proved. See: *Neka B.B.B. Mfg. Co. Ltd. v. A.C.B. Ltd.* (2004) 2 NWLR (Pt. 585) 521 @ 557. He submitted that the Court below failed to state how it arrived at the award of #64,000.00, (pounds) as three items were lumped together in the Final Amended Statement of Claim i.e.

- (i) One (1 no.) HT Transformer Code No. 16-13-819; and
- (ii) Two (2 nos.) X-Ray Tubes Code No. 72-13-549.

He submitted that the respondent failed to particularise the value of each item and also failed to lead evidence on how the figure of 64,000.00 (Sixty-Four Thousand Pounds Sterling) was arrived at.

Relying on the authority of *Osondu Co. Ltd. v. Akhigbe* (1999) 7 SCNJ 5, he submitted that since the respondent did not actually spend 64,000.00 (Sixty-Four Thousand Pounds Sterling) or give any evidence showing it incurred losses that amounted to 64,000.00 (Sixty-Four Thousand Pounds Sterling), the claim for that amount as special damages was not proved and ought not to have been awarded.

He submitted that the trial Court based its finding on a wrong principle of law when it awarded the sum of 64,000.00 (Sixty-Four Thousand Pounds Sterling) as the value of the item at the time of the alleged breach of contract, as the value of goods at the time of an alleged breach of contract cannot qualify in law as special damages unless it is shown that the party actually suffered loss in that amount.

In his view, the Lower Court ought to have interfered with the award. He relied on: *Newbreed Organisation Ltd. v. J. E. Erhomosele* (2002) 13 NWLR (Pt. 784) 251 @ 256. He also contended that the respondent gave contradictory and unreliable evidence as to the item allegedly not supplied. He noted that at page 224 lines 6-7 of the record, the respondent gave the outstanding value as 64,000.00 (Sixty-Four Thousand Pounds Sterling) while at page 225 lines 14-15 of the record, the value was stated to be #64,000.00.

In reaction to the above submissions, learned counsel for the respondent submitted that a party is entitled to make his claim in either the local currency or foreign currency. He cited several authorities in support of this contention. He submitted that by the terms of the two contracts to import, install and deliver X-Ray equipment

from Siemens, payment was to be made in Pounds Sterling and Deutsche Mark as per the Proforma Invoice, Exhibit D. He stated that the respondent, through Allied Bank of Nigeria Ltd. paid the sum of N1.4 million into the accounts of the appellant to enable it procure foreign exchange and remit same to Siemens of Germany. He stated that the money paid into the appellant's account was the entire contract sum and was expected to cover all the foreign exchange remittances to the overseas suppliers. He submitted that in breach of the terms of the contract, the appellant failed to procure and remit foreign exchange for some of the equipment. According to him, Siemens later confirmed that the cost of the X-ray equipment which the appellant failed to order was 64,000.00 (Sixty-Four Thousand Pounds Sterling).

He submitted that there was sufficient evidence in the proforma Invoice, Exhibit D from Siemens AG, that the cost of the X-ray equipment not supplied is 64,000.00 (Sixty-Four Thousand Pounds Sterling). He submitted that the evidence that the respondent paid the sum of N1.4 million to the appellant in 1987, which sum included the cost of importation and delivery of the X-ray equipment was uncontroverted and the trial Court was entitled to accept and act on the evidence. He referred to: *Pascutto v. Adecentro* (1997) 12 SCNJ 1; (1997) 11 NWLR (Pt. 529) 467.

He submitted that where two parties have made a contract and one of them breaches the contract, the damages which the other party ought to receive in respect of the breach should be such as may fairly and reasonably be considered either naturally according to the usual course of things to flow from the breach of contract itself or such as may reasonably be supposed to have been in the contemplation of the parties at the time they entered into the contract as the probable result of a breach thereof. He submitted that the measure of damages in the circumstances would be that which would put the affected party in the same position as he would have been had the contract not been breached. He referred to: *Okongwu v. N.N.P.C.* (1989) 4 NWLR (Pt. 115) 296; *U.B.N. Ltd. v. Ogbob* (1990) 1 NWLR H (Pt. 167) 369; *Momodu v. Uniben* (1997) 7 NWLR (Pt. 513) 325. He submitted that the evidence in respect of the special damages was uncontroverted and urged the Court not to interfere with the awards of damages.

In reply on points of law, learned senior counsel argued that the mere fact that evidence is uncontroverted does not mean that it would be accepted by the Court, hook, line and sinker, especially where the evidence fails to satisfy the basic requirements expected of it. He referred to: Sommer v. F.H.A. (1992) 1 NWLR (Pt. 219) 548 B @ 560.

