CLRN Direct

(2021) 10 CLRN OCTOBER 2021

ISSN 0189-7535

Commercial Law Reports Nigeria

=N=2,500

CONTENTS COURT PAGES

STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. Supreme Court 1 - 82

COMMERCIAL LITIGATION – Jurisdiction – jurisdiction is the lifeblood of any adjudication. It's being lacked renders the court's proceedings no matter how well conducted, liable to be set aside for being a nullity.

POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. Court of Appeal 83 - 107

TORT – Damages – General damages – Damages defined – A pecuniary compensation which law awards to a person for the injury he has sustained by reason of the act or default of another whether that act or default is a breach of contract or tort.

MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. Court of Appeal 108-134

COMMERCIAL LITIGATION – Locus standi – who can sue on a bill of lading – only a consignee or endorsee of a bill of lading has the legal capacity/locus standi to sue on it.

KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. Court of Appeal 135-167

CONTRACT – Contract of Sale – Need to be in writing – Exceptions – Part performance – when it applies to an agreement – the doctrine of part performance applies only where there is a completed agreement in existence.

THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC Court of Appeal 168-188

CONTRACT – Simple contract – simple contracts are not among those envisaged in the exclusive jurisdiction conferred on the Federal High Court.

ADEBAKIN & ANOR. v. ARCON & ANOR. F.H.C 189 - 201

COMMERCIAL LITIGATION – When a suit becomes lifeless – A suit is said to be lifeless or an academic exercise where a decision reached in the matter will not ensure any right or confer any benefit on the successful litigant.

(2021) 10 CLRN

Commercial Law Reports
Nigeria

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ISSN 0189-7535

Published by:
Commercial Law Reports Nigeria Limited.

HEAD OFFICE
Quramo Publishing Limited
The Simi Johnson Centre
No. 13, Sinari Daranijo, Victoria Island,
Lagos, Nigeria.
Tel: 01-4547878, 09091740210
E-mail: info@clrndirect.com
Website: www.clrndirect.com

Published October, 2021

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COURT OF APPEAL OF NIGERIA *(Contd)*
[JUSTICES OF THE COURT OF APPEAL]

HON. JUSTICE RIDWAN MAIWADA ABDULLAHI
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COURT OF APPEAL OF NIGERIA *(Contd)*
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CASES REPORTED

1. Statoil Nigeria Ltd. v. Inducon Nigeria Ltd. & Anor. (2021) 10 CLRN 1

2. Polaris Bank Limited v. Fidel Associates & Anor. (2021) 10 CLRN 83

3. Maersk Line Nigeria Ltd v. S. E. Eze & Co. Ltd. (2021) 10 CLRN 108

4. Keen Line Invest. Ltd. & Anor. v. Paterson Zochonis Ind. Plc & 2 Ors.(2021) 10 CLRN 135

5. The Export-Import Bank of the United States of America v. NDIC (2021) 10 CLRN 168

6. Adebakin & Anor. v. ARCON & Anor. (2021) 10 CLRN 189

CONTENTS

1. TABLE OF CASES .... x - liv

2. DIGEST OF CASES REPORTED .... lv - lix

3. REPORTED CASES .. .. 1 - 201

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

A. J. Inv. Ltd. v. Afribank (Nig.) Plc. (2013) 9 NWLR (Pt. 1359) 380 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

A.C.N. v. I.N.E.C. (2013) 13 NWLR (Pt. 1370) 161 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

A.G. Abia State v. A.G. Federation (2005) 6 SC (Pt.1) 63 (2005) 12 NWLR (Pt. 940) 452 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

A.G. Adamawa v. A.G. Federation (2014) LPELR 23221 (SC); (2014) 14 NWLR (Pt. 1428) 515 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

A.G. Anambra State v. Okafor (1992) 2 NWLR (Pt. 224) 396 S.C. **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

A.G. Lagos State v. Eko Hotels Ltd & Anor (2006) LPELR- 3161(SC); (2006) 18 NWLR (Pt. 1011) 378 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

A.G., Anambra State v. A.G., Fed. (2005) 9 NWLR (Pt. 931) 572 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

A.G., Bendel State v. A.G., Federation (1982) 3 NCLR 1; (1983) 1 SCNLR 293 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

A.G., Benue State v. Umar (2008) 1 NWLR (Pt. 1068) 311 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

A.G., C.R.S. v. FRN (2019) 10 NWLR (Pt. 1681) 401 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

A.G., Kwara State v. Adeyemo (2017) 1 NWLR (Pt. 1546) 210 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

A.G., Rivers State v. A.G., Akwalbom (2011) 8 NWLR (Pt. 1248) 31 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

A.T.P & *JAS v. Drake* & *Skull* (2003) NWLR (Pt. 649) 484 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Abalogu v. SPDC Nig Ltd (2003) 6 SC (Pt.11) 19; (2003) 13 NWLR (Pt. 837) 308 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

Abba v. Shell Petroleum Development Company of Nigeria Limited (2013) LPELR – 20338 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Abdulkareem v. Lagos State Gov't (2016) 15 NWLR (Pt. 1535) 177 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Abdullah v. Gov. of Lagos State (1989) 1 NWLR (Pt. 97) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Abisi v. Ekwealor (1993) 6 NWLR (Pt. 302) 643 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Adah v. N.Y.S.C (2004) 19 NSCQR 220 **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

Adama v. Kogi State House of Assembly (2019) 16 NWLR (Pt. 1699) 501 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Adama v. Maigari (2019) 3 NWLR (Pt. 1658) 26 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Adamu Abubakar v. Michelin Motor Services Ltd (2020) LPELR-50837; (2020) 12 NWLR (Pt. 1739) 579 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Adebayo v. A.G., Federation (2008) All FWLR (Pt. 412) 1195 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Adebayo v. PDP (2013) 17 NWLR (Pt. 1382) 1 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Adedayo v. Babalola (1995) LPELR - 85 (SC); (1995) 7 NWLR (Pt. 408) 383 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Adedeji v. Oloso (2007) 5 NWLR (Pt.1 026) 133 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Adedoyin & Ors. v. Amoo (2018) LPELR-44978 (CA) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Adefulu v. Oyesile (1989) 5 NWLR (Pt. 122) 377 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Adefunke v. Ikpenai (1958) SCNLR 189 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

Adegbuyi v. A.P.C. (2014) All FWLR (Pt. 761) 1486 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Adegoke v. Adibi (1992) 5 NWLR (Pt. 242) 410 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Adelakan v. Ecu-Line NV (2006) 12 NWLR (Pt. 993) 33 **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

Adelekan v. Ecu-Line NV (2006) 12 NWLR (Pt. 993) 33 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Adeleke v. Oyetola (2020) 6 NWLR (Pt. 1721) 440 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Adeniji & Ors v. Adeniji & Ors (1972) 1 All NLR (Pt. 1) 298 (SC) **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Adeniran v. Interland Transport Ltd (1991) 9 NWLR (Pt. 214) 155 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Adeogun v. Fashogbon (2008) LPELR - 131 (SC) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Adeokin Records v. M.C.S.N (Ltd/GTE) (2018) 15 NWLR (Pt. 1643) 550 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Adeokin Records v. MCSCN (2018) NWLR (Pt. 1643) **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Adeosun v. Adisa (1986) 5 NWLR (Pt. 40) 225 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Adeosun v. Governor of Ekiti State (2012) 4 NWLR (Pt. 1291) 581 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Adesanya v. Leigh Hoegh of Co. A/S (1968) AII NLR 333/(1968) SCNLR 426 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Adesanya v. The President (1981) 5 SC 112 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Adesei v. Adebayo (2012) 1 S.C. (Pt. IV) 95 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Adetayo & Ors v. Ademola & Ors (2010) LPELR155 SC; (2010) 15 NWLR (Pt. 1215) 169 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

Adetayo & Ors v. Ademola (2010) LPELR-155(SC), (2010) 15 NWLR (Pt 1215) 169 **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

Adetayo v. Ademola (2010) LPELR-155(SC) **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

Adetona and Ors v. Igele General Enterprise Ltd (2011) LPELR-159 SC; (2011) 7 NWLR (Pt. 1247) 535 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Adetoun Oladeji Nigeria Ltd v. Nigeria Breweries Plc (2007) 1-2 SC. (Pt. 2) 183; (2007) 5 NWLR (Pt. 1027) 415 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Adeyemi & Ors v. Opeyori (1976) F.N.L.R. 149 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Adeyemi & Ors v. Opeyori (1976) LPELR-171(SC) **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

Adimora v. Ajufo (1988) 3 NWLR (Pt. 80) 1 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Adimora v. Ajufo (1988) 3 NWLR (Pt. 80) 1 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Admin/Exec., Estate Abacha v. Eke-Spiff (2009) 17 NWLR (Pt. 1171) 614 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Adusei v. Adebayo (2012) 1 S.C. (Pt. IV) 95 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Adusei v. Adebayo (2012) 3 NWLR (Pt. 1288) 534 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

African Reinsurance Corp. v. Fantaye (1986) 1 NWLR (Pt. 14) **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Agbanelo v. U.B.N. Ltd. (2000) 7 NWLR (Pt. 666) 534 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Agbanelo v. Union Bank (2000) 45 SCNJ 353 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Agbi v. Ogbeh (2006) 11 NWLR (Pt. 990) 1 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Agbonifo v. Aiwereoba (1988) 1 NWLR (Pt. 70) 325 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

Agboola v. State (2013) 11 NWLR (Pt. 1366) 619 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Agbule v. W.R. & P. Co. Ltd (2013) 6 NWLR (Pt. 1350) 318 **- ADEBAKIN & ANOR. v. ARCON & ANOR. (2021) 10 CLRN 189**

Agi v. PDP (2017) 17 NWLR (Pt. 1595) 366 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Agi v. PDP (2017) 17 NWLR (Pt. 1595) 386 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Agip (Nig.) Plc. v. Ossai (2016) LPELR-40976 (CA) **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Agu v. CBN (2016) LPELR-41091(CA) **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

Agu v. General Oil Ltd. (2015) 17 NWLR (Pt. 1488) 327 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Agwu and Ors. v. Julius Berger Nigeria Plc (2019) 11 NWLR (Pt. 1682) 165 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Ahmed v. CBN (2013) 2 NWLR (Pt. 1339) **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Al-Hassan v. Ishaku (2016) 10 NWLR (Pt. 1520) 230 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Al-Hassan v. Ishaku (2016) 10 NWLR (Pt. 1520) 230 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Ajadi v. Ajibola supra; *FGN v. Zebra Energy Ltd* (2002) 18 NWLR (Pt. 798) 162 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Ajamole v. Yaduat (No. 1) (1991) 5 SCNJ 172 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Ajao v. Ajao (1986) 5 NWLR (Pt. 45) 802 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Ajayi v. Adebiyi (2012) 11 NWLR (Pt. 1310 1370 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Ajewole v. Adetimo (1996) 2 NWLR (Pt. 431) 391 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

Ajibade v. Pedro (1992) 5 NWLR (Pt. 241) 257 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Ajibola v. Ishola (2006) 13 NWLR (Pt. 998) 628 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Ajigbotosho v. R.C.C. Ltd. (2019) 3 NWLR (Pt. 1659) 289 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Akaighe v. Idama (1964) All NLR (Reprint) 317 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Akaninwo v. Nsirim (2008) All FWLR (Pt. 410) 510 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Akinbinu v. Oseni (1992) 1 NWLR (Pt. 215) 97 (SC) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Akinkugbe v. Ewulum Holdings (2008) All FWLR (Pt. 423) 1269 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Akinpelu v. Adegbore (2008) 10 NWLR (Pt.1096) 531 S.C. **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Akinrimisi v. Maersk (Nig.) Ltd. (2013) 10 NWLR (Pt. 1361) 73 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Akinsanya v. UBA Ltd (1986) 4 NWLR (Pt 35) 273 **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

Akintola v. Solano (1986) 2 NWLR (Pt. 24) 598 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Akpagher v. Gbunugu (2015) 1 NWLR (Pt. 1440) 209 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Akpan v. R.T.Q.I. Church (2001) 15 NWLR (Pt. 736) 328 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Akudo v. Guinness Nig. Plc (2012) 15 NWLR (Pt. 1322) 150 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Alfortin Ltd. v. A.V (1996) NWLR (Pt. 475) 634 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Alhaji Oyebamiji & Ors v. Iyabo Afusat Lawanson & Ors (2008) LPELR - 2864 (SC) **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021)**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

10 CLRN 1

Alhaji Tukur v. The Government of Gongola State (1989) 4 NWLR (Pt. 117) 517 at 549; (1989) 9 SCNJ 1 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

All Progressive Grand Alliance v. Senator Christians N. D. Anyanwu & Ors (2014) LPELR - 22182(SC) (2014) 7 NWLR (Pt. 1407) 541 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Alphonsus Nkuma v. Joseph Otunuya Odili & Ors (2006) LPELR - 2047 (SC); (2006) 6 NWLR (Pt. 977) 587 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Alsthom SA & Anor v. Saraki (2005) 3 NWLR (Pt 911) 208 **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

Amadi v. Osakwe (2006) 3 WRN **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Amaechi v. I.N.E.C. (No.3) (2007) 18 NWLR (Pt. 1065) 105 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Amaechi v. INEC (2007) LPELR - 449 (SC); (2008) 5 NWLR (Pt. 1082) 227 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Amaechi v. INEC (2008) All FWLR (Pt. 407) 1 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Amana Suits Hotels Ltd. v. P.D.P. (2007) 6 NWLR (Pt.1031) 453 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Amasike v. Registrar-Gen., C.A.C. (2006) 3 NWLR (Pt. 968) 462 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Aminu Ishola Investments Ltd. v. Afribank Plc (2014) All FWLR (Pt. 716) 498 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Angadi v. PDP (2018) 15 NWLR (Pt. 1641) 1 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Anigbogu v. Uchejigbo (2002) 10 NWLR (Pt. 776) 272 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Animashaun v. Mumuni (1941) 16 NLR 59 **- KEEN LINE INVEST. LTD. & ANOR.**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135

Anyanwu v. PDP (2020) 3 NWLR (Pt. 1710) 134 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

APC v. INEC & Ors (2014) LPELR -24036 (SC). (2015) 8 NWLR (Pt. 1462) 531 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

APC v. Karfi (2018) 6 NWLR (Pt. 1616) 479 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

APC v. Lere (2020) 1 NWLR (Pt. 1705) 254 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

APC v. Marafa (2020) 6 NWLR (Pt. 1721) 383 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

APC v. Ndual (2018) 2 NWLR (Pt. 1602) 1 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Aray v. Airline Management Support Ltd. (2003) 7 NWLR (Pt. 820) 577 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Aremo II v. Adekanye & Ors (2004) LPELR - 544 (SC); (2004) 13 NWLR (Pt. 891) 572 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Ariori v. Elemo (1983) 1 SCNLR 345 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Arowosaye v. Ogedengbe & Anor. (2008) LPELR - 3701 (CA) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Ashaka v. Nwachukwu (2013) LPELR - 20272 (CA) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Ashco Nig. Ltd. v. Ward and Green (2010) 3 NWLR (Pt.1181) 302 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Asika v. Atuanya (2008) All FWLR (Pt. 433) 1293 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Associated Discount House Limited v. Amalgamated Trustees Limited (2006) 10 NWLR (Pt. 989) 635 **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

Atalegbe v. Awuni (1997) 9 NWLR (Pt. 525) 537 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Atanda v. Ajani (1989) 3 NWLR (Pt. 111) 511 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Atiba Iyalamu Savings and Loans Ltd. v. Suberu (2018) 13 NWLR (Pt. 1637) 387 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Atolagbe & Anor v. Awuni & Ors (1997) LPELR - 593 (SC); (1997) 7 NWLR (Pt. 522) 536 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Atunka & Anor. v. Aboki & Anor. (2016) LPELR - 41199 (CA) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Awaye Motors Co. Ltd. v. Adewunmi (1993) 5 NWLR (Pt. 292) 236 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Awodi & Anor v. Ajagbe (2014) LPELR - 24219 (SC) (2015) 3 NWLR (Pt.1447) 578 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Awomuti v. Salami and Ors. (1978) 11 N.S.C.C. 180 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Awuse v. Odili (2005) 16 NWLR (Pt. 952) 416 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Ayinla v. Sijuwola (1984) 5 S.C. 77 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Ayuya v. Yorin (2011) 10 NWLR (Pt 1254) 135 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

B.M Ltd. v. The "M.V. Dancing Sister" (2012) 4 NWLR (Pt. 1289) 169 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

B.M. Ltd. v. Woermann-Line (2009) 13 NWLR (Pt. 1157) 149 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Bada v. Pereira (1974) 11 S.C. 5 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Bakare v. Ajose-Adeogun (2014) 6 NWLR (Pt. 1403) 320 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

Bakare v. NRC (2007) 17 NWLR (Pt. 1064) 606 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Bakare v. NRC (2007) 17 NWLR (Pt. 1064) 606 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Balogun v. Akanji (1988) 1 NWLR (Pt. 70) 301 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Bamgboye v. University of Ilorin (1999) 6 SC (Pt. 11) 72, (1999) 10 NWLR (Pt. 622) 290 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Barclays Bank Ltd. v. Customs and Excise Commissioners (1963) Lloyd's Rep. 81 at 88, per Diplock L. J. **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Barrister Franc Fagah Utoo v. All Progressives Congress & Ors (2018) LPELR - 44352 (SC); (2018) 12 NWLR (Pt. 1634) 507 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Basinco Motors Ltd v. Woermann Line & Anor (2009) LPELR-756 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Bello v. Adamu (2012) 3 NWLR (Pt.1287) 286 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Bello v. Damisa (2017) 2 NWLR (Pt. 1550) 455 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Bello v. Eweka (1981) N.S.C.C. 48 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Bello v. INEC (2010) 8 NWLR (Pt. 1196) 342 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Bello v. Yusuf & Ors (2019) LPELR 47918 SC; (2019) 15 NWLR (Pt. 1695) 250 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Best Nigeria Ltd. v. Blackwood Hodge Nigeria Ltd. (2011) LPELR - 776 (SC) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

BFI Group Corporation v. BPE (2012) LPELR - 9339 (SC); (2012) 18 NWLR (Pt. 1332) 209 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Bi-Courtney Ltd. v. A.G. Fed. (2019) 10 NWLR (Pt. 1679) 112 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

Bolaji v. Bamgbose (1986) 4 NWLR (Pt. 34) 632 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Boniface Ayika & Co. (Nig.) Ltd. v. Uzor (2006) LPELR-790 (SC) **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

BPE v. Dangote Cement Plc (2020) 5 NWLR (Pt. 1717) 322 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

BPS Construction and Engineering Co. Ltd v. FCDA (2017) 1 SC (Pt.2) 125 @ 181; (2017) 10 NWLR (Pt. 1572) 1 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Brawal Shipping Ltd. v. F. I. Onwadike Co. Ltd. (2000) 11 NWLR (Pt. 678) 387/ (2000) 2 SCNQR (Pt. 2) 1379 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Brawal Shipping Nig. Ltd. v. Ometraco Int'l Ltd. (2011) 16 WRN 84 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

British Airways v. Atoyebi (2014) 13 NWLR (Pt. 1424) 253 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Brittania-U (Nig.) Ltd. v. Seplat Pet. Co. Dev. Ltd. (2016) 4 NWLR (Pt. 1503) 541 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Broadline Enterprises Ltd. v. Monterey Maritime Corporation (1995) LPELR-807 (SC) **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Buhari v. I.N.E.C. (2009) All FWLR (Pt. 459) 419 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Buhari v. INEC (2008) 19 NWLR (Pt. 1120) 246 (2009) All FWLR (Pt. 459) 419 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Bulet Int'l (Nig.) Ltd. v. Olaniyi (2017) 17 NWLR (Pt. 1594) 260 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Bulet Int'l (Nig.) Ltd. & Anor. v. Olaniyi & Anor (2017) LPELR - 42475 (SC) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

C.C.B. Ltd. v. Mbakwe (2002) 7 NWLR (Pt. 765) 158 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

C.K. & W.M.C. Ltd. v. Akingbade (2016) 14 NWLR (Pt. 1533) 487 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

C.R.S.W.B. v. N.C.E Ltd. (2007) WRN (Vol. 18) 132 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Cameroon Airlines v. Otutuizu (2011) 4 NWLR (Pt. 1238) 512 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Cappa & *D'Alberto Ltd. v. Akintilo* (2003) 9 NWLR (Pt. 824) 49 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

CBN v. Aribo (2018) 4 NWLR (Pt. 1608) 130 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

CBN v. UTC (Nig.) Ltd. (1996) 4 NWLR (Pt.445) 694 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Central Bank of Nigeria v. Industrial Bank Ltd (1997) 9 NWLR (Pt. 522) 712 **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

Centre for Oil Pollution Watch v. NNPC (2019) 5 NWLR (Pt. 1666) 518 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Cesare Missini & Ors. v. Balogun (1986) 1 All NLR 318 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

CGG v. Ogu (2005) 8 NWLR (Pt. 927) 366 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Chabasaya v. Anwasi (2010) LPELR – 839 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Chedi v. A.G., Fed (2007) LPELR-8958 (CA) **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Chidubem v. Ekenna (2009) All FWLR (Pt. 455) 1692 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Chief Ebbav. Ogodo & Anor (1984) 4 SC 84, (1984) 1 SCNLR 372 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Chief Etuedor Utih & Ors. v. Jacob Umurhurhu Onoyivwe & Ors. (1991) LPELR-3436(SC) **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

Chime v. Chime (2001) 3 NWLR (Pt. 701) 527 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Chukwuma v. Ifeloye (2008) 18 NWLR (Pt.1118) 204 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

Citizens International Bank v. SCOA (Nig.) Ltd. (2006) 18 NWLR (Pt. 1011) 332 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Civil Design Const. Nig. Ltd. v. SCOA Nig. Ltd. (2007) 6 NWLR (Pt. 1030) 300 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Clifford Osuji v. Nkemjika Ekeocha (2009) LPELR - 2816 (SC); (2009) 16 NWLR (Pt. 1166) 81 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Coca-Cola (Nig.) Ltd. v. Akinsanya (2017) 17 NWLR (Pt. 1593) 74 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Cole v. Jibunoh (2016) 4 NWLR (Pt. 1503) 499 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Combe v. Combe (1951) 1 All ER 767 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Commercial Bank (C.L.) Nig. Ltd. v. Ishola (2015) 4 NWLR (Pt.1449) 291 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Cookey v. Fombo (2005) 15 NWLR (Pt. 947) 182 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

CPC v. Ombugadu (2013) 18 NWLR (Pt.1385) 66 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

D.M.V (Nig) Ltd. v. NPA (2019) 1 NWLR (Pt. 1652) **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Dabup v. Kolo (1993) LPELR - 905 (SC), (1993) 9 NWLR (Pt. 317) 254 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Dahiru v. Kamale (2005) 9 NWLR (Pt. 929) 8 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Dairo v. UBN Plc (2007) 16 NWLR (Pt. 1071) 347 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Dakur v. Dapal (1998) 10 NWLR (Pt. 571) 573 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Dange Shuni L.G.C. v. Okonkwo (2008) All FWLR (Pt. 415) 1757 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Dangote Gen. Textile Products Ltd & Ors v. Hascon Associates Nig Ltd & Anor

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

(2013) LPELR-20665, (2013) 16 NWLR (Pt. 1379) 60 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Daniel v. INEC (2015) 9 NWLR (Pt. 1463) 113 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Danladi v. T.S.H.A. (2015) 2 NWLR (Pt. 1442) 103 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Daro v. UBN (2007) 16 NWLR (Pt. 1029) 164 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Dec Oil & Gas Limited v. Shell Nigeria Gas Limited (2019) LPELR-49347(SC) **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

Dec Oil & Gas Ltd v. Shell Nigeria Gas Ltd (2019) LPELR - 49347 (SC); (2019) 14 NWLR (Pt. 1692) 273 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Dedeke and Ors. v. Williams and Ors. (1944) 10 W.A.C.A. 164 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Delmas v. Sunny Ositez Int'l Ltd (2019) 9 NWLR (Pt 1677) 305 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Diamond Bank Ltd. v. Ugochukwu (2016) 9 NWLR (Pt. 1517) 193 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Dickson v. Sylva (2017) 10 NWLR (Pt. 1573) 299 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Dike v. Adube (2016) LPELR – 41035 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Dike v. Nzeka (1986) 4 NWLR (Pt. 34) 144 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Dim v. Enemuo (2009) 10 NWLR (Pt. 1149) 353 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Dingyadi v. INEC (2011) LPELR - 950 (SC) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Ebe v. Nnamani (1997) 7 NWLR (Pt. 513) 479 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Ebe v. Ottih (1961) All NLR 507 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

Ebhodagbe v. Okoye (2004) 18 NWLR (Pt. 905) 472 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Ebhota v. P.I. & P.D Co. Ltd (2005) 15 NWLR (Pt. 948) 266 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Echere v. Ezirike (2006) All FWLR (Pt. 323) 1597 at 1608 (SC); (2006) 12 NWLR (Pt. 994) 386 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Ecobank (Nig.) Ltd. v. Anchorage Leisures Ltd. (2018) 18 NWLR (Pt. 1650) 116 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Ecobank v Honeywell Flour (2019) NWLR (Pt. 1655) 55 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Ecobank v. Honeywell Flour (2019) NWLR (Pt. 1655) 55 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Ede v. Okufo (1990) 2 NWLR (Pt. 135) 787 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Efetiroroje & Ors v. Okpalefe (1991) 7 SC (Pt.1) 105, (1991) 5 NWLR (Pt. 193) 517 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Effiom v. C.R.S.I.E.C. (2010) 14 NWLR (Pt. 1213) 133 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Egbe v. Duru (1998) 9 NWLR (Pt. 565) 288 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Egbue v. Araka (1982) 2 NSCC 278 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Egwumi v. State (2013) 13 NWLR (Pt. 1372) 525 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Ehinle v. Ikondu Local Government (2021) 1 NWLR (Pt. 1757) 279(SC) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Ejezie v. Anuwu (2008) LPELR-1063 (SC) **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Ekpanya v. Akpan (1989) 2 NWLR (Pt. 101) 86 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Elugbe v. Omokhafe (2004) 18 NWLR (Pt. 905) 319 **- MAERSK LINE NIGERIA**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108

Emegokwue v. Okadigbo (1973) 4 SC 113 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Emeka v. Chuba-Ikeazu (2017) 15 NWLR (Pt. 1589) 345 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Emeka v. Okafor (2017) 11 NWLR (Pt. 1577); 410 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Emezi v. Osuagwu (2005) 12 NWLR (Pt. 939) 349/(2005) 30 WRN 1 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Emirate Airline v. Agonadi (2) (2014) 9 NWLR (Pt. 1413) 506 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Enang & Ors. v Adu & Ors. (1981) 11 - 12 SC 25. (Reprint) 17 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Enang v. Adu (1981) 11 - 12 5 SC 25 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Enekwe v. International Merchant Bank of Nigeria Limited (2006) 19 NWLR (Pt.1013) 146 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Enterprise Bank Ltd. v. Aroso (2014) 3 NWLR (Pt. 1394) 256 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Eseigbe v. Agholor (1990) 7 NWLR (Pt. 161) 234 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Eta v. Dazie (2013) 9 NWLR (Pt. 1359) 248 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Eta v. Dazie (2013) 9 NWLR (Pt. 1359) 248 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Exquisite Ind. Ltd. v. Omars of MV Bacoliners 1-3 (Pt. 998) 5 NWLR (Pt. 549) 335 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Eyibio v. Abia (2012) 16 NWLR (Pt. 1325) 51 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Eze v. PDP & Ors (2018) LPELR – 44907; (2019) 1 NWLR (Pt. 1652) 1 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Ezeanah v. Attah (2004) 7 NWLR (Pt. 873) 648 **- MAERSK LINE NIGERIA LTD**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108

Ezechukwu v. Onwuka (2016) 5 NWLR (Pt. 1506) 529 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Ezegbu v. First African Trust Bank Ltd. and Anor. (1992) 1 NWLR (Pt. 220) 699 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Ezeokonkwo & Ors. v. Nwafor Okeke (2002) 5 S.C. (Pt. 1) 44 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

F & F Farms (Nig.) Ltd. v. NNPC (2009) 12 NWLR (Pt. 1155) 387 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

F.B.N. Plc v. Maiwada (2013) 5 NWLR (Pt. 1348) 444 (SC) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Fagunwa v. Adibi (2004) 17 NWLR (Pt. 903) 544 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Fairline Pharmaceutical Industries Ltd. v. Trust Adjusters Nig. Ltd. (2012) LPELR - 20860 (CA) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

FBN v. Ozokwere (2014) 3 NWLR (Pt. 1395) 439 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Fhomo v. Zenith Bank (2016) LPELR - 42233 (CA) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

First Bank of Nigeria Plc v. T.S.A. Industries Ltd. (2010) 15 NWLR (Pt.1216) 247 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Frazimex Nigeria Ltd. v. Doatee Concepts Nigeria Ltd. (2010) LPELR-4173 (CA) **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Fredrick v. Ibekwe (2019) 17 NWLR (Pt. 1702) 467 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

FRN v. Borishade (2015) 5 NWLR (Pt. 1451) 155 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

FRN v. Dairo (2015) 6 NWLR (Pt. 1452) 141 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

Gaji v. Paye (2003) LPELR-1300 (SC) **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Garan v. Olomu (2013) LPELR - 20340 (SC); (2013) 11 NWLR (Pt. 1365) 227 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Garba v. Mohammed (2016) 16 NWLR (Pt. 1537) 144 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Gari v. Seirafina (2008) All FWLR (Pt. 399) 434 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Gbafe v. Gbafe (1996) 6 NWLR (Pt. 455) 417 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Gbejuade v. Gbejuade (2017) LPELR - 41977 (CA) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

General Finance and Facilities Ltd. v. Cooks Cars (Romford) Ltd. (1963) 1 WLR 664 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

General Muhammadu Buhari v. INEC (2008) LPELR - 814 (SC); (2008) 19 NWLR (Pt. 1120) 246 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Geonesons Pharmaceuticals v. Francis Adeku (2007) 14 NWLR (Pt. 1055) 333 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

George & Ors. v. Dominion Flour Mills Ltd. (1963) 1 All NLR 71 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Gombe v. P.W. (Nig.) Ltd. (1995) 6 NWLR (Pt. 402) **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Gonzee (Nig.) Ltd. v. NERDC (2005) 13 NWLR (Pt. 943) 634 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Government of Gongola State v. Tukur (1989) 4 NWLR (Pt.117) 592 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Governor of Lagos State v. Ojukwu (1986) 1 NWLR (Pt.18) 621 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Hallmark Bank Plc v. Obasanjo (2013) LPELR-20552 (CA) **- ADEBAKIN & ANOR. v. ARCON & ANOR. (2021) 10 CLRN 189**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

Hamzat v. Sanni (2015) 5 NWLR (Pt. 1453) 486 (SC) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Haricon Ltd. v. Wasurum (1987) 3 NWLR (Pt. 66) 646 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Hashim v. Minister FCT (2002) 15 NWLR (Pt. 789) 159 **- ADEBAKIN & ANOR. v. ARCON & ANOR. (2021) 10 CLRN 189**

Hassan Isa Zakirai v. Salisu Dan Azumi Muhammad & Ors (2017) LPELR - 42349 (SC); (2017)17 NWLR (Pt. 1594) 181 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Heritage Bank Ltd. v. Bentworth Finance (Nig.) Ltd. (2018) 9 NWLR (Pt. 1625) 420 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Hilary Farms Ltd. v. M/V Mahtra (2007) All FWLR (Pt. 190) 1417 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Honourable Eseme Eyiboh v. Mr. Dan Abia & Ors (2012) LPELR - 20607 (SC); (2012) 16 NWLR (Pt. 1325) 51 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

I.M.N.L. v. Nwachukwu (2004) LPELR-1526 (SC) **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

I.T.P.P. Ltd v. U.B.N. Plc (2006) 12 NWLR (Pt. 995) 483 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Ibadan North East Local Govt. v. Alhaji A.O. Makinde (2018) LPELR - 44984 (CA) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Ibrahim v. Obaje (2019) 3 NWLR (Pt. 1160) 389 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

IBWA Ltd & Anor v. Pavex International Co. Ltd (2000) LPELR-1523 (SC); (2000) 7 NWLR (Pt. 663) 105 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Idesoh v. Ordia (1997) 2 SCNJ 175 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Idufueko v. Pfizer Products Ltd & Anor (2014) LPELR 22999 SC; (2014) 12 NWLR (Pt. 1420) 96 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

Idufueko v. Pfizer Products Ltd. (2014) 12 NWLR (Pt. 1420) 96 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

IfeanyiChukwu (Osondu) Ltd. v. Soleh Boneh Ltd. (2000) 5 NWLR (Pt. 656) 322 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Igago v. State (1999) 14 NWLR (Pt. 637) 1 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Igbojimadu v. Ibeabuchi (1998) 1 NWLR (Pt. 533) 179 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Igbokwe v. Kehinde (2008) 2 NWLR (Pt. 1072) 441 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Iheanacho v. Ejiogu (1995) 4 NWLR (Pt. 389) 324 (CA) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Iheanacho v. Uzochukwu (1997) 1 SCNJ 117 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Ihewueze v. Ekeanya (1989) 1 NWLR (Pt. 96) 239 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Ijaodola v. Unilorin Governing Council & Ors. (2018) 7 SC (Pt. II) 3 **- ADEBAKIN & ANOR. v. ARCON & ANOR. (2021) 10 CLRN 189**