Resolution of Issue 3

The law is trite that special damages must be strictly proved by the person who claims to be entitled to them. The nature of the proof depends on the circumstances of each case.
 C See Okunzua v. Amosu (1992) 6 NWLR (Pt. 248) 416 @ 432 E-G.
 See also: Oshinjinrin & Ors. v. Elias & Ors. (1970) 1 ALL NLR 151 @ 156, where it was held inter alia, that a person claiming special damages must establish his entitlement to the particular type of damages
 D by credible evidence of such a character as would suggest that he indeed is entitled to an award under that head, otherwise the general law of evidence as to proof by preponderance or weight usual in civil cases operates.

The object of an award of damages is to compensate a person
 E for the injury he has sustained by reason of the act or default of another, whether the act or default is a breach of contract or tort. The measure of damages on the other hand, is an amount that would reflect what would put the injured party in the same position as he would have been had the injury not occurred. See: Umudje v. S.P.D.C.
 F Nig. Ltd. (1975) 9-11 SC (Reprint) 95; Okongwu v. N.N.P.C. (1989) 4 NWLR (Pt. 115) 296; S.P.D.C. (Nig.) Ltd. v. High Chief Tiebo VII & Ors. (1996) 4 NWLR (Pt. 445) 657 @ 680 D-E; Cameroon Airlines v. Otutuizu (2011) 4 NWLR (Pt. 1238) 512.

G It is also trite that an appellate Court would not interfere with an award of special damages unless the award is based on some wrong principle of law, or where the amount awarded is so high or so low as to make it an entirely erroneous estimate of the damage suffered by the claimant. See: S.P.D.C. Nig. Ltd. v. Tiebo VII (2005) 9
 H NWLR (Pt. 931) 439, where it was held that the evidence proffered must be qualitative and credible such as lends itself to quantification and that each case depends on its own facts and circumstance.

I refer to paragraphs 15, 17, 18 and 19 (a) of the Final Amended Statement of Claim reproduced earlier in the judgment.

For ease of reference I shall repeat paragraph 20 (a) wherein the respondent sought the following relief:

“The sum of #64,000.00 (Sixty Four Thousand Pounds Sterling) or its equivalent in Nigerian Currency at prevailing exchange rate being the cost of importing the items yet to be ordered and supplied by the defendant, that is to say One (1 No.) HT Transformer Code No. 16-13-819 and Two (2 Nos.) X-Ray Tubes Code No. 72-3-549 but excluding the cost of One (1 No.) X-Ray Tube B/25/11 Code No. 11-28-875 already ordered by the defendant but which the defendant failed to deliver to the plaintiff, the cost of which will be ascertained at the trial.”

From the elaborate pleadings in the said paragraphs it is beyond dispute that the special damages claimed were specifically pleaded. The respondent also pleaded clearly that it was given the particulars of the items not ordered by the appellant but for which the appellant had been paid in full by Siemens AG. The appellant’s contention is that the three items referred to were lumped together and that they ought to have been itemised individually. The figure of 64,000.00 (Sixty-Four Thousand Pounds Sterling) was based on Exhibit D. The learned trial Judge made the following observation at page 264 lines 21-31 of the record:

“He [PW1] identified the equipment paid for but not ordered by the defendant as those listed on the document consisting [of] the last three pages of Exhibit D. The said document is in fact a quotation from Siemens dated 26th August 1987 to the plaintiff through the defendant for the one HT Transformer 16-13-819 valued at 24,766 pounds sterling, the X-Ray tubes 72-13-549 valued at 35,578 pounds sterling and cost of freight to Lagos free on board estimated at 3,656 pounds sterling bringing the total to 64,000 pounds sterling. These equipments constitute part of the order in Exhibit A for which payment had been made.”

His Lordship continued at page 271 lines 20-25:

“I accept PW1’s evidence that the list of equipment contained in the last three pages of Exhibit D valued at sixty-four thousand pounds sterling as at August 1987 were neither produced nor delivered by the defendant.”

The Court below agreed with this finding in the following terms

at pages 416 to 418 of the record:

“The learned trial Judge awarded the sum of 64,000.00 (Sixty-Four Thousand Pounds Sterling) to the respondent on the breach of contract as loss which arose in the usual course of things as was in contemplation of the parties at the time of the contract as the like [sic: B likely] result of the breach of it, that is impliedly under the breach of the contract. The 64,000 (Sixty-Four Thousand Pounds Sterling) being the value at the time of the breach of one HT Transformer and two X-Ray tubes Code No. 72-12-543. ... Payment can be made C either in sterling or equivalent in Nigerian currency as the respondent paid enough money to appellant to cater for payment in pound sterling to Siemens AG of Germany.”

I am of the view that the concurrent findings of the two Lower Courts in this regard cannot be faulted. The respondent D pleaded and proved the value of the items paid for but neither ordered nor delivered by the appellant. The evidence led was credible and clearly established the respondent’s entitlement thereto. This issue is accordingly resolved against the appellant.

E Issue 5

Whether the Court of Appeal was right when it held that Section 91(3) of the Evidence Act cannot operate against Exhibits F & F1.

F This issue relates to the award of N120,450.00 by the Lower Court as cost of installation of the supplied equipment. Learned counsel submitted that Exhibits F & F1 are contract agreements made in 1991 and 1992, more than three years after the commencement of the suit in Court. He contended further that both documents were G prepared and signed by G. A. Adetola-Kazeem the respondent’s then solicitor, in the course of the proceedings. He submitted that the documents are therefore in violation of Section 91(3) of the Evidence Act and therefore inadmissible. He submitted that where inadmissible evidence is admitted, an appellate Court has a duty to expunge it. H He referred to: *Jacker v. International Cable Co. Ltd. (1895) 5 TLR 13*. He submitted that the Court of Appeal did not consider the fact that Exhibits F & F1 were made during the pendency of the suit and that they were made and signed by a “person interested” in the suit. He argued that failure of the Court below to consider this vital issue

led to a miscarriage of justice in the award of N120,450.00. He urged this Court to interfere with the decision.

In response, learned counsel for the respondent urged the Court to hold that the Lower Court was right to uphold the decision of the trial Court. He noted that the appellant refused to install the equipment in spite of a Court order and that unless the equipment was installed, it would be of no use to the respondent. He submitted further that the respondent was right in installing the equipment to mitigate its loss. He submitted that the Court was right in accepting the cost of installation as tendered by the respondent evidenced by Exhibits F & F1.

Learned counsel also referred to the finding of fact by the Court below that the equipment could not have been installed earlier than the date of the Court order directing the appellant to release them.

He argued that the appellant cannot take refuge under Section 91(3) of the Evidence Act to avoid the evidence of the fact or cost of installation.

RESOLUTION OF ISSUE 5

The appellant's contention under this issue is that Exhibits F and F1 are agreements entered into during the pendency of the suit and prepared by G. A. Adetola Kaseem Esq., learned counsel for the respondent. Learned senior counsel argues that the agreements were inadmissible and ought not to have been admitted in evidence by the learned trial Judge having regard to the provisions of Section 91(3) of the Evidence Act 1990 and that the Lower Court erred in failing to expunge them from the records.

Section 91(3) of the Evidence Act 1990, which was the applicable law at the time the suit was heard, provides as follows:

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

In *Nigeria Social Insurance Trust v. Klifco Nig. Ltd.* (2010) 13 NWLR (Pt. 1211) 307 this Court cited with approval the case of *Evan v. Noble* (1949) 1 KB 222 @ 225, where a person not interested in the outcome of an action was described as:

"a person who has no temptation to depart from the truth on one side or the other, a person not swayed by personal interest but

completely detached, judicial, impartial, independent.”

His Lordship, Chukwuma-Eneh, JSC, after quoting the above portion of the judgment opined that:

“...it contemplates that the person must be detached, independent and non-partisan and really not interested in which way in the context the case goes. Normally, a person who is performing an act in his official capacity cannot be a person interested under Section 91(3).”

As often reiterated by this Court, cases are decided on the basis of their own peculiar facts. When deciding whether a person is a “person interested” within the contemplation of Section 91(3) of the Evidence Act, the Court usually takes all the facts and surrounding circumstances into account. For instance, in *NSIT v. Klifco (supra)*, the Court considered the fact that the Director who certified the Certificate of Indebtedness, Exhibit L, was only performing his statutory duty as provided by Section 38 of the National Provident Fund Act. In *Apena v. Aiyetobi (1989) 4 NWLR (Pt. 95) 85*, a Court of Appeal decision cited with approval in several cases by this Court, it was held per *Apata, JCA*, that there must be a real likelihood of bias before a person making a statement can be said to be a “person interested”.

In the instant case it is not in dispute that Exhibits F and F1 were prepared quite some time after the suit commenced at the trial Court. It is also not in dispute that the documents were prepared by the respondent’s counsel. However, it is important to consider the purport of the documents. It is a settled fact, from the record, that the appellant had to be compelled by orders from the trial Court and from the Court below to deliver the equipment it had imported to the respondent. **It is also not in dispute that by the terms of the agreement between the parties, the respondent was to install the equipment once delivered. It failed and/or refused to do so, which caused the respondent to procure a third party to carry out the installation. The agreement between the respondent and the third party is what gave rise to Exhibits F and F1, The Court below, considered the peculiar facts of the case and held at pages 423-424 of the record as follows:**