Ikenta Best (Nig.) Ltd. v. A.G., Rivers State (2008) LPELR-1476 (SC) **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Ikpeazu v. ACB Ltd. (1965) NMLR 374 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Ikpeazu v. Otti (2016) 8 NWLR (Pt. 1513) 38 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Imoka & Anor v. UBA Plc (2012) LPELR-19837(CA) **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

Inakoju v. Adeleke (2007) 4 NWLR (Pt. 1052) 423 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Incorporated Trustees of the Nigerian Baptist Convention v. Governor of Ogun State (2016) LPELR-41134 (CA) **- ADEBAKIN & ANOR. v. ARCON & ANOR. (2021) 10 CLRN 189**

INEC v. Ogbadibo L.G. (2016) 3 NWLR (Pt. 1498) 167 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

INEC v. Ogbadibo Local Government (2015) LPELR - 24839(SC), (2016) 3 NWLR (Pt. 1498) 167 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Integrated Timber and Plywood Products Ltd v. U.B.N Plc (2006) LPELR 1519 SC; (2006) 12 NWLR (Pt.995) 485 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

International Timber and Ply Wood Products Limited v. Union Bank Plc (2006) LPELR-1519(SC) **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

Isah v. INEC (2016) 18 NWLR (Pt. 1544) 175 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Ishaya Bamaiyi v. The State (2001) 8 NWLR (Pt. 715) 270 **- ADEBAKIN & ANOR. v. ARCON & ANOR. (2021) 10 CLRN 189**

Ito v. Ekpe (2000) LPELR - 1561 (SC) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

ITTP Ltd v. UBN Plc (2006) 12 NWLR (Pt. 995) 483 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Iyere v. B.F.F.M Ltd (2008) 18 NWLR (Pt. 1119) 300 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Iyoho v. Effiong (2007) 4 SC (Pt.111) 90, (2007) 11 NWLR (Pt.1044) 31 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

J.E. Oshevire Ltd. v. Tripoli Motors (1997) 5 NWLR (Pt. 503) 1 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

J.U.T.H. v. Ajeh (2007) 1 NWLR (Pt. 1016) 490 **- ADEBAKIN & ANOR. v. ARCON & ANOR. (2021) 10 CLRN 189**

Jallco Ltd v. Owoniboys Tech Service Ltd (1994) 4 NWLR (Pt. 391) 534 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Jev v. Iyortyom (supra); Abdulraheem & Ors v. Oduleye & Ors (2019) LPELR-48892(SC) **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

Jian Sheng Co. v. Great Tempo S.A. (1998); 225 N.R 140 (FCA) **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Jitte v. Okpulor (2016) 2 NWLR (Pt. 1497) 542 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Jitte v. Okpulor (2016) 2 NWLR (Pt. 1497) 542 **- POLARIS BANK LIMITED v.**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83

John Hold Nigeria and Cameroons v. Holt African Workers Union of Nigeria and Cameroon (1963) 1 All NLR 388 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Jolasun v. Bamgboye (2010) 18 NWLR (Pt. 1225) 285 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Jolasun v. Bamgboye (2010) 18 NWLR (Pt. 1225) 285 S.C. **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Jonah Onyebuchi v. Federal Republic of Nigeria (1987) 1 NWLR (Pt. 51) 506 (SC) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Julius Berger Nig. Pic v. Toki Rainbow Community Bank Ltd. (2007) 1 NWLR (Pt. 1016) 540 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Julius Berger Nig. Plc v. Omogui (2001) 6 SC 185 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Jumbo United Co. Ltd. v. Leadway Ass. Co. Ltd. (2016) 15 NWLR (Pt. 1536) 439 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

K.S.O. Allied Products Ltd. v. Kofo Trading Co. Ltd. (1996) 3 NWLR (Pt. 436) 244 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Kanu v. A.G., Imo State (2013) LPELR - 20646 (CA) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Katto v. C.B.N. (1991) 9 NWLR (Pt. 214) 126 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Kawawu v. PDP (2017) 3 NWLR (Pt. 1553) 420 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Kawawu v. PDP (2017) 3 NWLR (Pt. 1553) 420 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Kaycee (Nig.) Ltd. v Prompt Shipping Corporation (1986) 1 NWLR (Pt. 15) 180 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Kekong v. State (2017) 18 NWLR (Pt. 1596) 108 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Kephas Gata Kpezanyashi v. Maiangwa Yamusa Jezhi (2018) LPELR - 44402 (CA) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND.**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

PLC & 2 ORS. (2021) 10 CLRN 135

Kopek Construction Ltd. v. Ekisola (2010) 3 NWLR (Pt. 1182) 18 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Kosile v. Folarin (1989) 3 NWLR (Pt. 107) 1 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Kraus Thompson Org. Ltd. v. N.I.P.S.S. (2004) 17 NWLR (Pt. 901) 44) **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Kraus Thompson Organ. Ltd. v. University of Calabar (2004) 9 NWLR (Pt. 879) 631 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Labobadi v. Lagos Metal Industries Ltd. (1973) 1 S.C. 1 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Ladunni v. Adesoye (2015) LPELR – 25579 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Lagga v. Sarhuna NWLR (Pt. 1114) 427 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Lakanmi v. Adene (2003) 10 NWLR (Pt. 828) 353 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Lana v. University of Ibadan (1987) 4 NWLR (Pt. 64) 245 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Larmie v. D.P.M.S. Ltd. (2005) 12 SC (Pt. 1) 93 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Lasisi v. State (2013) 12 NWLR (Pt. 1367) 133 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Lasisi v. Tubi (1974) All NLR (Pt. 11) 438 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Latunde v. Lajinfin (1989) 3 NWLR (Pt.108) 177 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Lawson v. Afaro Cont. Co. Ltd. (2002) 2 NWLR (Pt.752) 585 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Lewis & Peat (N.I.R.) Ltd. v. Akhimien (1976) 1 All N.L.R. 460 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021)**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

10 CLRN 135

Ihunwo v. Ihunwo (2013) 8 NWLR (Pt. 1357) 550 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Ilori v. Ishola (2018) 15 NWLR (Pt. 1641) 77 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Lokpobiri v. Ogola (2016) 3 NWLR (Pt. 1499) 328 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Lucky v. State (2016) 13 NWLR (Pt. 1528) 128 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Lufthansa Airlines v. Odiase (2006) 7 NWLR (Pt. 978) 34 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

M.F. Kent (WA) Ltd. v. Martchem Ind. Ltd. (2000) 8 NWLR (Pt. 669) 459 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Madukolu v. Nkemdilim (1962) 1 All NLR 587 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Madukolum v. Nkemdilim (1962) 1 All NLR (Pt. 4) 587, (1962) 2 SCNLR 341 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Magbagbeola v. Akintola (2018) 11 NWLR (Pt. 1629) 177 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Maisaje v. Hassan (2004) 11 NWLR (Pt. 883) 181 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Makwe v. Nwukor (2001) FWLR (Pt. 63)/(2001) 14 NWLR (Pt. 733) 356 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Mamman v. Hajo (2016) 8 NWLR (Pt. 1575) 411 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Mamonu v. Dikat (2019) 7 NWLR (Pt.1672) 495 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Management Enterprises Ltd. v. Otusanya (1987) 2 NWLR (Pt. 55) 179 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Marine Management Associates Inc. v. National Maritime Authority (2012) 18 NWLR (Pt. 1333) 506 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

Mba v. Mba (2018) 15 NWLR (Pt. 1641) 177 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Mba-Ede v. Okufo (1990) 2 NWLR 135 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Mbani v. Bosi (2006) 11 NWLR (Pt. 991) 400 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Melwani v. Five Star Industries Ltd (2002) 1 S.C. 120 **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

Messrs Lewis and Peat (N.R.T.) Ltd. v. Akhimien (1976) LPELR - 1864) (SC) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Mobil Pro. Co. Unltd. v. LASEPA (2002) 18 NWLR (Pt. 798) 1 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Mobil Producing (Nig.) Unltd. v. Monokpo (2003) 18 NWLR (Pt. 852) 346 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Mobil Production (Nig) Unlimited v. Suffolk Petroleum Services (2020) 9 NWLR (Pt.1728) 1 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Mobil-Oil (Nig.) Plc v. Yusuf (2012) 9 NWLR (Pt. 1304) 47 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Modukolu v. Nkemdilim (2006) 2 LC 2081961) NSCC (Vol. 2) 374 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Mogaji v. Odofin (1978) 4 SC91 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Mohammed v. Husseini (1998) 14 NWLR (Pt. 584) 108 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Mohammed v. M.E. Co. Ltd. (2010) 2 NWLR (Pt. 1179) 473 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Mojeed Suara Yusuf v. Madam Idiatu Adegoke (2007) LPELR - 3534 (SC) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

Momoh v. Olotu (1970) 1 All NWLR 117 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Momoh v. Utnoru (2011) 15 NWLR (Pt. 1270) 217 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Monkem v. Odili (2010) 2 NWLR (Pt. 1179) 419 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Moses v. Onu & Anor. (2013) LPELR – 20348 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

MPNU v. SPS Ltd (2020) 9 NWLR (Pt. 1728) 1 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Mr. Archibong Nkana v. Abimbola (2018) LPELR – 42757 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Mr. Ikenna John Ogbuli v. Madam Abomeli Blackie (2018) LPELR - 44203 (CA) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

MTN (Nig.) Comm. Ltd. v. Corporate Comm. Inv. Ltd. (2019) 9 NWLR (Pt. 1678) 427 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

MTN (Nig.) Comm. Ltd. v. Corporate Comm. Investment Ltd. (2019) 9 NWLR (Pt. 1678) 427 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

MV Caroline Maersk v. Nokoy Investment Ltd. (2000) NWLR (Pt. 666) 587 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

MV Gongola Hope v. Smurfit Cases Nig. Ltd. (2007) MJSC 90 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

N.A.C.B. Ltd. v. Achagwa (2010) 11 NWLR (Pt. 1205) 339 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

N.A.C.B. Ltd. v. Ozoemelam (2016) 9 NWLR (Pt. 1517) 376 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

N.A.S Ltd. v. UBA Plc. (2005) 9 NWLR (Pt. 1463) 133 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

N.B.C.I. v. Integrated Gas (Nig.) Ltd. (2005) 4 NWLR (Pt. 916) 617 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

N.J.C & Ors. v. Aladejani (2014) LPELR 24134 (CA) **- ADEBAKIN & ANOR. v. ARCON & ANOR. (2021) 10 CLRN 189**

N.N.B. Plc v. Denclag Ltd. (2005) 4 NWLR (Pt. 916) 549 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

N.O.H.B. v. Ajogwu (2000) 12 NWLR (Pt. 682) 626 **- ADEBAKIN & ANOR. v. ARCON & ANOR. (2021) 10 CLRN 189**

N.R.M.A. & FC v. Johnson (2019) 2 NWLR (1656) 247 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Nabore Properties Ltd. v. Peace-cover Nigeria Ltd. (2014) LPELR – 22586 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

NACENN (Nig.) Ltd. v. B.A.P. Ltd (2011) 11 NWLR (Pt. 1257) 193 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Narindex Trust Ltd. v. N.I.C.M.B. Ltd. (2001) FWLR (Pt. 49) 1546 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Nasiru v. Civil Service Commission Kano State (2010) 6 NWLR (Pt. 1190) 250 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

NBC Plc v. Obah (2000) 11 NWLR (Pt. 677) 212 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Ndaeyo v. Ogunnaya (1977) 11 MSLR 300 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Ndayako v. Dantoro (2004) 13 NWLR (Pt. 889) 187 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

NDIC v. Okem Enterprises Ltd & *Anor* (2004) 10 NWLR (Pt 880) 107 **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

Nduul v. Wayo (2018) 16 NWLR (Pt. 1646) 548 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Negbenebor v. Negbenebor (1971) 1 All NWLR 210 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Neka B.B.B. Mfg. Co. Ltd. v. A.C.B. Ltd (2004) 2 NWLR (Pt. 858) 521 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

New Res Int'l v. Oranusi (2011) 2 NWLR (Pt. 1230) 102 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Ngere v. Okuruket (2014) 5 S.C. (Pt.11) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Ngwo v. Monye (1970) LPELR-1991 (SC) **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Niger Care Dev. Co. Ltd. v. ASWB (2008) 9 NWLR (Pt. 1093) 493 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Nigerian Agip Oil Col. Ltd. v. Nkweke (2016) LPWELR-26060 (SC) **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Nigerian Breweries Plc v. Dumeje (2015) LPELR - 25583 (CA) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Nigerian Ports Plc. v. B.P. PTE Ltd. (2012) 18 NWLR (Pt. 1333) 454 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Nigerian Reinsurance Corporation v. Cudjoe (2008) 10 NWLR (Pt. 1095) 329 **- ADEBAKIN & ANOR. v. ARCON & ANOR. (2021) 10 CLRN 189**

Nika Fishing Co. Ltd v. Lavina (Corporation) (2008) 6 - 7 SC (Pt. 11) 200, (2008) 16 NWLR (Pt.1114) 509

Nika Fishing Co. Ltd v. Lavina Corp (2008) 16 NWLR (Pt.1114) 509 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

NIPOL Ltd. v. Bioku Investment & Proco. Ltd. (1992) 3 NWLR (Pt. 232) 727 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Nkwocha v. MTN Nigeria Communication Ltd. (2008) 11 NWLR (Pt. 1099) 439 (CA) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Nnonye v. Anyichie (2005) 2 NWLR (Pt. 910) 633 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Nnorodim v. Ezeeni (1995) 2 NWLR (Pt. 378) 448 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

NNPC v. Orhiowasele (2013) 13 NWLR (Pt. 1371) 211 (SC) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021)**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

10 CLRN 135

NNPC v. Roven Shipping Ltd. (2019) 9 NWLR (Pt. 1676) 67 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

NNPP v. Otefe (2003) LPELR-7281 (CA) **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Nruamah v. Ebuzoeme (2013) 13 NWLR (Pt. 1372) 474 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Nwachukwu (?) v. Ottih (1961) All NLR 507 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Nwadinobi v. MCC Nig. Ltd (2016) 1 NWLR (Pt. 1494) **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Nwangwu v. FBN (2008) LPELR-4478(CA) **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

Nwankwo v. Yar'Adua (2010) 12 NWLR (Pt. 1209) 518 SC **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

Nweke v. Nweke (2014) LPELR-23563 (CA) **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Nwokoro v. Onuma (1999) 12 NWLR (Pt. 631) 342 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Nworka v. Ononeze-Madu (2019) 7 NWLR (Pt. 1672) 422 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Nwuba v. Ogbuehi (2007) NWLR (Pt. 1072) **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Nyesom v. Peterside (2016) 7 NWLR (Pt. 1512) 452 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Obaba v. Military Governor of Kwara State (1994) 4 SCNJ 121 **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

Obajimi v. Adediji (2008) 3 NWLR (Pt.1073) 1 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Obasuyi v. Business Ventures Ltd. (2000) 5 NWLR (Pt. 658) **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

Odebunmi v. Abdullahi (1997) 2 SCNJ 112 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Odedo v. Oguebego (2015) 13 NWLR (Pt. 1476) 229 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Odega v. Olloh (2015) LPELR-24568 (CA) **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Odogwu v. Odogwu (1992) 2 NWLR (Pt. 225) 539 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Odom v. PDP (2015) 2 SC (Pt. 1) 46 **- ADEBAKIN & ANOR. v. ARCON & ANOR. (2021) 10 CLRN 189**

Odom v. PDP (2015) 6 NWLR (Pt. 1456) 527 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Odumosu v. ACB Ltd. (1976) 11 SC 55 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Odutola v. Mabogunje (2013) 7 NWLR (Pt. 1354) **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Offodile v. Offodile (2019) 16 NWLR (Pt. 1698) 189 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Offor v. State (2012) 18 NWLR (Pt. 1333) 421 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Oforlete v. State (2000) 12 NWLR (Pt. 681) 415 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Ogbeiwi v. Egharevba (2009) LPELR-4685 (CA) **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Ogbonna v. Ogbonna (2014) LPELR-22308 (CA) **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Oguanuhu v. Chiegboka (2013) 6 NWLR (Pt. 1351) 588 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Ogundalu v. Macjob (2015) 8 NWLR (Pt. 1460) 96 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Ogundele v. Agiri (2009) 18 NWLR (Pt. 1173) 219 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Ogunleye v. Oni (1990) 21 NSCC (Pt. 2) 72 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