“In the breach of the contract by the appellant it failed to deliver

*the imported equipment to the respondent. It was only forced to deliver same by a Court order in 1990. The appellant ordered the X-Ray tube model P/25/11 but did not deliver same to the respondent. DW1 denied liability for installation and repairs. Unless the equipment supplied were installed, they would be of no use to the respondent. The respondent made arrangements to install the equipment. The respondent tendered Exhibits F and F1 in support of the contracts entered into with another contractor to install the equipments (sic). **The trial Court accepted the evidence that the respondent expended a total sum of N120,450 to install the supplied equipment. The sum of N120,450 was properly awarded as loss flowing directly from the breach of contract by the appellant. This Court agrees with the award. Installation of the equipment cannot be earlier than the date the Court order was made. Section 91(3) of the Evidence Act cannot operate against Exhibits F and F1. The respondent was entitled to the amount to mitigate their loss. Award of damages is a matter for the trial Court, consequently, the appellate Court will not interfere with it save for certain reasons particularly where the trial Court failed to take into account relevant matters in making its award, which is not the position in this case.***

I am inclined to agree with the Court below, that Section 91 (3) of the Evidence Act could not be called in the appellant's aid in the circumstances of this case. The appellant has not advanced any cogent reason to warrant the interference by this Court in the concurrent findings of fact by the two Lower Courts.

Issue 6

Whether there was an aspect of the respondent's claim that could not be justly determined in the absence of the Nigeria Deposit Insurance Corporation.

In this final issue, it is contended on behalf of the appellant that there was an aspect of the suit that could not be justly, effectively and effectually determined in the absence of Nigeria Deposit Insurance Corporation (NDIC), which inherited the assets and liabilities of Allied Bank of Nig. Ltd. after its liquidation. Learned senior counsel submitted that the respondent made its calculations of what was due to it arising from the breach of contract based on two out of the three

letters of credit (LCs) opened through Allied Bank of Nig. Ltd. That the value of the third LC for 86,472.23 DM, which had already been opened by the appellant through the same Allied Bank Nig. Ltd was not taken into account and that there was no evidence of the whereabouts of the value of the said LC, which learned counsel presumed B was still in the hands of the bank. He contended that the respondent confirmed by its pleadings (paragraph 12c of the final amended statement of claim) that there was an unremitted balance of #20,815.87 (pounds) in the LC accounts.

C He argued that if damages are awarded based on the respondent's method of deducting the value of what was supplied from the total contract price, it would be unjust not to take into account the unremitted funds left in the hands of a third party. He submitted that the whereabouts of 84,472.23 DM omitted from the D respondent's calculation of what was actually paid to Siemens and #20,815.87 (pounds) in the LC account with the bank were, in his view, crucial issues without which no just resolution of the case could have been reached. He was also of the view that evidence of the actual amount of foreign exchange paid by it to Allied Bank and the E exact number of LCs opened were vital issues that could not be determined in the absence of Nigeria Deposit Insurance Corporation, which took over the assets and liabilities of the bank upon its liquidation. He submitted that the absence of NDIC, a necessary party in the circumstances of this case, rendered the suit incompetent. F

In response, learned counsel for the respondent submitted that the Court will not generally compel a plaintiff to proceed against a party he has no desire to prosecute. He submitted further that where the presence of a party is not necessary for the effectual and complete adjudication of the dispute before the Court, the Court will not G have jurisdiction to make an order for joinder. He referred to: *Ige v. Farinde* (1994) 7-8 SCNJ 301: (1994) 7 NWLR (Pt. 354) 42.

He submitted that the name of Allied Bank of Nig. Ltd. was duly struck out by the trial Court pursuant to an application brought H under Order 3 Rule 7 of the Anambra State High Court Rules 1988 and that the appellant did not appeal against the order. He noted that the ruling granting the application was an interlocutory decision and in order to appeal against it, the applicant required the leave of this Court. He submitted that Ground 6 of the Amended Notice of

Appeal and the present issue formulated thereon are incompetent for failure of the appellant to seek and obtain leave to appeal against the interlocutory decision. He relied on: *Ogigie v. Obiyan* (1997) 10 NWLR (Pt. 524) 179 and Section 25(1) of the Court of Appeal Act.

He submitted that assuming without conceding that the ground of appeal is competent, the reasoning of the trial Court which led to the striking out of the name of Allied Bank Nig. Ltd. for not being a necessary party to the suit, is unassailable, as the writ of summons and statement of claim disclosed no cause of action against it nor was it a party to the contracts, Exhibits A & B.

In his reply on points of law, learned counsel for the appellant did not address the issue of the competence of Grounds 6 and issue 6 predicated thereon.