Ogunseye & Ors. v. Registered Trustees of World Mission Agency Incorporated (2017) LPELR - 42767 (CA) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Ojobo v. Moro (2019) 17 NWLR (Pt. 1700) 166 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Ojoh v. Kamalu (2005) 18 NWLR (Pt. 958) 523 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Ojukwu v. Onwudike (1984) 2 S.C. 15 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Okafor & Ors. v. Nweke & Ors. (2007) 10 NWLR (Pt.1043) 521 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Okafor v. Abumofuani (2016) 12 NWLR (Pt. 1525) 117 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Okaqbue v. Romaine (1982) 5 S.C. 133 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Okereke v. Yar'Adua (2008) 12 NWLR (Pt. 1100) **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Oketade v. Adewunmi (2010) 8 NWLR (Pt.1195) 63 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Okhuarobo v. Aigbe (2002) 3 SC (Pt. 1) 41, (2002) 9 NWLR (Pt. 771) 29 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Okoko v. Dakolo (2006) 14 NWLR (Pt. 1000) 401 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Okoleji v. Okupe 15 NLR 28 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Okolo v. U.B.N. Ltd. (1998) 2 NWLR (Pt. 539) 618 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Okolo v. UBN Ltd. (2004) 3 NWLR (Pt. 859) 87 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Okonkwo v. Okagbue (1994) 9 NWLR (Pt. 368) 301 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Okoro v. Okoro (2018) 16 NWLR (Pt. 1646) 506 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

Okorodudu v. Okoromadu (1977) 3 SC 21 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Okotie-Eboh v. Okotie Eboh (1986) 1 S.C. 479 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Okoya v. Santili (1991) 7 NWLR (Pt. 206) 753 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Okoye & Anor v. Centre Point Merehant Bank Ltd. (2008) 15 NWLR (Pt. 1110) 335 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Okoye v. N.C.F.C (1991) 7 SC (Pt. 111) 33 **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

Okoye v. Nigeria Const. & Furniture Co. Ltd. (1991) 6 NWLR (Pt. 199) 501 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Okoye v. Nwankwo (2014) 15 NWLR (Pt. 1429) 93 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Okpala v. Ibeme (1989) 2 NWLR (Pt. 102) 208 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Okpe v. Fan Milk Plc. (2017) 2 NWLR (Pt. 1549) 282 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Okwu v. Umeh (2016) 4 NWLR (Pt. 1501) 120 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Oladipo v. Nigeria Customs Service Board (2009) LPELR-8278(CA) 14 **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

Olagungu v. Adesoye (2009) 9 NWLR (Pt. 1146) 225 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Olamoda v. Mustapha (2019) 6 NWLR (Pt. 1667) 36 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Olaniyan v. Fatoki (2013) 17 NWLR (Pt. 1384) 477 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Oloba v. Akereja (1988) 3 NWLR (Pt. 84) 508 (1988) 7 SC (Pt.1) 11 **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

Oloruntoba-Oju v. Abdulrahim (2009) 13 NWLR (Pt.1157) 83 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

Olowu v. Building Stock Ltd. (2018) 1 NWLR (Pt. 1601) 343 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Olufeagba v. Abdul-Raheem (2009) 18 NWLR (Pt.1173) 384 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Olufosoye v. Fakorede (1993) 1 NWLR (Pt. 272) 747 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Olumide & Ors. v. Ajayi (1997) LPELR - 6244 (CA) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Olutola v. UNILORIN (2004) 18 NWLR (Pt 905) 416 **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

Omerede v. Eleazu (1996) LPELR- 2673 (SC), (1996) 6 NWLR (Pt.452) 1 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Omiolemhen & Ors v. Nigerian Gas Company (2012) LPELR-7957 (CA) **- ADEBAKIN & ANOR. v. ARCON & ANOR. (2021) 10 CLRN 189**

Omisore v. Aregbesola (2015) 15 NWLR (Pt. 1482) 205 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Onagoruwa v. Aderemi (2001) 13 NWLR (Pt. 721) 38 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Oni v. Cadbury Nig. Plc. (2016) 9 NWLR (Pt. 1516) 80 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Onisaodu v. Elewuju (2006) 13 NWLR (Pt. 998) 517 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Onisese v. Oyeleye (2008) All FWLR (Pt. 447) 1826 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Onocha v. A.G., Delta State (2013) LPELR – 20781 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Onochie v. Odogwu (2006) 6 NWLR (Pt. 975) 65 SC **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Onovo v. Mba (2014) 14 NWLR (Pt. 1427) 391 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Onuoha v. State (1998) 5 NWLR (Pt. 548) 118 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

Onuorah v. Kaduna Refinery and Petroleum Company (2005) LPELR 2707 (SC); (2005) 6 NWLR (Pt. 921) 393 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Onuorah v. Kaduna Refining & Petrochemical Co. Ltd (2005) 6 NWLR (Pt 921) 393 **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

Onwoamanam v. Fatuade (1986) 2 NWLR 199 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Onwugbelu v. Ezebuo & Ors (CA/E/56/2009 of 21-2-2013) **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1***Orisakwe v. The State* (2004) LPELR - 2764 (SC); (2004) 12 NWLR (Pt. 887) 258

Onwuzuraike v. Edoziem (2016) 6 NWLR (Pt. 1508) 215 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Onyekwelu v. Elf Pet (Nig.) Ltd. (2009) 5 BWKR (Pt. 1133) 181 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Onyero v. Nwadike (2011) 18 NWLR (Pt. 1279) 954 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Onyiorah v. Onyiorah (2019) 15 NWLR (Pt. 1695) 227 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Opia v. INEC (2014) LPELR-22185(SC) **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

Opobiyi v. Muniru (2011) LPELR-7840 (SC) **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Ordia v. Piedmont (Nig.) Ltd. (1995) 2 SCNJ 175 at 184/(1994) 2 NWLR (Pt. 379) 516 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Orianezi v. A.G., Rivers State (2017) 6 NWLR (Pt. 2017) 6 NWLR (Pt. 1561) 224 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Orient Bank (Nig.) Plc v. Bilante International Ltd (1997) 8 NWLR (Pt. 515) 37 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Orlu v. Gogo-Abite (2010) 8 NWLR (Pt. 1196) 307 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Oshievire Ltd. v. Tripoli (1997) 4 SCNJ 246 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

Osi v. Accord Party (2017) 3 NWLR (Pt. 1553) 387 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Osigwe v. PSPLS Mgt. Consortium Ltd. (2009) 3 NWLR (Pt. 1128) 378 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Osinupebi v. Saibu & Ors. (1982) 7 S.C. 104 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Osoh v. Unity Bank Plc (2013) 9 NWLR (Pt. 1358) 1 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Osolu v. Osolu (2003) FWLR (Pt. 172) 177 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Otapo and Ors. v. Sunmonu (1987) 2 NWLR (Pt. 58) 587 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Otukpo v. John (2012) 7 NWLR (Pt. 1299) 357 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Our Line v. S.C.C. Nig. Ltd. (2009) 7 SCNJ 358 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Ovunwo v. Woko (2011) 17 NWLR (Pt.1277) 522 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Owens Bank Nig Plc v. Michael Ade-Ojo (2003) 17 NWLR (Pt 848) 174 **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

Owners of Cargo on KH Enterprise v. Owners of Pioneer Container (1994) 1 Lloyd's Rep: 593 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Owodunmi v. Registered Trustees, CCC Worldwide (2001) 10 NWLR (Pt. 675) 315 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Owosho v. Dada (1984) 7 S.C. 149 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Oyebamiji v. Lawanson (2008) 15 NWLR (Pt. 1109) 122 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Oyebanji v. Fowowe (2008) All FWLR (Pt. 410) 780 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

Oyegun v. Igbinedion (1992) 2 NWLR (Pt. 226) 747 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Oyeneyin v. Akinkugbe (2010) 4 NWLR (Pt. 1184) 265 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Oyeyemi v. Owoeye (2017) 12 NWLR (Pt. 1580) 364 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Oyovbiare v. Omamurhomu (1999) 10 NWLR (Pt. 621) 23 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Ozuzu v. Emewu (2019) 13 NWLR (Pt. 1688) 143 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

P&C.H.S. Co Ltd & Ors v. Migfo (Nig) Ltd & Anor (2012) LPELR - 9725 (SC); (2012) 18 NWLR (Pt. 1333) 555 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

P.I.P.C Security Ltd. v. *George X Vlachos* (2008) 4 NWLR (Pt. 1076) 1 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

P.M. Ltd. v. The "M.V. Dancing Sister" (2012) 4 NWLR (Pt. 1289) 169 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Pacers Multi-Dynamics Ltd. v. M. V. "Dancing Sister" (2000) 3 NWLR (sic-no part) 241 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Pam v. Muhammed (2008) 16 NWLR (Pt. 1112) 1 (SC) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Papersack Nig. Ltd. v. Odutola (2011) 10 NWLR (Pt.1255) 244 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Pascutto v. Adecentro (Nig.) Ltd. (1997) 11 NWLR (Pt. 529) 467 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Paul Ordia v. Piemont Nig. Ltd. (1995) 2 SCNJ 175 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

PDP v. Okorocha (2012) 15 NWLR (Pt. 1323) 205 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

PDP v. Okorocha (2012) 15 NWLR (Pt. 1323) 205 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

PDP v. Sylva (2012) LPELR-7814(SC) **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

PDP v. Umeh (2017) 12 NWLR (Pt. 1579) **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Petro Jessica Enterprises Ltd v. Leventis Technical Company Ltd (1992) LPELR-2915 (SC) **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

Petrojessica Enterprises Ltd v. Leventis Technical Co Ltd (1992) 5 NWLR (Pt. 244) 675 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Plateau State v. A.G., Fed. (2006) 3 NWLR (Pt. 967) 346 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Ports and Cargo Handling Services Company Ltd & Ors v. Migfor Nig Ltd & Anor (2012) (n)LPELR (SC); (2012) 18 NWLR (Pt. 1333) 555 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

R-Benkay Nigeria Ltd. v. Cadbury Nigeria Ltd. (2012) LPELR - 7820 (SC)

Re Adewunmi (1988) 3 NWLR (Pt. 83) 483 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Rebold Ind. Ltd. v. Magreola (2015) 8 NWLR (Pt. 1461) 201 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Registered Trustees Apostolic Church v. Olowoleni (1990) 4 NWLR (Pt.158) 514 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Reichie v. N.B.C.I (2016) 8 NWLR (Pt.1514) 274 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Reptico S.A. Geneva v. Afribank (Nig.) Plc (2013) 14 NWLR (Pt.1373) 172 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Rilwan & Partners v. Skye Bank Plc (2015) 1 NWLR (Pt. 1441) 460 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Roe Ltd v. UNN (2018) LPELR-43855(SC) **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

S.C.O.A. (Nig.) Ltd. v. J.A. Kehinde & Sons Nig. Ltd. (2004) 8 NWLR (Pt. 874) **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

S.L.B. Consortium Ltd. v. N.N.P.C. Plc (2011) 9 NWLR (Pt. 1252) 317 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

S.P.D.C. (Nig.) Ltd v. Isaiah & Ors (2001) LPELR-3205 (SC), (2001) 11 NWLR (Pt. 723) 168 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

S.P.D.C. (Nig.) Ltd. v. Emehuru (2007) All FWLR (Pt. 381) 1694 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Sabale v. Abdulkadir (1993) LPELR-693(SC) **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

Salau v. State (2019) 16 NWLR (Pt. 1699) 399 (Pt. 1372) 474 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Salik v. Idris (2014) 15 NWLR (Pt. 1429) 36 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Sanyaolu v. INEC (1994) 7 NWLR (Pt. 612) 611 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Saraki v. FRN (2016) 3 NVVLR (Pt. 1500) 531 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Savannah Bank v. Pan Atlantic Shipping &Transport Agencies Ltd & Anor (1987) LPELR - 302 (SC); (1987) 1 NWLR (Pt. 49) 212 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

SCEN v. Nwosu (2008) All FWLR (Pt. 413) 1399 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Seatrade (owners of MV Joint Frost) v. Fiogret Ltd 3 NSC (1987)-1990) 453 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Seismograph Services Nig. Ltd. v. Efuaye (1976) 9 - 10 S.C. 135 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Senfowokan v. Idowu & Anor. (1975) 4 S.C. (Reprint) 136 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Setracto (Nig) Ltd. v. Kpayi (2017) 5 NWLR (Pt. 1558) 280 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Setracto (Nig) Ltd. v. Kpayi (2017) 5 NWLR (Pt. 1558) 280 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

Shell Pet. Dev. Co. (Nig.) Ltd. v. Amaro (2000) 10 NWLR (Pt. 675) 248 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Shell Petroleum Development Company of Nigeria Ltd. v. Amadi & Ors. (2011) 14 NWLR (Pt. 1266) 157 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Shelle v. Rossek (1938) 14 NLR 80 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Shena Security Company Ltd. v. Afropak (Nigeria) Ltd. (2008) LPELR - 3052 (SC) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Shining Star (Nig.) Ltd v. AKS Steel (Nig.) Ltd (2011) 4 NWLR (Pt. 1238) 596 **- ADEBAKIN & ANOR. v. ARCON & ANOR. (2021) 10 CLRN 189**

Shitta-Bey v. Federal Public Service Commission (1981) 1 S.C. (REPRINT) 26 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Shuaibu v. Muazu (2007) 7 NWLR (Pt. 1033) 271 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Sifax (Nig) Ltd & Ors v. Migfo (Nig) Ltd & Anor (2018) LPELR - 49735 (SC); (2018) 9 NWLR (Pt. 1623) 138 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Skenconsult (Nig.) Ltd. v. Ukey (1981) NSCC 1 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Skye Bank Plc v. Victor Anaenen Iwu (2017) LPELR - 42595 (SC), (2017) 16 NWLR (Pt. 1590) 24 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Societe Bancaire (Nigeria) v. Margarida Salvado De Lluch (2004) 18 NWLR (Pt 905) 341 **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

Socio - Political Research Development v. Ministry of FCT & Ors (2018) LPELR-45708 (SC); (2019) 1 NWLR (Pt. 1653) 313 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Sona Brew Plc. v. Peters (2005) 1 NWLR (Pt. 908) 478 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

SPDC (Nig) Ltd v. Isaiah & Ors (2001) LPELR3205 SC, (2001) 11 NWLR (Pt. 723) 168 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

SPDC Nig. Ltd. & Anor v. X.M. Federal Ltd. & Anor (2006) 7 SC (Pt.11) 27; (2006) 16 NWLR (Pt. 1004) 189 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Standard Bank Nigeria v. Ikomi (1992) LPELR – 3112 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

State v. Ajayi (2016) 14 NWLR (Pt. 1532) 196 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Suleiman v. Johnson 13 WACA 213 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Sulu-Gambori v. Bukola (2004) 1 NWLR (Pt. 853) 122 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Sunmonu v. Dada (2019) LPELR – 48270 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Sylva v. INEC & Ors (2015) LPELR - 2447 (SC); (2015) 16 NWLR (Pt. 1486) 576 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

T. E. Oshevire Ltd v. Tripoli Motors (1997) 5 NWLR (Pt. 503) 1/(1997) 4 SCNJ 246 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Taiwo v. Adegboro (2011) 11 NWLR (Pt. 1259) 562 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Tanko v. U.B.A. Plc (2010) 17 NWLR (Pt. 1221) 80 (SC) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

The MV S Araz v. Scheap (1996) 5 NWLR (Pt. 447) 204 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

The People of Lagos State v. Umaru (2014) 7 NWLR (Pt. 1407) 584 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Thomas v. Olufosoye (1986) 1 NWLR (Pt. 18) 669 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Trade Bank Plc and Ors. v. Pharmatek Industries Projects Ltd. (2020) 8 NWLR (Pt. 1725) 124 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

TSKJ (Nig) Ltd v. Otochem (Nig) Ltd (2018) LPELR-44294 (SC); (2018) 11 NWLR (Pt. 1630) 330 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

Tukur v. Government of Gongola State (1988) 1 NWLR (Pt.68) 39 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Tukur v. Government of Gongola State (1989) 4 NWLR (Pt 117) 517 **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

Tukur v. Taraba State (1997) 6 SCNJ 81 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

U.B.N. Plc v. Ajabule (2011) 18 NWLR (Pt. 1278) 152 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

U.B.N. Plc v. Borini Prono Co. Ltd. (1998) 4 NWLR (Pt. 547) 640 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

U.N.T.H.M.B. v. Nnoli (1994) 8 NWLR (Pt. 363) 376 **- ADEBAKIN & ANOR. v. ARCON & ANOR. (2021) 10 CLRN 189**

U.T.B. v. Ozoemena (2007) 3 NWLR (Pt. 1022) 448 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

UAC v. MacFoy (1961) All ER 1169 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

UBA Plc v. Jargaba (2007) 11 NWLR (Pt. 1045) 247/(2007) 5 SC 1 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

UBA Plc v. Samba Pet. Co. Ltd. (2002) 16 NWLR (Pt. 739) 361 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

UBA Plc. v. Jargaba (2007) 11 NWLR (Pt. 1045) 237 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

UBA v. Nwora (1978) 11-12 SC 1 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

UBN Ltd v. Sax (Nig.) Ltd (1994) 8 NWLR (Pt. 361) 150 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

UBN Plc v. Nwankwo (2019) 3 NWLR (Pt. 1660) 474 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

UBN Plc v. Soares (2012) LPELR-8018(CA) **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