RESOLUTION OF ISSUE 6

As rightly pointed out by learned counsel for the respondent, the decision of the trial Court striking out the name of Allied Bank Nig. Ltd., was an interlocutory decision made on 25/4/90 upon an application by the said bank. It is settled law that a necessary party to a suit is one who is not only interested in the dispute but one whose presence is essential for the effective and complete determination of the claim before the Court. See: *Green v. Green* (1986) 1 NWLR (Pt. 19) 519; *In re Mogaji* (1986) 1 NWLR (Pt. 19) 579; *Panalpina World Transport (Nig.) Ltd. v. J.B.O. International & Ors.* (2010) 19 NWLR (Pt. 1226) 1; *Ige v. Farinde* (1994) 7 NWLR (Pt. 354) 42; *Okwu & Anor. v. Umeh & Ors.* (2016) LPELR-SC.565/2014. ***The learned trial Judge considered all the material before him before agreeing with the applicant that its name should be struck off the suit. If the appellant was dissatisfied with the decision, it ought to have appealed against it within 14 days thereof as prescribed by Section 24 (2) (a) of the Court of Appeal Act. Not being an issue of law alone, the appellant required leave of the trial Court or of the Court of Appeal to appeal against it. See Sections 241 and 242 of the 1999 Constitution. There is nothing in the record to show that such leave was sought and/or obtained. There is also no application before this Court for leave to appeal against the said interlocutory decision. I therefore agree with learned counsel for the respondent that Ground 6***

and issue 6 predicated thereon are incompetent and are hereby struck out.

In conclusion I hold that the appeal lacks merit. It is accordingly dismissed. The judgment of the Court of Appeal, Enugu Division delivered on 7th July 2005 dismissing the appellant's appeal
B against the judgment of the High Court of Enugu State delivered on 20th December 2000 is hereby affirmed.

There shall be costs in the sum of N500, 000.00 against the appellant in favour of the respondent.

C _____

ONNOGHEN JSC

I have had the benefit of reading in draft the lead judgment of my learned brother, KEKERE-EKUN, JSC just delivered.

D My learned brother has dealt exhaustively with the issues for determination. I will however comment mainly on issue 1 in the appellant's amended brief deemed filed and served on the 22nd day of January 2016 which is as follows:-

E *"Whether in all the circumstances of this case, the Court has jurisdiction to entertain the case of the plaintiff. Grounds 7, 8 and 9 of Amended Notice of Appeal."*

To begin with, the facts of the case have been stated in details in the lead judgment of my learned brother, KEKERE-EKUN, JSC making it unnecessary for me to repeat them herein except as may
F be needed for the point being made.

Learned Senior Counsel for appellant, L. O. FAGBEMI, SAN discussed issue 1 under three (3) subtitles viz:

(a) the locus standi of the plaintiff/respondent in instituting the
G action;

(b) nullity and unenforceability of the contract agreement, and

(c) the provisions of Act No. 59 of 1991 and Decree No. 107 of 1993.

H It is the contention of the learned leading senior counsel for appellant that the combination of the three sub-titles/factors listed supra robbed the Courts of the jurisdiction to hear and determine the suit. It is also the contention of learned Senior Counsel that only a party to a contract can enforce its provisions even where the contract is made for the benefit of a third party; that the plaintiff/respon-

dent was not a party to exhibits 'A' and 'B' which constitute the foundation of its claims and can therefore not sue to enforce their provisions; that exhibits 'A' and 'B', the contracts herein, were made and executed by "the National Orthopaedic Hospital, Enugu", claiming to act on behalf of Orthopaedic Hospitals Management Board; that by the provisions of Section 1 of the Orthopaedic Hospitals Management Board Act, Cap 341 LFN, 1990, the National Orthopaedic Hospital, Enugu is not a juristic person and as such it cannot act on behalf of Orthopaedic Hospitals Management Board, a legal person under the law; that in the circumstance, exhibits 'A' and 'B' are incompetent, void, unenforceable and of no effect whatsoever; that the said exhibits, when looked at critically, it is clear that they were not made by the plaintiff/respondent, Orthopaedic Hospital Management Board and as such it lacks the locus standi to enforce their provisions; that the suit was therefore not properly constituted and ought to be struck out.

On his part learned Counsel for respondent. AHMED ADETOLA-KAZEEM, ESQ. in the amended respondent brief deemed filed on the 19th day of January, 2016 submitted that Section 6 of the Orthopaedic Hospitals Management Board Act Cap. 010 LFN 2004 made provisions for Management Committees of the various hospitals comprising of principal officers thereof: that the contents of exhibits 'A' and 'B' fall within the day to day activities of the respondent and was therefore made pursuant to the provisions of the Act.