UBN Plc v. Bear Marine Service Ltd. & Anor. (2018) LPELR - 43692 (CA) **- KEEN**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135

Ude v. Nwara & Anor (1993) 2 SCNJ 47; (1993) 2 NWLR (Pt. 278) 638 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Ude v. Nwara (1993) 2 NWLR (Pt. 278) 638 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Udeagha v. Omegara (2010) 11 NWLR (Pt. 1204) 168 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Udengwu v. Uzuegbu (2003) 13 NWLR (Pt. 836) 136 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Udo & Ors. v. Obot and Ors. (1989) 1 NWLR (Pt. 95) 59 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Udo v. Cross River State Newspaper and Anor (2002) FWLR (Pt. 104) 665 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Udom v. Umanah (No.1) (2016) 12 NWLR (Pt. 1526) 179 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Ugba v. Suswan (2014) 14 NWLR (Pt. 1427) 264 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Ugo v. Obiekwe (1989) 1 NWLR (Pt. 99) 566 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Ugwu v. Ararume (2007) 12 NWLR (Pt. 1048) 367 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Ugwu v. Ararume (2007) 6 SC (Pt 1) 88 **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

Ukudie v. SPDCN (1975) 8-11 SC 155 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Unilorin v. Adesina (2014) 10 NWLR (Pt. 1414) 159 (SC) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Union Bank v. Ravih Abdul & Co Ltd. (2018) LPELR-46333 (SC) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Union Beverages Ltd v. Pepsi Cola Int. Ltd (1994) 3 NWLR (Pt. 330) 1 **- MAERSK**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108

Union Homes Savings & Loans Plc v. Olumide (2018) LPELR – 45572 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Unipetrol (Nlg.) Plc v. Bureimoh (2004) 15 NWLR (Pt. 897) 641 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

United Bank for Africa Plc v. Bottling Industries Ltd (2006) LPELR - 3404 (SC), (2006) 9 NWLR (Pt. 1013) 61 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

United City (Investments) Ltd v. Royal Bank of Canada (1983) A.C. 168 **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

Unity Bank Plc v. Ahmed (2020) 1 NWLR (Pt. 1705) 364 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

University of Calabar v. Essien (1996) 10 NWLR (Pt. 477) 225 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Unongo v. AperAku (1983) 11 SC 129 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Uredi v. Dada (1988) 1 NWLR (Pt. 69) 237 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

UTC (Nig) Plc. v. Lawal (2014) 5 NWLR (Pt. 1400) 221 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Utih v. Onoyivwe (1991) 1 SC (Pt. 1) 65 at 96-97; (1991) 1 NWLR (Pt. 166) 166 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Utih v. Onoyivwe (1991) 1 SCNJ 25 **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

Uwazuruike v. A.G., Fed. (2007) 8 NWLR (Pt. 1035) 1 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Uwazuruonye v. Gov., Imo State (2013) 8 NWLR (Pt. 1355) 28 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Uzodinma v. Ihedioha (2020) 5 NWLR (Pt. 1718) 529 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Vab Petroleum Inc v. Momah (2013) LPELR - 19770 (SC) **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

Vassileva v. P.M.S. Industries Ltd. (2000) FWLR (Pt.199) 392 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Vaswani Trading Co. v. Savalakh& Co. (1972) 12 S.C. 77 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Veritas Insurance Co. *Ltd. v. Citi Trust Investments Ltd.* (1993) 3 NWLR (Pt. 281) 349 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Victor Adelekan v. ECU-Line NV (2006) LPELR - 113(SC); (2006) 12 NWLR (Pt. 993) 33 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

WAEC v. Adeyanju (2008) NWLR (Pt. 1092) 270 **- MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108**

Wassah v. Kara (2015) 4 NWLR (Pt. 1449) 374 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Wassah v. Kara (2015) 4 NWLR (Pt.1449) 374 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Wema Securities and Finance Plc. v. NAIC (2015) 16 NWLR (Pt. 1484) 93 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

West Construction Co. Ltd v. Santo M. Batalha (2006) 4 SC (Pt. 1) 88; (2006) 9 NWLR (Pt. 986) 595 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Widman & Walters (Nig.) Ltd. v. Mojibolu Oluwa (1968) 1 All NLR 383 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Willaims v. Williams (2008) 10 NWLR (Pt. 1094) 364 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Woherem v. Emereuwa (2004) 13 NWLR (Pt. 890) 398 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Woluchem v. Gudi (1981) 5 SC 291 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Woluchem v. Gudi (1981) 5 SC 291 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Wuemeni v. Ochie (2004) 15 NWLR (Pt. 895) 196 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

TABLE OF CASES REFERRED TO IN (2021) 10 CLRN

Yare v. NSWIC (2013) LPELR20520; (2013) 12 NWLR (Pt. 1367) 173 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Yashe v. Umar (2003) 13 NWLR (Pt. 838) 465 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Yongbush v. Bulus (1997) 2 NWLR (Pt. 489) 621 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Yusuf v. Adegoke & Anor. (2007) 6 SC (Pt. 1) 126, (2007) 11 NWLR (Pt. 1045) 332 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

Yusuf v. Mobolaji (1999) 12 NWLR (Pt. 631) 374 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Yusuf v. Oyetunde (1998) (sic) (2014) 1 NWLR (Pt. 1387) 80 **- POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83**

Zakirai v. Muhammad & Ors (2017) LPELR-42349(SC) **- THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168**

Ziregbe v. Eyekpimi (2020) 9 NWLR (Pt. 1729) 327 **- KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135**

Zubair v. Kolawole (2019) LPELR - 46928 (SC); (2019) 11 NWLR (Pt.1682) 66 **- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1**

DIGEST OF CASES REPORTED IN (2021) 10 CLRN

ADMINISTRATIVE LAW – Agency – factors determining whether an organization is a Federal Government agency – whether the government has control over it or whether the functions affect government policies. - ADEBAKIN & ANOR. v. ARCON & ANOR. (2021) 10 CLRN 189 **– PAGES 196, 197**

ADMINISTRATIVE LAW – Agency – factors determining whether an organization is a Federal Government agency – whether the government has control over it or whether the functions affect government policies. - ADEBAKIN & ANOR. v. ARCON & ANOR. (2021) 10 CLRN 189 **– PAGES 196, 197**

APPEAL – Jurisdiction – Findings by an Appellate Court - where an appellate court finds that the trial court lacks jurisdiction over a case on appeal before it, the matter must be struck out. - STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1 **– PAGE 21**

APPEAL – Setting aside the judgement of a trial court on improper evaluation of evidence – What appellant must show – an appellant who relies on improper evaluation of evidence to set aside the judgment of a trial court, has the onus to identify and specify the evidence improperly evaluated or not evaluated. - KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135 **– PAGE 159**

APPEAL – Tort – Damages – Interference with the grant of damages by an appellate court – An appellate court does not usually interfere with award of damages. - POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83 **– PAGE 101**

BANKING – Letters of credit – concept of letters of credit – this is an instrument under which the issuer, usually a bank, at a customer's request, agrees to honour a draft or other demand for payment made by a third party or a beneficiary, as long as the draft or demand complies with specified conditions, and regardless of whether any underlying agreement between the customer and the beneficiary is satisfied. - THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168 **– PAGES 180, 181, 182**

COMMERCIAL LITIGATION – Evidence – Admissibility of an affidavit – section 109 of the Evidence Act, 2011 – Any affidavit sworn before any judge, officer or other person duly authorized to take affidavits in Nigeria may be used in the court in all cases affidavits are admissible. - POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83 **– PAGES 96**

COMMERCIAL LITIGATION – Evidence – Admission defined – admission connotes a statement, oral or documentary, made by a party which suggests an inference as to any fact in issue or relevant fact. - POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83 **– PAGE 93**

DIGEST OF CASES REPORTED IN (2021) 10 CLRN

COMMERCIAL LITIGATION – Evidence at variance with pleadings – Evidence that is at variance with the pleadings goes to no issue and should be rejected and if admitted should be expunged from the record. - STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1 **– PAGES 55, 56**

COMMERCIAL LITIGATION – Jurisdiction – Distinction between procedural and substantive jurisdiction – procedural jurisdiction is secondary to substantive jurisdiction; the distinction being that while procedural jurisdiction can be waived, substantive jurisdiction cannot be waived. - KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135 **– PAGE 154**

COMMERCIAL LITIGATION – Jurisdiction – jurisdiction is the lifeblood of any adjudication. It's being lacked renders the court's proceedings no matter how well conducted, liable to be set aside for being a nullity. - STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1 **– PAGE 10**

COMMERCIAL LITIGATION – Jurisdiction – nature – Jurisdiction is the authority or power of a Court to adjudicate over any matter. It is the very basis on which a Court adjudicates over a matter. - THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168 **– PAGES 177, 178**

COMMERCIAL LITIGATION – Jurisdiction – Where a court is disrobed of the jurisdiction to entertain a matter, the proceeding germinating from it, becomes a nullity. - MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108 **– PAGE 125**

COMMERCIAL LITIGATION – Locus standi – who can sue on a bill of lading – only a consignee or endorsee of a bill of lading has the legal capacity/ locus standi to sue on it. - MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108 **– PAGES 121, 122**

COMMERCIAL LITIGATION – Originating Summon – Whether defendants can raise questions on their own in an originating summons – This is a suit commenced by originating summons to give answers to the questions raised therein. The Defendants are not permitted to raise questions of their own. - ADEBAKIN & ANOR. v. ARCON & ANOR. (2021) 10 CLRN 189 **– PAGE 195**

COMMERCIAL LITIGATION – Reliefs – grant of declarative reliefs – Declarative reliefs are granted on convincing evidence tendered by the party claiming the declaratory reliefs. - KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135 **– PAGE 155**

COMMERCIAL LITIGATION – What to Consider in Determining Limitation Period – in determining whether or not the instant suit is statute-barred, it is important to ascertain when time started running against the respondents.

DIGEST OF CASES REPORTED IN (2021) 10 CLRN

- STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1 **– PAGE 19**

COMMERCIAL LITIGATION – When a cause of action arises – a cause of action arises on the date or from the time the breach of duty occurs. - STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1 **– PAGE 37**

COMMERCIAL LITIGATION – When a suit becomes lifeless – A suit is said to be lifeless or an academic exercise where a decision reached in the matter will not ensure any right or confer any benefit on the successful litigant. - ADEBAKIN & ANOR. v. ARCON & ANOR. (2021) 10 CLRN 189 **– PAGE 195**

CONTRACT – Contract for Sale – Must be in writing – No contract for any disposition of land, being a disposition that is required by any enactment to be made by deed or instrument or in writing shall be enforceable by action unless the contract is in writing and is signed by the party to be charged therewith or by some other person lawfully authorised by him. - KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135 **– PAGE 158**

CONTRACT – Contract of sale – Acceptance under letters of credit – acceptance of documents under a letter of credit does not preclude the buyer from rejecting the goods subsequently, if the goods, on their arrival, do not conform to the contract of sale. - THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168 **– PAGE 185**

CONTRACT – Contract of Sale – Need to be in writing – Exceptions – Part performance – when it applies to an agreement – the doctrine of part performance applies only where there is a completed agreement in existence. - KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135 **– PAGE 158**

CONTRACT – Contract of Sale – Registration of title – Effects of – Registration of title is for security. It guarantees title to the property registered but is not one of the methods to establish contract of purchase of landed property. - KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135 **– PAGE 159**

CONTRACT – Contract of Sale – when it becomes invalid – Fraud – Defined. - KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135 **– PAGE 159**

CONTRACT – Elements of a valid contract – Offer and Acceptance. - KEEN LINE INVEST. LTD. & ANOR. v. PATERSON ZOCHONIS IND. PLC & 2 ORS. (2021) 10 CLRN 135 **– PAGE 159**

CONTRACT – Offer and Acceptance – When does a contract becomes binding – It is during negotiation that offer and acceptance is made, and

DIGEST OF CASES REPORTED IN (2021) 10 CLRN

It is only after the conclusion of negotiations and the acceptance of the terms agreed upon by both parties that an agreement or a contract comes into existence. - STATOIL NIGERIA LTD. v. INDUCON NIGERIA LTD. & ANOR. (2021) 10 CLRN 1 **– PAGE 57**

CONTRACT – Privity of contract – a contract cannot confer/bestow rights, or impose obligations arising under it, on any person except parties to it. - MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108 **– PAGE 126**

CONTRACT – Simple contract – simple contracts are not among those envisaged in the exclusive jurisdiction conferred on the Federal High Court. - THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NDIC (2021) 10 CLRN 168 **– PAGE 185**

Court – Jurisdiction to adjudicate over academic issues – a court is divested of the necessary jurisdiction to adjudicate over academic disputes. - MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108 **– PAGE 127**

MARITIME – Bill of lading – Meaning – Concept – A bill of lading, in the province of carriage of goods by sea/contract of affreightment, connotes a written evidence of contract between a person engaged in the business of transporting/forwarding goods by sea and a carrier (shipper) or its agents embodying an' undertaking by the shipper for the carriage and delivery of the freight or cargo to the order or assigns of a specified person at a specified place. - MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108 **– PAGES 120, 121**

MARITIME – Bill of lading – who is a notify party – A notify party or addressee is a party who is to be notified of the arrival of the goods and is often an agent for the receiver of the goods who arranges for their clearance. - MAERSK LINE NIGERIA LTD v. S. E. EZE & CO. LTD. (2021) 10 CLRN 108 **– PAGE 123**

TORT – Damages – General damages – Damages defined – A pecuniary compensation which law awards to a person for the injury he has sustained by reason of the act or default of another whether that act or default is a breach of contract or tort". - POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83 **– PAGE 101**

TORT – Detinue – Remedies for the tort of detinue – A person who has a right of action in detinue has three optional remedies open to him. - POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83 **– PAGES 98, 99**

TORT – Detinue – Right of the plaintiff to damages in detinue – the defendant cannot deprive the plaintiff of his right to damages for retention of the chattel simply because he was not earning anything from its use. - POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83 **– PAGE 99**

DIGEST OF CASES REPORTED IN (2021) 10 CLRN

TORT – Detinue defined – Conditions for the establishment of detinue – Detinue connotes the wrongful detention of a person's chattel after the holder/person, who is in actual possession of it, has refused to deliver it upon demand by the owner/person who has an immediate right to its possession. - POLARIS BANK LIMITED v. FIDEL ASSOCIATES & ANOR. (2021) 10 CLRN 83 **– PAGE 99**

STATOIL NIGERIA LIMITED v. INDUCON NIGERIA LIMITED; DR. JOHN ABEBE

SUPREME COURT OF NIGERIA

SC. 411/2012
FRIDAY 5TH FEBRUARY 2021

(MUHAMMAD; PETER-ODILI; AUGIE; ABOKI; AGIM, JJ.SC)

COMMERCIAL LITIGATION – Jurisdiction – jurisdiction is the lifeblood of any adjudication. It's being lacked renders the court's proceedings no matter how well conducted, liable to be set aside for being a nullity.

COMMERCIAL LITIGATION – What to Consider in Determining Limitation Period – in determining whether or not the instant suit is statute-barred, it is important to ascertain when time started running against the respondents.

COMMERCIAL LITIGATION – When a cause of action arises – a cause of action arises on the date or from the time the breach of duty occurs.

COMMERCIAL LITIGATION – Evidence at variance with pleadings – Evidence that is at variance with the pleadings goes to no issue and should be rejected and if admitted should be expunged from the record.

APPEAL – Jurisdiction – Findings by an Appellate Court - where an appellate court finds that the trial court lacks jurisdiction over a case on appeal before it, the matter must be struck out.

CONTRACT – Offer and Acceptance – When does a contract becomes binding – It is during negotiation that offer and acceptance is made, and It is only after the conclusion of negotiations and the acceptance of the terms agreed upon by both parties that an agreement or a contract comes into existence.

Facts:

This is an appeal against the judgment of the Court of Appeal sitting in Lagos, delivered on the 5th of June 2012.

The respondents as plaintiffs, via a Writ of Summons sued the appellant as a defendant, at the Federal High Court, holden at Lagos Division for the enforcement of a net profit interest which they claimed that they were entitled to from the appellant, and also for accrued earnings arising from the said profit. The Respondents contended that the appellant had the obligation to enter into an agreement to pay them the said net profit interest from oil produced from its

oil block, just as their counterpart had done, that the appellant had represented to them that it would enter in to such agreement with them and that it was this representation that made it provide its brokerage services to the benefit of the appellant and influenced the allocation of oil blocks by the Ministry of Petroleum to it.

The Appellant in its defense denied all the claims as put forth by the respondents through its Statement of Claim on the ground that it was not part of the agreed consideration for respondent's service to it and refused to execute a written agreement between it and the respondents to pay 1.5% net profit interest to it, stating that such payment is not commercially and ethically justifiable as it is a nationally owned company.

Pleadings were exchanged and the trial judge gave judgment and made orders in favour of the Respondent.