In the alternative, learned Counsel urged the Court to hold that appellant cannot take advantage of an irregularity he acquiesced in, relying on *Hydro-Quest (Nig.) Ltd. v. Bank of the North Ltd.* (1994) 1 NWLR (Pt. 318) 41; that a party who has taken benefits from a contract cannot turn round to evade obligation on the basis of purported illegality, relying on *Chidoka v. F.C.F.C.* (2013) 5 NWLR (Pt. 1346) 144 at 163 and *Ibrahim v. Osim* (1988) 3 NWLR (Pt. 82) 257 at 279; that the claims of the respondent, as plaintiff was for special damages arising from breach of contract per exhibits 'A' and 'B' and as such it has nothing to do with admiralty etc, etc.

I have looked at exhibits 'A' and 'B' as reproduced in the judgment of the trial Court at pages 266-267 of the record of appeal. The exhibits 'A' and 'B' are the contracts on the basis of the breach of which the action was instituted and are stated to have been entered

between the National Orthopaedic Hospital, Enugu, *“acting for and on behalf of the Orthopaedic Hospitals Management Board, Lagos”* on the one hand and Messrs B. B. Apugo & Sons Ltd on the other.

However, at pages 266 to 267 of the record is reproduced part of exhibit ‘A’ (in the judgment of the trial Court) as follows:-

B *“THE ORTHOPAEDIC HOSPITALS MANAGEMENT BOARD/
NATIONAL ORTHOPAEDIC HOSPITAL ENUGU, shall on her part:*

(1) *On signing the contract, provide the full cash specified above (N1,132,915.00) One Million, One Hundred and Thirty-Two Thousand, Nine Hundred and Fifteen Naira only, to the Allied Bank of Nigeria Limited, Aba in favour of Messrs B. B. Apugo & Sons Ltd/ Siemens Aktiengesellschaft of Western Germany. This is in consideration of the fact that the company/contractor shall require cover for foreign exchange transactions as stipulated by the Central Bank of*
D *Nigeria.*

(2) *Provide the company/contractor necessary documents for exemption from import duty of the spare parts or order.*

(3) *Provide accommodation for not more than 50 days in a hotel for the engineers/technicians who shall carry out the installation/repair work on the x-ray machine.”*
E

A similar clause also appears on exhibit ‘B’ - reproduced at page 23 of the record of appeal. I must state that exhibits ‘A’ and ‘B’ were signed, sealed and delivered *“for and an behalf of the ORTHOPAEDIC HOSPITALS MANAGEMENT BOARD”* which is the body established by Section 1 of the ORTHOPAEDIC HOSPITALS MANAGEMENT BOARD ACT, Cap 341 LF 1990 and not by or on behalf of the National Orthopaedic Hospital, Enugu as stated in the recital on the basis of which appellant has submitted that the body has no legal personality. Both parties agree that Orthopaedic Hospitals Management Board is, by virtue of the provisions of the said Section 1 of Orthopaedic Hospitals Management Board Act, a body corporate with perpetual succession and a common seal. It is also not in dispute that both exhibits ‘A’ and ‘B’ were signed, sealed and delivered *“for*
F
G *and on behalf of the Orthopaedic Hospitals Management Board”*. See page 267 of the record where the following franking appears on exhibit ‘A’.

“IN WITNESS WHEREOF the parties hereunto have caused their HANDS and SEALS to be affixed hereunto, the day and year

first above written.

SIGNED, SEALED AND DELIVERED BY:

*for and on behalf of the Orthopaedic Hospital Management Board,
Lagos...”*

From the above, it is very clear that the party that entered into the contracts, exhibits ‘A’ and ‘B’ with appellant is the respondent not National Orthopaedic Hospital Enugu as argued. It follows therefore that exhibits ‘A’ and ‘B’ were validly made and executed by respondent and as such the respondent has the right to sue for any breach of the terms and conditions of the said exhibits ‘A’ and ‘B’

Furthermore, I had earlier reproduced the obligations undertaken by the Orthopaedic Hospital Management Board under the contracts to which it duly affixed its common seal, thereby demonstrating that respondent had sufficient interest and locus standi in the case.

Secondly, it is not in dispute that appellant took some benefits of the contracts by receiving full payments from the respondent on account of the goods and services contracted for. The above being the case, it is settled law that it does not lie in the mouth of appellant to seek to avoid its obligations under the said contracts which it voluntarily entered into on the ground that the said contract(s) is/are void. See *Inyang v. Ebong* (2002) 2 NWLR (Pt. 751) 284 at 333-334; *Okechukwu v. Onuorah* (2001) 12 SC (Pt. 1) 106; *E. A., Industries Ltd. v. NERFUND* (2009) 8 NWLR (Pt. 1144) 535 at 592 etc. The above principle is founded on public policy.