The Appellant being aggrieved, appealed to the Court of Appeal, seeking to set aside the judgement of the trial court. The Court of Appeal affirmed the Judgment of the Trial Court, and the Appellant still not satisfied with the Judgment of the Court of Appeal, further appealed to the Supreme Court.

Held (*Unanimously Allowing the Appeal):*

[1] ***Commercial Litigation – Jurisdiction – jurisdiction is the lifeblood of any adjudication. It's being lacked renders the court's proceedings no matter how well conducted, liable to be set aside for being a nullity.***

It is very well settled that jurisdiction is the lifeblood of any adjudication. Its being lacked renders the court's proceedings no matter how well conducted, liable to be set aside for being a nullity. Jurisdiction of a court is so fundamental that once it is challenged it must be addressed and resolved first before any other steps is taken in the proceedings. This importance of a court's jurisdiction explains why it can be raised at any time, manner or stage of the proceedings be it at the trial, on appeal at the Court of Appeal or even in this court for the first time by any of the parties or by any of the courts suo motu. No decision can be more perverse than a null and void decision arrived at by a court that lacks the required jurisdiction and competence to determine the case in the first place. See *Petrojessica Enterprises Ltd v. Leventis Technical Co Ltd* (1992) 5 NWLR (Pt. 244) 675, *All Progressive Grand Alliance v. Senator Christians N. D. Anyanwu & Ors* (2014) LPELR - 22182(SC) (2014) 7 NWLR (Pt. 1407) 541.

In *Skye Bank Plc v. Victor Anaenen Iwu* (2017) LPELR -42595 (SC),

(2017) 16 NWLR (Pt. 1590) 24 my lord, Peter-Odili JSC restated the principle at pages 78 - 79 of the report thus: -

> "The situation on ground throws up the matter of jurisdiction of court and it is trite that jurisdiction is the bedrock of any adjudication to the extent that it affects the very foundation of every cause of action before a court of law.
>
> The reason is simple, since without jurisdiction, the decision of a court or tribunal without the requisite jurisdiction is a nullity, dead on arrival and of no effect whatsoever." See also *Utih v. Onoyivwe* (1991) 1 SC (Pt. 1) 65 at 96-97; (1991) 1 NWLR (Pt. 166) 166 and *Madukolu v. Nkemdilim* (1962) 2 SCNLR 341. **(P. 10 lines 18 - 45)**

[2] ***Commercial Litigation – What to Consider in Determining Limitation Period – in determining whether or not the instant suit is statute-barred, it is important to ascertain when time started running against the respondents.***

It is trite that in determining whether or not the instant suit is statute-barred, it is important to ascertain when time started running against the respondents. Time, this court has held, begins to run when there is in existence a person who can sue and another who can be sued and all facts material to be proved to entitle the plaintiff to succeed have occurred. See *United Bank for Africa Plc v. Bottling Industries Ltd* (2006) LPELR - 3404 (SC), (2006) 9 NWLR (Pt. 1013) 61; *Sifax (Nig) Ltd & Ors v. Migfo (Nig) Ltd & Anor* (2018) LPELR - 49735 (SC); (2018) 9 NWLR (Pt. 1623) 138 and *A.G. Lagos State v. Eko Hotels Ltd & Anor* (2006) LPELR- 3161(SC); (2006) 18 NWLR (Pt. 1011) 378.
(P. 19 lines 17 - 25)

[3] ***Commercial Litigation – When a cause of action arises – a cause of action arises on the date or from the time the breach of duty occurs.***

The law is settled that a cause of action arises on the date or from the time the breach of duty occurs which warrants the person adversely affected by the breach or the injury therefrom to sue in a law court to assert or protect his legal right that has been violated.

Thus, a cause of action enures to the plaintiff the very momenta wrong is done to him by another which factual situation entitles the former to seek relief in the law court by way of enforcement. See: *Bello v. Yusuf & Ors* (2019) LPELR 47918 SC; (2019) 15 NWLR (Pt. 1695) 250; *A.G. Adamawa v. A.G. Federation* (2014) LPELR 23221 (SC); (2014) 14 NWLR (Pt. 1428) 515; *Zubair v. Kolawole* (2019) LPELR - 46928 (SC); (2019)

11 NWLR (Pt.1682) 66. **(P. 37 lines 9 - 19)**

[4] ***Commercial Litigation – Evidence at variance with pleadings – Evidence that is at variance with the pleadings goes to no issue and should be rejected and if admitted should be expunged from the record.***

Oral evidence must be consistent with the pleadings, whether it be the statement of claim or the statement of defence. This is because the case of the parties is erected by the pleadings and parties do not have the freedom to move out of the pleadings in search of a better case. Evidence which is at variance with the pleadings will go to no issue. See generally; *Adimora v. Ajufo* (1988) 3 NWLR (Pt. 80) 1; *Atanda v. Ajani* (1989) 3 NWLR (Pt. 111) 511; *Uredi v. Dada* (1988) 1 NWLR (Pt. 69) 237; *Ajao v. Alao* (1986) 5 NWLR (Pt. 45) 802)" see also *Woluchem v. Gudi* (1981) 5 SC 291, *Enang & Ors. v Adu & Ors.* (1981) 11 - 12 SC 25. (Reprint) 17 *Okhuarobo v. Aigbe* (2002) 3 SC (Pt. 1) 41, (2002) 9 NWLR (Pt. 771) 29; *Yusuf v. Adegoke & Anor.* (2007) 6 SC (Pt. 1) 126, (2007) 11 NWLR (Pt. 1045) 332 etc. **(P. 55 lines 38 - 45; P. 56 lines 1 - 3)**

[5] ***Appeal – Jurisdiction – Findings by an Appellate Court - where an appellate court finds that the trial court lacks jurisdiction over a case on appeal before it, the matter must be struck out.***

It is settled that where an appellate court finds that the trial court lacks jurisdiction over a case on appeal before it, the matter must be struck out - see *Adelekan v. Ecu-Line Consortium(supra), Okoye & Anor v. Centre Point Merchant Bank Ltd.* (2008) 15 NWLR (Pt. 1110) 335, and *Lakanmi v. Adene* (2003) 10 NWLR (Pt. 828) 353. **(P. 21 lines 41 - 45)**

[6] ***Contract – Offer and Acceptance – When does a contract becomes binding – It is during negotiation that offer and acceptance is made, and It is only after the conclusion of negotiations and the acceptance of the terms agreed upon by both parties that an agreement or a contract comes into existence.***

The acceptance of a proposal for the negotiation of an agreement does not bring into existence the agreement yet to be negotiated. It is only after the conclusion of negotiations and the *acceptance* of the terms agreed upon by both parties that an agreement or a contract comes into existence. It is during negotiation that offer and acceptance is made. The acceptance of a proposal for the negotiation of a contract is not legally enforceable. See *Dangote Gen. Textile Products Ltd & Ors v. Hascon Associates Nig Ltd & Anor* (2013) LPELR-20665, (2013) 16 NWLR (Pt. 1379) 60; *Chukwuma v. Ifeloye* (2008) 18 NWLR (Pt.1118) 204 and *BPS*

Construction and Engineering Co. Ltd v. FCDA (2017) 1 SC (Pt.2) 125 @ 181; (2017) 10 NWLR (Pt. 1572) 1.
(P. 57 lines 11 - 20)

MUHAMMAD, JSC (Delivering the Leading Judgment): This is an appeal against the judgment of the Court of Appeal, Lagos Division, hereinafter referred to as the lower court, delivered on the 5th of June 2012, affirming the decision of the Federal High Court, the trial court, dated 6th December 2010.

The appeal hinges on appellant's 3rd amended notice of appeal deemed duly filed on the 9th of November 2018 by order of this court.

The facts which brought about the appeal are briefly stated herein under.

The respondents, as plaintiffs at the trial court, commenced suit FHC/L/CS/224 against the appellant inter-alia for the enforcement of profit interest they assert they are entitled to, following an agreement between the two, from the defendant and the appellant herein. On account of appellant's refusal to assign the 1.5% net profit interest to them, the respondents entreated the trial court for:

A declaration of their entitlement to a 1.5 net profit interest in any and all appellant's oil and gas interests

(i) including those in Agbami Oil Field.

(ii) Specific performance of the net profit interest sharing agreement between the two and

(iii) Other reliefs that appear to flow from and above.

The entire reliefs the respondents seek against the appellant are as contained at page 933 of vol. 3 of the record of appeal.

In its amended statement of defence dated 28th May 2010, see page 1127, vol. 3 of the record of appeal, the appellant while admitting that by several agreements the respondents had assisted it to secure some business patronage in the Nigeria Oil Industry, it insists that respondents had been duly compensated for their services. Appellant emphatically pleads the non-existence of any agreement between the parties, oral or otherwise, to assign or enter into any agreement assigning a net profit Interest to the respondents. The appellant further denies making any representation to the respondents, the regulatory authorities and the world at large that the net profit Interest issue between the parties had been settled. Respondents' demand for the execution of the net profit Interest agreement, the appellant maintains, had on each occasion been rejected and denied.

In resolving the dispute between the two sides, the trial court made some findings of fact at pages 2155 - 2161, vol. 5 of the record of appeal. Being profoundly germane, items (m), and of the judgment are herein under reproduced: -

"(m) I find as fact that though Statoil initially, most probably following BP's lead indicated an intention or willingness to enter a long term net profit/royalty agreement with Inducon 'to be negotiated at a late date', the parties never put pen to paper, and Statoil later actively resisted such an arrangement or agreement with the plaintiffs or either of them.

(n) I find as fact however, regardless of whether it is disputed or not, represented accurately or not in the pleadings or in the final submissions, given the totality of testimony deposed and orally presented and from the exhibits tendered and admitted in evidence, that the plaintiffs BP, and the defendant proceeded within the public policy framework articulated by PW3 Dr. A.B. Oyekan MFR in his deposition and oral testimony, which is to say on the basis of a long term equitable and/or beneficial participation of a Nigerian collaborator such as the 2nd plaintiff in the circumstances of this oil industry venture.

(o) Whether the laws and regulations stipulated, the public policy framework enunciated by Dr. A.J. Oyekan MFR PW3 underpinned the conduct, exertions and commitments made by BP, Statoil and the plaintiffs in this Nigerian Oil Industry Business Development effort with understandings and agreements were reached which though enforceable were unperfected in parts." (Italic supplied for emphasis).

The trial court notwithstanding its finding 'm' above particularly made the consequential order that:

> "The specific performance of the respondents' 1.5% net profit or leasehold interest agreement with the appellant in respect of all appellant's oil and gas interests in Nigeria to be enforced by the Ministry of Petroleum Resources, the Department of Petroleum Resources, the Nigerian National Petroleum Corporation, the Ministry of Finance, the Federal Inland Revenue Service and the Nigerian Customs Service."

It is evident from the trial court's judgment that though the appellant had raised the issue that respondents case is statute barred, the point has not been determined by the court.

The lower court's affirmation of the trial court's decision informs the instant further

appeal to this court by the defendant at the trial court against the concurrent decisions of the two courts below.

At the hearing of the appeal parties identified, adopted and relied on their respective briefs of argument filed and exchanged between them for and against the appeal. The recorded twelve issues distilled by the appellant at pages 2 - 3 of its brief of argument read: -

a. **Issue One:** Considering the contractual nature of the claim of the respondents and the reliefs granted by the trial court, whether the Federal High Court had the statutory jurisdiction to have entertained the claim and make the orders granted by it and affirmed by the Court of Appeal (ground 1 of the 3rd amended notice of appeal).

b. **Issue Two:** Whether the writ of summons by which the claim at the trial court was instituted was/is valid? (Ground 2 of the 3rd amended notice of appeal).

c. **Issue Three:** Whether the claims of the respondents were/are statute barred (grounds 8, 9, 10, 33, 34 and 36 of the 3rd amended notice of appeal).

d. **Issue Four:** Considering the fact that the decision affirmed by the Court of Appeal granted reliefs in favour of and against persons who were not parties to the suit, whether the said decision is not liable to be set aside for breach of fair hearing (Grounds 5, 7, 21 and 22 of the 3rd amended notice of appeal).

e. **Issue Five:** In view of the trial court's finding that there was no agreement between the appellant and the respondents, whether the Court of Appeal was right to have affirmed the trial court's judgment on the ground that there was an agreement between the appellant and the respondents. (Grounds 18, 28, 32 and 35 of the 3rd amended notice of appeal)

f. **Issue Six:** Whether the Court of Appeal was right when it struck out issue 3 (and all the arguments therein formulated) in the appellant's brief of argument dated 7th March, 2011, filed before it. (Ground 6 of the 3rd amended notice of appeal).

g. **Issue Seven:** Whether the Court of Appeal was right to have affirmed all the orders made by the trial court when none of the principal reliefs sought by the respondent was granted. (Grounds 3, 4 and 11 of the 3rd amended notice of appeal).

h. **Issue Eight:** Considering that the trial court had resolved that there was no agreement between the appellant and the respondents, was the Court of Appeal right to have upheld the trial court's judgment on the bases that: the appellant had inherited an encumbered interest from British Petroleum (BP); the respondents was entitled to an assignment of an interest on the strength of some Federal Government policy and representations made by BP bound the appellant because both of them were in a partnership/alliance? (Grounds 12, 13, 14, 15, 19, 27, 29, 30 and 31 of the 3rd amended notice of appeal).

i. **Issue Nine:** Was the Court of Appeal correct to have affirmed the trial court's decisions on the admissibility of exhibits AA and the original copy of the amendment to the BP net profit interest agreement. (Grounds 16 and 17 of the 3rd amended notice of appeal).

j. **Issue Ten:** Was the Court of Appeal correct to have affirmed the trial court's judgment which was inconclusive and extended the life span of its interlocutory order for non repatriation of the appellant's profits. (Grounds 23 and 24 of the 3rd amended notice of appeal).

k. **Issue Eleven:** Was the Court of Appeal correct when it held that the entitlement of the respondents could not be capped by a monetary sum after production started in the oil fields? (Grounds 20 and 25 of the 3rd amended notice of appeal).

l. **Issue Twelve:** Was the Court of Appeal right when it affirmed the trial court's orders for the grant and the registration of an equity stake in the appellant's holdings? (Ground 26 of the 3rd notice of appeal."(Italic supplied for emphasis).

The respondents distilled thirteen issues at pages 16 - 17 of their brief of argument thus: -

1. Whether the Federal High Court had the jurisdiction to entertain this suit and make the orders granted by it and affirmed by the Court of Appeal? (Distilled from ground 1 of the 3rd amended notice of appeal).

2. Whether the writ of summons was valid? (Distilled from ground 2 of the 3rd amended notice of appeal).

3. Whether the respondents' claims were statute barred? (Distilled from grounds 8, 9, 10, 33, 34 and 36 of the 3rd amended notice

of appeal).

4. Whether the decision of the Court of Appeal affirming the decision of the trial court was made in favour of or against persons who were not parties to the suit and thereby occasioned a breach of fair hearing? (Distilled from grounds 5, 7, 21 and 22 of the 3rd amended notice of appeal).

5. Whether the finding of the trial court was at variance with the finding of the lower court with respect to whether there was an agreement between the parties? (Distilled from grounds 18, 28, 32 and 35 of the 3rd amended notice of appeal).

6. Whether the Court of Appeal was right when it struck out issue 3 and the appellant's arguments in paragraph 73 to 99 of its brief of argument dated 7th March, 2011 which were made in respect of the said issue 3? (Distilled from ground 6 of the 3rd amended notice of appeal).

7. Whether the judgment of the trial court, which was affirmed by the lower court, granted the principal reliefs sought by the respondents? (Distilled from grounds 3, 4 and 11 of the 3rd amended notice of appeal).

8. Whether the Court of Appeal was right to have affirmed the findings of the trial court that the BP/Statoil partnership, the appellant was bound by BP's representations and also inherited BP's interest; and (b) the Federal Government policy on indigenization also entitled the respondents to a percentage stake in the appellant's oil concessions? (Distilled from grounds 12, 13, 14, 15, 19, 27, 29, 30 and 31 of the 3rd amended notice of appeal).

9. Whether the Court of Appeal was correct to affirm the decision of the trial court rejecting the appellant's copy of the amendment to the BP Net Profit Interest agreement? (Distilled from ground 16 of the 3rd amended notice of appeal).

10. Whether the admissibility of exhibit AA was an issue before the Court of Appeal? (Distilled from ground 17 of the 3rd amended notice of appeal).

11. Whether the Court of Appeal was right to have affirmed the trial court's judgment on non-repatriation of appellant's profits? (Distilled from grounds 23 and 24 of the 3rd amended notice of

appeal).

12. Was the Court of Appeal correct when it held that the entitlement of the respondents could not be capped by a monetary sum after commencement of production from the oilfields? (Distilled from grounds 20 and 25 of the 3rd amended notice of appeal).

13. Whether the Court of Appeal was right when it affirmed the trial court's orders for the grant and registration of the respondents' equity stake in the appellant's leasehold interest? (Distilled from ground 26 of the 3rd amended notice of appeal)." (Italic supplied for emphasis).

The 1st, 3rd and 5th issues distilled by the appellant are the very same 1st, 3rd and 5th issues raised in the respondents' brief of argument. They are indeed the critical issues for the determination of this appeal.

It is very well settled that jurisdiction is the lifeblood of any adjudication. It's being lacked renders the court's proceedings no matter how well conducted, liable to be set aside for being a nullity. Jurisdiction of a court is so fundamental that once it is challenged it must be addressed and resolved first before any other steps is taken in the proceedings. This importance of a court's jurisdiction explains why it can be raised at any time, manner or stage of the proceedings be it at the trial, on appeal at the Court of Appeal or even in this court for the first time by any of the parties or by any of the courts suo motu. No decision can be more perverse than a null and void decision arrived at by a court that lacks the required jurisdiction and competence to determine the case in the first place. See *Petrojessica Enterprises Ltd v. Leventis Technical Co Ltd* (1992) 5 NWLR (Pt. 244) 675, *All Progressive Grand Alliance v. Senator Christians N. D. Anyanwu & Ors* (2014) LPELR - 22182(SC) (2014) 7 NWLR (Pt. 1407) 541.

In *Skye Bank Plc v. Victor Anaenen Iwu* (2017) LPELR-42595 (SC), (2017) 16 NWLR (Pt. 1590) 24 my lord, Peter-Odili JSC restated the principle at pages 78 - 79 of the report thus:-

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> The reason is simple since without jurisdiction, the decision of a court or tribunal without the requisite jurisdiction is a nullity, dead on arrival and of no effect whatsoever." See also *Utih v. Onoyivwe* (1991) 1 SC (Pt. 1) 65 at 96-97; (1991) 1 NWLR (Pt. 166) 166 and *Madukolu v. Nkemdilim* (1962) 2 SCNLR 341.

Chief Wole Olanipekun, learned senior counsel for the appellant, contends under their 1st issue that the trial Federal High Court lacks the jurisdiction of hearing and determining the dispute between the two sides. The main or principal reliefs the respondents seek by their amended statement of claim, it is argued, are contractual in nature. All the other eleven ancillary reliefs, it is further agitated, are dependant on the grant of respondents' three main reliefs. The evidence on record as well as the trial court's finding thereon at pages 2164 - 2165 of vol. 5 of the record of appeal, learned senior counsel argues, show clearly that the dispute between the parties is whether or not they had concluded a legally enforceable agreement. Inter alia relying on *I.T.P.P. Ltd v. U.B.N. Plc* (2006) 12 NWLR (Pt. 995) 483, *Adelekan v. Ecu-Line NV* (2006) 12 NWLR (Pt. 993) 33, and *P&C.H.S. Ltd & Ors v. Migfo (Nig) Ltd & Anor* (2012) 18 NWLR (Pt. 1333) 555, learned senior appellant counsel submits that the trial court lacks the competence of proceeding upon and determining claims on simple contract.

Further referring to *Tukur v. Govt of Gongola State* (1988) 1 NWLR (Pt. 68) 39, learned senior counsel insists that only the State High Court can grant an order for specific performance of a contract which the trial court's decision has done in the instant case. Learned senior counsel urges that the decision of the trial court as wrongly affirmed by the lower court, being a nullity, be set aside.

Responding, Uche Nwokedi SAN, in their brief and oral argument, contends that the appellant deliberately focused its attention exclusively on the reliefs entreated by the respondents rather than the facts of their case as pleaded. Jurisdiction of the trial court in relation to the subject matter of the case, it is submitted, is statutory. Section 251 of the 1999 Constitution (as amended), learned senior counsel submits, is the trial court's primary source of jurisdiction with section 7(1) and of the Federal High Court Act being the secondary source. Read together, learned senior counsel further submits, the trial court is invested with the jurisdiction in disputes relating to mines and minerals including oil field, oil mining, etc. The jurisdiction, it is further contended, extends to the hearing and determination of all issues relating to, arising from or ancillary to the subject matter principally provided for by the two legislations. The reliefs sought by the respondents and concurrently granted by the two courts, it is argued, all pertain to interests in oil field. Referring to *SPDC Nig Ltd v. Isaiah* (2001) 11 NWLR (Pt. 723) 168 at 183 - 185 and *MPNU v. SPS Ltd* (2020)9 NWLR (Pt. 1728) 1, learned senior counsel for the respondent insists that the cases the appellant relies upon are unavailing as the peculiar facts of the instant case place the matter squarely within the trial court's jurisdiction. The lower court's affirmation of the trial court's lawful exercise of its jurisdiction, learned senior counsel to the respondents conclude, cannot be interfered with. It is urged that the issue be resolved against the appellant.

My lords, learned senior counsel on both sides are one, and correctly too, that section 251(1) of the 1999 Constitution (as amended) and section 7(1) of the Federal High Court Act pointedly circumscribe the trial court's jurisdiction. I also

agree with learned senior counsel that the court cannot lawfully extend the frontiers of its jurisdiction beyond the province the Constitution and the statute specify. Being a court of limited jurisdiction, the court must function within the frontiers expressly delineated and enumerated in the two legislations. Sections 251(1) of the 1999 Constitution (as amended) and section 7(1) are similarly worded. They vest in the Federal High Court exclusive jurisdiction to hear civil causes and matters arising from mines and minerals including oilfields. See *S.P.D.C. (Nig.) Ltd v. Isaiah & Ors* (2001) LPELR-3205 (SC), (2001) 11 NWLR (Pt. 723) 168; *Alphonsus Nkuma v. Joseph Otunuya Odili & Ors* (2006) LPELR - 2047 (SC); (2006) 6 NWLR (Pt. 977) 587 and *Dec Oil & Gas Ltd v. Shell Nigeria Gas Ltd* (2019) LPELR - 49347 (SC); (2019) 14 NWLR (Pt. 1692) 273.

Again, by the numerous decisions of this court, learned senior counsel rightly further agree, the exclusive jurisdiction vested in the trial Federal High Court by virtue of section 251(1) of the 1999 Constitution (as amended) and section 7(1) of the Federal High Court Act does not extend to simple contractual disputes. See *Victor Adelekan v. ECU-Line NV* (2006) LPELR - 113(SC); (2006) 12 NWLR (Pt. 993) 33; *Onuorah v. Kaduna State Refinery and Petrol Chemical Company* (2005) LPELR - 2707(SC); (2005) 6 NWLR (Pt. 921) 393 and *Ports and Cargo Handling Services Company Ltd & Ors v. Migfor Nig Ltd & Anor* (2012) (n)LPELR (SC); (2012) 18 NWLR (Pt. 1333) 555.

Restating the principle in my concurring contribution in *Crestar Intergrated Natural Resources Limited v. The Shell Petroleum Development Company of Nigeria Limited & 2 Ors*, opined as follows: -

> "This court in *Onuorah v. Kaduna Refinery and Petroleum Company* (2005) LPELR 2707 (SC); (2005) 6 NWLR (Pt. 921) 393 held that the Federal High Court lacks the jurisdiction of determining actions grounded in breach of contract. The respondents are on a very firm ground in their reliance on the subsequent decision of this court in *P&C.H.S. Co Ltd & Ors v. Migfo (Nig) Ltd & Anor* (2012) LPELR - 9725 (SC);(2012) 18 NWLR (Pt. 1333) 555 wherein the same legislation was applied to similar facts as in *Onuorah v. Kaduna Refinery & Petroleum Company (supra).* The Court maintained its earlier stance in these two cases subsequently in *Socio - Political Research Development v. Ministry of FCT & Ors* (2018) LPELR- 45708 (SC); (2019) 1 NWLR (Pt. 1653) 313 and *TSKJ (Nig) Ltd v. Otochem (Nig) Ltd* (2018) LPELR -44294 (SC); (2018) 11 NWLR (Pt. 1630) 330.

On these authorities therefore, the law remains that the Federal High Court lacks jurisdiction over contract matters which cases are only actionable in the State High Court or the High Court of the Federal Capital Territory.

The lower court's decision which conforms with the binding precedent

provided by this Court cannot certainly be wrong. See *Atolagbe & Anor v. Awuni & Ors* (1997) LPELR - 593 (SC); (1997) 7 NWLR (Pt. 522) 536 and *APC v. INEC & Ors* (2014) LPELR-24036 (SC). (2015) 8 NWLR (Pt. 1462) 531"

The only point of disagreement between learned senior counsels is whereas the one contends that the dispute in the instant case pertains simple contract the other argues that the subject matter of the case goes beyond dispute over a simple contract. Relying on *Mobil Production (Nig.) Unlimited v. Suffolk Petroleum Services Ltd*, learned respondents' senior counsel, Nwokedi submits that since the dispute between the parties pertains appellant's activities in oil fields, the trial Federal High Court has the jurisdiction to determine the suit. Who among the two is right?

A plaintiff's claim as pleaded determines the jurisdiction of the court that hears and determines the action. To ascertain whether the instant action comes within the jurisdiction conferred on the trial court, by section 251 of the 1999 Constitution (as amended) and section 7(1) of the Federal High Court Act, therefore, it is the claim before the court that must be examined. See *Adeyemi & Ors v. Opeyori* (1976) F.N.L.R. 149, *Hassan Isa Zakirai v. Salisu Dan Azumi Muhammad & Ors* (2017) LPELR - 42349 (SC); (2017)17 NWLR (Pt. 1594) 181 and *Amaechi v. INEC* (2007) LPELR - 449 (SC); (2008) 5 NWLR (Pt. 1082) 227.

An examination of the amended statement of claim of the respondents, as Olanipekun SAN for the appellant correctly submits, leaves no one in doubt that their claim is for the enforcement of an agreement, a contract, between the parties. Paragraphs 10, 12, 13, 19, 23 and 24 and specifically assert the nature of the relationship between the parties as a contractual arrangement. The respondents by the arrangement, were to facilitate the allocation of licenses, leaseholds, in respect of some oil blocks. The appellant, the respondents pleaded, were to remunerate them inter-alia by paying them a 1.5% net profit interest in the oil produced from the oilfields grant of which licence to the appellant the respondents facilitated. Not surprisingly, the trial court itself, inter-alia in its judgment at pages 2164 - 2165 of vol, 5 of the record of appeal, has held that the question on which the parties agreed to proceed to trial is as to the existence, between them, of a legally enforceable agreement, a contract. Exhibit PE21, the net profit agreement entered into by the 1st respondent and BP, learned senior counsel rightly noted, defines the Net Profit Interest, NPI, the respondents claim against the appellant, as monetary payment the calculation of which sum is contained in clause 4 of the very exhibit. It is the appellant's failure to replicate the content of exhibit PE21, vis- a-vis the respondents, that constitutes the respondents' cause of action.

It is my firm and considered view that by these pleadings and the reliefs the respondents entreat the trial court's jurisdiction pursuant to section 251(1) of the 1999 Constitution (as amended) and section 7(1) of the Federal High Court Act

does not extend to entertaining the subject matter of the respondents' claim that is simply contractual.

Learned senior counsel for the respondents appears to suggest that in spite of these vivid facts in respondents' statement of claim the trial court is right to have proceeded on the instant case. He relies on *Mobil Production (Nig.) Unlimited v. Suffolk Petroleum Services* (2020) 9 NWLR (Pt. 1728) 1

I disagree. Cases being authorities for what they decided, the decision learned senior counsel calls in aid on the issue does not avail the respondents. My learned brother Nweze JSC, in the leading judgment in the case, never deviated from the numerous decisions of this court on the trial court's competence to hear and determine simple contract causes such as the one in the instant case. Lifting from *Wema Securities and Finance Plc. v. NAIC* (2015) 16 NWLR (Pt. 1484) 93, his lordship at page 21 of the law report admonished courts and counsel against rushing to conclusions in matters such as the one at hand thus: -

> "From the tenor and context of the above provisions that is section 251 (c); (d); (e); (f); (g); (h); (i); (j); (k); (l); (m); and (supra), the drafts person would seem to leave no one in doubt that it is the subject matter of the claim of the plaintiff that would be determinative of the jurisdiction of the court. As such, in an action involving any of the above sub-paragraphs, the court's duty may, simply, be to find out if the plaintiff's claim could be pitch-forked into any of the items in the above sections. If it could be factored into any of them, then it is only the Federal High Court that has the jurisdiction ... (Italic mine for emphasis)."

At pages 19 - 20 of the report, his lordship, after emphasizing the position of this court on the trial court's competence pursuant to section 251 of the 1999 Constitution (as amended) regarding simple contracts, adroitly enthused that the facts before this court then had brought appellant's claim therein within the trial Federal High Court's competence. Please read: -

> "True, indeed, as this court has held in *Adelekan v. ECU-Line N (supra),* the Federal High Court does not have jurisdiction in matters relating to simple contracts." (Italic supplied for emphasis).

My lord explained the reason why, in that case, he found the trial Federal High Court competent thus: -

> "However, from a perusal of the contract documents involved in this case, it is evident that this case transcends simple contracts, see, for example, paragraph 9 of the statement of claim, pages 8 - 9 of the records. The contract document can be found at pages 126 - 313 of the records. There is exhibit 'A' attached to the contract. It is titled Scope of Work. It states

what the job undertaking under the MIPS Contract is all about. This can be found at page 313 of the record.

The said exhibit 'A' contains an armada of technical contracts pertaining to oil fields, oil mining etc, that fall outside the definition of simple contract." (Italic mine for emphasis).

His lordship concluded as follows: -

"In all, from my survey of the contract documents, I have no hesitation in adopting the position in *SPDC Nigeria limited v. Isaiah (supra)* in holding that they appertain to mines and minerals including oil fields, mining, geological surveys and so on pursuant to section 251 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

The suit can, thus, only be entertained by the Federal High Court to the exclusion of the State High Court." (Italic mine for emphasis).

It must be reiterated that respondents' claim herein, unlike the one in *Mobil Production (Nig.) Unlimited v. Suffolk Petroleum Services (supra)*, is rooted in simple contract and outside the jurisdiction of the trial court pursuant to section 251(1) of the 1999 Constitution (as amended) and section 7(1) of the Federal High Court Act as expounded by this court is its numerous decisions thereon.

For the foregoing, the 1st issue is hereby resolved against the respondents.

Ordinarily, the resolution of the 1st issue for the determination of the appeal would have made the consideration of the other issues un-called for. This is so because, the judgment of the trial court, the lower court purports to affirm, being the decision of a court, bereft of the necessary jurisdiction to adjudicate in the cause, is a nullity. See *Madukolu v. Nkemdium (supra) Petrojessica Ent Ltd v. Leventis Tech Co Ltd (supra)* and *Barrister Franc Fagah Utoo v. All Progressives Congress & Ors* (2018) LPELR - 44352 (SC); (2018) 12 NWLR (Pt. 1634) 507. The wantonness in the miscarriage of justice occasioned by the futility and perversity of the concurrent decisions of the two courts, however, makes brief remarks on the 3rd and 5th issues in the appeal necessary.

At the trial court, parties had joined issue as to whether or not respondents' claim is statute barred. It is apparent from the record of this appeal that the trial court did not resolve the issue as raised by the parties. The court below, in relation to the issue held inter-alia as follows: -

"I have to say that it is the statement of claim that determines whether an action is statute barred or not. In the respondent's amended statement of claim paragraph 27 at pg. 925 - 934 of the record, the respondents

had pleaded that the cause of action arose in 2009 when they made a claim to an NPI after production commenced from the oil fields in 2008. Paragraph 27 of the respondents' statement of claim is set out below on Pg 929 vol. 3 of the records:

'27. As a result thereby, the plaintiffs relied on these representations in entering and continuing its relationship with the defendant. However, after production had commenced from the Agbami Oil Field, by a letter dated the 8th of June 2009, the defendant fraudulently denied knowledge of the plaintiffs in the first instance and also further denied the afore stated existence business development efforts and relationship with the plaintiffs.'

The respondent then went on to plead particulars of fraud.

Also, we must note that where there is an allegation of fraud, the period of limitation commences from when the respondents discovered the fraud.

Thus the respondents claim was not statute barred. See *Willaims v. Williams* (2008) 10 NWLR (Pt. 1094) pg.364 at 383.

It is my view that the cause of action arose in 2009 when a demand was made for the actualization of the promises between the parties." (Italic supplied for emphasis).

Appellant's grouse against the foregoing finding of the lower court is that with parties having joined issue as to when respondents' cause of action arose, resolution of the issue cannot be limited to the consideration of their statement of claim alone. The issue, appellant's learned senior counsel submits, must be proved on the basis of evidence from the parties.

I entirely agree with learned senior counsel's submission and find his reliance on *Woherem v. Emereuwa* (2004) 13 NWLR (Pt. 890) 398 in support of same very apposite. See also *General Muhammadu Buhari v. INEC* (2008) LPELR - 814 (SC); (2008) 19 NWLR (Pt. 1120) 246. Further relying on *Garan v. Olomu* (2013) LPELR - 20340 (SC); (2013) 11 NWLR (Pt. 1365) 227 learned senior counsel urges that this court undertakes the evaluation of the evidence on when respondents' cause of action arose with the failure of the two courts below to do so. Again, learned senior appellant's counsel is on a firm terrain.