On the sub-issue as to whether Decree 107 of 1993 ousted the jurisdiction of the State High Courts in the matter, I wish to state briefly that the action in this appeal was instituted on the 5th day of July, 1988 while Decree No. 107 came into effect on the 17th day of November, 1993 well after pleading had been filed and exchanged between the parties and various applications made and entertained by the trial High Court. Also of significance is the fact the said Decree 107 has no retrospective effect. I therefore, in the circumstance, hold the strong view that the said Decree 107 of 1993 does not oust the jurisdiction of the State High Court to continue to entertain the action as constituted.

On the sub-issue of admiralty jurisdiction, my view is simply that looking closely at the pleadings, it is very clear that the claim is

grounded on special damages for breach of contract - exhibit 'A' and 'B' - entered into by the parties herein. It does not matter whether the goods to be supplied and installed etc. had to be brought into the country by sea or air. The means of their transportation is irrelevant to the term of the contract allegedly breached by a party thereto. In the case of Chevron (Nig.) Ltd v. Lonestar Drilling (Nig.) Ltd. (2007) 16 NWLR (Pt. 1059) 168 at 185 and 187 this Court held that the fact that a transaction between two parties in Nigeria involves the conveyance of the subject of the transaction by sea from another country to Nigeria does not give that transaction the character of an admiralty action.

It is for the above reasons and the more detailed reasons contained in the said lead judgment of my learned brother that I too find no merit in the appeal.

I accordingly dismiss same and abide by the consequential orders made in the said lead judgment including the order as to costs. Appeal dismissed.

RHODES-VIVOUR JSC

I read in draft the leading judgment prepared by my learned brother Kekere-Ekun, JSC. I am in complete agreement with the reasoning and conclusions. I intend to comment on Locus standi of the plaintiff/respondent to institute this action. This is so since locus standi is a threshold issue which can be raised at anytime in proceedings or on appeal. A party instituting proceeding must have locus standi.

The facts of this case has been so well set out in detail by my learned brother, Kekere-Ekun, JSC, that there is no point me restating the facts all over again. The issue is whether on the facts, the respondent Orthopaedic Hospital Management Board (OHMB) has locus standi to institute this suit.

In Pacers Multi Dynamics Ltd v. M.V. Dancing Sister (2012) 1 SC (Pt. 1) p.75. I explained locus standi as follows: I said:

"A person has locus standi to sue in an action if he is able to show to the satisfaction of the Court that his civil rights and obligations have been or are in danger of being infringed. There are two tests for determining if a person has locus standi.

They are:

1. *The action must be justiciable, and*
2. *There must be a dispute between the parties.*

In applying the test a liberal attitude must be adopted. Senator Adesanya v. The President of Nigeria (1981) 5 SC p.112 lays down the rule for locus standi in civil cases, while Fawehinmi v. Akilu 1987 B 12 SC p.99 lays down the far more liberal rule for locus standi in criminal cases..... To have locus standi, the plaintiffs statement of claim must disclose sufficient legal interest, and show how such interest arose in the subject matter of the action."

It follows that a plaintiff can only invoke the judicial power entrenched in Section 6(6) (b) of the Constitution if, he has locus standi. He has locus standi if he can show that he has a stake in the subject matter or outcome of the case, and must be able to establish that what he suffers or the injury to his person was the consequence of the defendant's act or conduct. There must be nexus between the plaintiff's action and the defendant's act or conduct. See *Isah v. INEC & 3 Ors (2014) 1-2 SC (Pt. IV) p. 101. Bakare & 5 Ors v. Ajose-Adeogun & 3 Ors (2014) 1 SC (Pt. II) p.1. Uwazuruonye v. Gov. of Imo State & 2 Ors (2012) 11 SC p.133. Dr. Ajayi v. Prince Adebiyi & 3 Ors (2012) 5 SC (Pt. III) p.135.*

Exhibits A and B (the contracts) states that the Orthopaedic Hospital Management Board/ National Orthopaedic Hospital Enugu shall on her part:

1. On signing the contract, provide the full cash specified....

It is clear that the contracts were between the appellant and the Orthopaedic Hospitals Management Board/National Orthopaedic Hospital, Enugu.

The Orthopaedic Hospital Management Board Act, Chapter 010 Vol.13 Laws of the Federation of Nigeria establishes a management board for the running of the Orthopaedic Hospitals established by the Federal Government and to provide for their affiliation with teaching Hospitals mentioned in the Act. In the Second Schedule to the Act, the Hospitals under the control and management of the Board are listed as:

1. Orthopaedic Hospital, Igbobi, Lagos
2. Orthopaedic Hospital, Enugu
3. Orthopaedic Hospital, Kano

By virtue of Section 1 and 2 of the Orthopaedic Hospital Management Board Act, the Orthopaedic Hospitals Management Board is a body corporate with perpetual succession and a common seal.

The goods were imported for and on behalf of the Orthopaedic Hospital Management Board for the Orthopaedic Hospital Enugu. Exhibits A and B were executed by the respondent. It becomes abundantly clear that the respondent satisfied the two tests for determining locus standi earlier alluded to in this judgment, in that this action is justiciable and there is indeed a dispute between the parties in this suit. The respondent has locus standi to institute this suit.

For this and the more comprehensive reasoning and conclusion in the leading judgment, I dismiss the appeal with costs of N500,000 in favour of the respondent.

D

AKA'AHS JSC

I had a preview of the judgment of my learned brother Kekere-Ekun JSC. I agree with the reasoning and conclusion that the appeal lacks merit and should be dismissed. I also agree with my learned brother, that Section 1(h) of Decree 59 of 1991 which vests exclusive jurisdiction in admiralty matters in the Federal High Court did not oust the jurisdiction of the State High Court to entertain the suit which was instituted prior to the promulgation of the Decree, and that the claim in this suit is not an admiralty matter.

The claim of the plaintiff (now respondent) against the defendant (appellant) was for special damages as follows:

(a) The sum of #64,000. 00 (sixty four thousand pounds sterling) or its equivalent in Nigerian currency at prevailing exchange rate being the cost of importing the items yet to be ordered and supplied by the defendant, that is to say one HT Transformer Code No. 16-13-549

(b) The sum of 17,500.00 (Seventeen thousand five hundred pounds sterling) or its equivalent in Nigerian currency at prevailing exchange rate being cost of one (1) X-Ray Tube P/25/11 Code No. 11-28- 875 ordered by the defendant on the account of the plaintiff but which the defendant failed to deliver to the plaintiff

(C) The sum of N360,000.00 (three hundred and Sixty thou-

sand Naira) representing expenses incurred and losses suffered by the plaintiff as a result of the breach of the defendant's obligation to the plaintiff under the contract and interest on the said sum at the rate of 30% per annum from the date of the writ of summons until judgment and thereafter at the rate of 4% per annum until payment.

What the parties entered into were two simple contracts for supply, delivery and installation of (a) X-Ray Equipment and spare parts and (b) Prosthetic and Othortic Equipment from Siemens, Germany. The respondent made full payment for all the items to be supplied.

Although some of the equipments were supplied, they were never delivered to the respondent while others were not brought in at all.

It took the intervention of the Court to get the items supplied delivered to the respondent and the respondent had to incur extra costs to install the equipment delivered. Hence it sued for the cost of installation and for those items which were paid for but not supplied.

Contrary to the contention by learned counsel for the appellant that by virtue of Section 7 of the Federal High Court Act as amended by Decree 60 of 1991 and Decree No. 107 of 1993, the trial High Court lacked jurisdiction to entertain the claims as endorsed in their writ of summons and final amended Statement of claim, the plaintiffs claim did not fall within the exclusive jurisdiction of the Federal High Court.

The Supreme Court in *Chevron (Nig.) Ltd v. Lonestar Drilling (Nig.) Ltd* (2007) 1 NWLR (Pt. 1059) 168 considered the question whether an action for breach of contract for supply of goods conveyed by sea is an admiralty action agreed with the view given by the Court of Appeal per Niki Tobi, JCA (as he then was) that:

"I have carefully examined the claim and I am of the view that it is a claim in contract and has nothing to do with admiralty. It is clearly stated in the claim that it is for the sum of \$10,000 000.00 (Ten Million U.S. Dollars) as special and general damages. It is not an admiralty action"... See: also Ports & Cargo Handling Services Ltd & 3 Ors. v. Micro Nigeria Ltd & Anor. (2012) 11- 12 SCM 205.

In cases of agency where the agent contracts on behalf of a foreign principal, the agent is liable for his engagements (as for his torts) even though he is acting for another, unless he can show that

by the law of agency he is to be held to have expressly or impliedly negatived his personal liability. See: *Asafa Foods Factory v. Alraine (Nig). Ltd* (2002) 12 NWLR (pt. 781) 353; *Stanley Yeung Kei Yung v. Hong Kong & Shangai Corporation* (1981) A C 787.

B It is unconscionable for a party who having taken benefit under the contract to seek to avoid its obligations under the contract on the ground that the contract is void unless ex facie the contract is illegal where the principle of ex turpi cause non oritur actio will apply. See: *Union Bank of Nigeria Plc & Anor. v. Ayodare & Sons (Nig.) Ltd* (2007) 13 NWLR (Pt. 1052) 567.

C It is for these reasons and the more detailed ones contained in the lead judgment that I dismiss the appeal. I too award N500,000.00 costs to the respondent against the appellant.

D

NWEZE JSC

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

E I abide by the consequential orders in the said leading judgment. Appeal dismissed.

F

G

H