It is the primary responsibility of the trial court to evaluate evidence proffered in a case and make the appropriate findings therefrom. The court, while evaluating the evidence, is duty bound to put the entire evidence on the imaginary scale in determining in whose favour the balance tilts. See *Mogaji v. Odofin* (1978) 4 SC91

and *Honourable Eseme Eyiboh v. Mr. Dan Abia & Ors* (2012) LPELR - 20607 (SC); (2012) 16 NWLR (Pt. 1325) 51.

Now, in paragraphs 13, 19, 23 and 24(i) of their amended statement of claim, at pages 926 - 928 of volume III of the record of appeal, the respondents assert that appellant had agreed to enter into an agreement assigning a 1.5% Net Profit/ leasehold interest in its oil acreages following respondents' facilitation efforts. The appellant having secured the licence in respect of the oil blocks, respondents further assert, however, reneged. Respondents' cause of action is founded on appellant's refusal to assign to them an interest in the concession acreage they helped the appellant to acquire.

Respondents' cause of action arose, on the authorities, on the date of appellant's refusal to assign the Net Profit Interest to the respondents.

In paragraph 20 of its amended statement of defence at page 1144 volume III of the record, the appellant aver that its refusal to assign the Net Profit Interest to the respondents occurred in 1992.

On their part, the respondents in paragraphs 27, 28, 29 and 35 of their amended statement of claim, per contra, contend that appellant's refusal to enter into agreement to or transfer the Net Profit Interest to them took place in 2009.

Having pleaded contrary positions and joined issue on the point, the two sides proffered evidence in support of their respective positions.

In exhibit 14, a letter tendered by the respondents, same as exhibit D9 from the appellant, the 2nd respondent had written the appellant as follows: -

> "Following my discussions with you yesterday, I am putting down on paper the various issues which have got to be agreed upon by Statoil and Inducon before any more movement on the outstanding issues in Lagos. I am under strict instructions not to come back to Lagos until these issues are resolved.
>
> 1. Inducon to be paid 10% of the agreed bonuses and reserve value on OPL 213, 217 and 218…
>
> 2. 2-3% NPI agreement on all three blocks (213, 217 & 218)
>
> 3. 1% of this NPI to be traded in now ….
>
> These are critical issues. I have left these issues unresolved until now because I wanted things to progress very well. I have however been instructed to conclude these now." (Italic supplied for emphasis).

Exhibit PE14 supra is dated 29 June 1992.

Exhibit PE15 was also tendered by the respondents. Dated 10th July 1992, the exhibit is appellant's reply to respondents' exhibit PE 14. Exhibit PE15 inter-alia reads: -

> "Let me now refer to your letter of 29th June, regarding compensation for your services.
>
> There are, essentially, three elements to our current agreement with you.
>
> Bonus payment for delivery of deep water license agreements with the Nigerian authorities. Compensation in this category is covered by separate agreements with BP and Statoil to pay you USD 400,000 and USD 300,000 respectively each in equal stages.
>
> Consultancy fees to cover the expenses of you and your company in pursuit of the deep water licenses. This is covered by your agreement with Statoil, Nigeria.
>
> A Net Profits Interest Agreement which you are Separately Negotiating with BP Exploration.
>
> These agreements should be adequate to cover the services you are providing to the Statoil/BPX Alliance.

With respect to the specific points raised in your letter, I can answer as follows: -

> ... 2 & 3, Net profits agreements are the subject of your separate discussions with BPX, and do not involve Statoil. Our understanding is that such an agreement with BPX is intended to cover the part you played in successfully bringing BPX back to Nigeria. As such, Statoil has no part to play in these discussions." (Italic supplied for emphasis).

In exhibit D24, respondents' letter to the appellant dated 3rd June 1993, the 2nd respondent stated inter-alia as follows: -

> "I have come to accept the inability of Statoil to have a long term profit share agreement for some unique reasons BPX has of course agreed to a 1½% profit share with me." (Italic supplied for emphasis).

Appellant's contention, from the trial court through to this court, is that by section 8(1) of the Lagos State Limitation Law 2003, respondents' action on simple contract is barred having been commenced more than six years after their cause of action had arisen. The respondents contend to the contrary.

In determining whether or not an action is statute barred, the court considers:

(i) The date when the cause of action accrued;

The date the action, as indicated on the writ, commenced

(ii) and Time within which the barring statute allows for the

(ii) action to be brought.

See *INEC v. Ogbadibo Local Government* (2015) LPELR - 24839(SC), (2016) 3 NWLR (Pt. 1498) 167; *Alhaji Oyebamiji & Ors v. Iyabo Afusat Lawanson & Ors* (2008) LPELR - 2864 (SC) reported as *Oyebamiji v. Lawanson* (2008) 15 NWLR (Pt. 1109) 122 and *Adamu Abubakar v. Michelin Motor Services Ltd* (2020) LPELR-50837; (2020) 12 NWLR (Pt. 1739) 579.

It is trite that in determining whether or not the instant suit is statute barred, it is important to ascertain when time started running against the respondents. Time, this court has held, begins to run when there is in existence a person who can sue and another who can be sued and all facts material to be proved to entitle the plaintiff to succeed have occurred. See *United Bank for Africa Plc v. Bottling Industries Ltd* (2006) LPELR - 3404 (SC), (2006) 9 NWLR (Pt. 1013) 61; *Sifax (Nig) Ltd & Ors v. Migfo (Nig) Ltd & Anor* (2018) LPELR - 49735 (SC); (2018) 9 NWLR (Pt. 1623) 138 and *A.G. Lagos State v. Eko Hotels Ltd & Anor* (2006) LPELR- 3161(SC); (2006) 18 NWLR (Pt. 1011) 378.

My lords, in the instant case, since it is the appellant who pleaded that respondents' action is statute barred, it is its burden to prove by credible evidence when respondents' cause of action accrued. It is not enough for the plaintiff to merely plead a particular date except if the defendant admits the date in a reply to the statement of defence, otherwise there would be absolutely nothing on which basis to compute when plaintiff's cause of action arose. Thus where the defendant, the appellant herein, pleads statutory limitation of action and same is not admitted in the plaintiff's reply, the court, of necessity, will resolve the objection on the basis of proffered evidence. See *Savannah Bank v. Pan Atlantic Shipping &Transport Agencies Ltd & Anor* (1987) LPELR - 302 (SC); (1987) 1 NWLR (Pt. 49) 212 and *Woherem v. Emereuwa (supra).*

I have before now had recourse to the pleadings and evidence of the two sides. It is my firm and considered view that respondents' cause of action accrued, given the content of exhibit PE14 and exhibit PE15, on 10th July 1992 rather than in 2009 the respondents insist it did. By section 8(I)(a) of the Lagos State Limitation Law the action ought to have been filed within six years from the 10th of July 1992 when the appellant repudiated the agreement the respondents assert existed between them as to the former assigning to the latter Net Profit

Interest on account of respondent's brokerage of the oil businesses the appellant secured. Respondents, from the evidence on record, commenced their action 18 years after the appellant's repudiation of the agreement respondents' claim, exist between them. Respondents' action had become statute barred at the time it was commenced. No court, neither the trial court nor any other court could hear the case at the time it was commenced. Respondents' right to enforcing their claim has been taken away by the statute. See *Abubakar v. Michelin Motor Services Ltd (supra) and Sylva v. INEC & Ors* (2015) LPELR - 2447 (SC); (2015) 16 NWLR (Pt. 1486) 576 and *Aremo II v. Adekanye & Ors* (2004) LPELR - 544 (SC); (2004) 13 NWLR (Pt. 891) 572.

The issue is resolved in favour of the appellant.

Lastly, I have elsewhere in this judgment also reproduced the trial court's finding on respondents' failure to establish the agreement between them and the appellant on the 1.5% Net Profit interest in appellant's oil field the latter was to assign the former for their brokerage. In spite of this profound finding, the trial court somersaulted and found merit in respondents' action.

Neither party to the action appealed against that decision of the trial court to the lower court. A finding of a court against which there is no appeal remains binding and conclusive. In the instant case, the trial court's finding that the respondents have not proved the existence of the agreement on which they seek their reliefs which has not been appealed against, therefore, persists. The lower court's finding on the existence of the agreement between the parties, in the absence of any appeal before it against the finding, is one made without the necessary jurisdiction, a vain one. See *Dabup v. Kolo* (1993) LPELR - 905 (SC), (1993) 9 NWLR (Pt. 317) 254; *Awodi & Anor v. Ajagbe* (2014) LPELR - 24219 (SC) (2015) 3 NWLR (Pt.1447) 578 and *Eze v. PDP & Ors* (2018) LPELR – 44907; (2019) 1 NWLR (Pt. 1652) 1. The lower court, this court has held in an endless chain of its decisions, has no right to be a "knight errant engaging in skirmishes". It has no business with any issue that has not been placed before it by parties or raised suo motu by it with the input of the parties before the resolution of same. See *Chief Ebbav. Ogodo & Anor* (1984) 4 SC 84, (1984) 1 SCNLR 372; *Clifford Osuji v. Nkemjika Ekeocha* (2009) LPELR - 2816 (SC); (2009) 16 NWLR (Pt. 1166) 81.

It is obvious from the record of this appeal that the lower court is in serious error of delving into a matter it is incompetent to decide. Not surprisingly, it has arrived at a wrong, illegal, unjust and perverse decision which this court is duty-bound to set aside.

The 5th issue is also resolved in appellant's favour.

The appeal succeeds on account of the appellant's 1st issue and it is allowed. The lower court's judgment affirming the trial court's null and void decision, being

a nullity too, is hereby so declared and set-aside.

I make no order on costs.

PETER-ODILI, JSC: I concur with the judgment just delivered by my learned brother, Musa Dattijo Muhammad, JSC. I adopt the decision and reasonings therein as mine

I abide by the consequential orders made.

AUGIE, JSC: I had a preview of the lead Judgment just delivered by my learned brother, M. D. Muhammad, JSC, and I agree with him that the bone of contention between the parties at the trial court boiled down to a simple contract, and it is settled that the Federal High Court has no jurisdiction in matters relating to simple contracts - see *Onuorah v. K.R.P.C.* (2005) 6 NWLR (Pt. 921) 393, and *Adelekan v. Ecu-Line Consortium* (2006) 12 NWLR (Pt. 993) 33, wherein this court held -

The provisions of section 251 of the Constitution of the Federal Republic of Nigeria, 1999 - are very clear and unambiguous. It's the section that confers jurisdiction on the Federal High Court, which jurisdiction clearly does not include dealing with any case of simple contract.

In this case, the trial court found that there was no contract; it said:

I find as a fact that though Statoil initially, most probably following BP's lead, indicated an intention or willingness to enter a long-term Net Profit/Royalty agreement with Inducon "to be negotiated at a later date", the parties never put pen to paper, and Statoil later actively resisted such an arrangement or agreement with the plaintiffs or either of them. The Directorate of the Department of Petroleum Resources and Ministry of Petroleum are, in the absence of an agreement between the plaintiffs and the defendants at the time the defendant was granted entry to the Nigerian Oil Industry, and that absence is acknowledged and found as fact to be lacking.

So, the trial court's finding makes it clear beyond peradventure that the respondents' claim had no bearing at all on "mines or minerals (including oil fields or oil mining, geological surveys and natural gas)" - Section 251(1) of the 1999 Constitution (as amended). The claim relates to a simple contract, and the trial court had no jurisdiction.

It is settled that where an appellate court finds that the trial court lacks jurisdiction over a case on appeal before it, the matter must be struck out - see *Adelekan v. Ecu-Line Consortium(supra), Okoye & Anor v. Centre Point Merehant Bank Ltd.* (2008) 15 NWLR (Pt. 1110) 335, and *Lakanmi v. Adene* (2003) 10 NWLR (Pt. 828) 353.

It is for this reason that I also allow this appeal, strike out the action filed by the respondents, and declare the whole proceedings at the trial court a nullity, ab initio, I also make no order as to costs.

ABOKI, JSC: I have had the privilege of reading before now, the lead judgment of my Learned brother M.D. Muhammad, JSC, just delivered. I agree with his reasoning and conclusion.

This is an appeal against the judgment of the Court of Appeal sitting in Lagos, delivered on the 5th of June 2012.

The respondents, as plaintiffs, sued the appellant as defendant, at the Federal High Court, holden at Lagos. The reliefs claimed by the respondents are stated in paragraph 38 of their amended statement of claim. They are:

i. A declaration that the plaintiffs are assignees of a leasehold interest or net profit interest of 1.5% out of the defendant's interest in the Agbami Field in consideration of the business development successes it achieved for the defendant.

ii. A declaration that the plaintiffs are entitled to a net profit interest of 1.5% in any and all of the defendant's oil and gas interests resulting from the business development efforts of the plaintiffs.

iii. Specific performance of the Net Profit Interest Agreement between the plaintiffs and the defendant.

iv. An order of court compelling the defendant to comply with paragraph 14 of the First Schedule to the Petroleum Act.

v. An account of all sums accruing to the defendant from Agbami Filed, together with a statement of projected earnings in respect thereof.

vi. An account of all incomes due to the plaintiffs from the defendants in respect of income accrued from the upstream petroleum activities of the defendant.

vii. An account of all income received from or accruing to the defendant in respect of its upstream activities in Nigeria.

viii. An order for payment by the defendant to the plaintiffs of all sums found to be due from the defendant to the plaintiffs to the taking of account under (v), and above, and interest on such sums as the court may(vii) deem fit from date of first production

until judgment.

ix. An order compelling the defendant to render full and proper accounts as at the date of this action, of all crude oil accruing to the defendant from the Agbami fields operations.

x. An order compelling the defendant to deliver up and submit to the plaintiffs, details of payments receivedx.in respect of the concession interests in Nigeria.

xi. An order of injunction, compelling the defendant to pay all income derived from all the upstream production available to the defendant into an interest-bearing account with a reputable financial institution within the jurisdiction of this court and subject to the directions of this Honourable Court, pending the determination of this action.

xii. An order of perpetual injunction restraining the defendant from alienating, transferring, or howsoever called, any of its interests in any of the oil concessions obtained for it through the efforts of the plaintiffs and subject to the directions of this Honourable Court.

xiii. Further or other relief, including all further necessary or appropriate accounts, inquiries, and directions.

The undisputed and established facts of this case are that in 1979, the Federal Government of Nigeria, had, by virtue of Decree No. 56 of 1979, the Acquisition of Assets (British Petroleum Company Limited) Act, nationalized all the interests and assets of British Petroleum in BP Nig. Ltd, and transferred same to the Nigerian National Petroleum Corporation. As a result of this nationalization exercise, British Petroleum was effectively precluded from doing any business in Nigeria and was thereby compelled to leave Nigeria. In 1990, the 2nd respondent approached BP Exploration Operation Company (BP) in the UK offering to help it re-enter the Nigerian Oil Industry. BP UK accepted the offer and engaged the 2nd respondent for that purpose. About the same time or shortly thereafter, in April 1990, BP UK agreed with the appellant's parent company, Statoil Stanvanger in Norway to cooperate in the exploration, development and exploitation of oil and gas assets in Africa, the USSR, the Pacific Margin of China and Vietnam, formed an alliance for that purpose and entered into a Memorandum of Understanding containing the terms of their relationship. The main objectives of the alliance were spelt out in a document titled "The Alliance- International Exploration and Production."

At the time of entry into this Alliance, BP was no longer in Nigeria and Statoil Norway had never operated in Nigeria. It was BP UK that introduced Statoil

Norway to the respondents soon after the formation of the Alliance, as its partner in the oil and gas venture in Nigeria. To carry out their oil business in Nigeria, each of them registered a separate Nigerian subsidiary company, namely BP Nigeria and Statoil Nigeria. These two companies carried on their joint venture oil business in Nigeria on equal basis. BP UK discussed and negotiated with the 2nd respondent the consideration and terms of payment for the facilitation and brokerage services to be rendered by the respondents and represented to the respondents that the appellant would endorse and accept the terms and consideration agreed between BP and the respondents. But while BP and the appellant agreed to coordinate their efforts, they remained, and acted as separate legal entities. Neither company had the authority to bind the other in any way without the other's express consent.

The respondents succeeded in bringing BP into Nigeria in 1991 to participate in oil industry opportunities. The appellant came along with BP to carry out joint oil and gas ventures. They jointly applied for and were granted some oil blocks or fields or concession acreage. Due to the facilitation and brokerage services to the respondents, the appellant now holds a portfolio of leasehold or participating interests and/or joint venture interest in a number of concession interests in Nigeria.

As concession for the brokerage services rendered to BP Nigeria and the appellant, each of them separately paid the respondents short term remuneration in form of an upfront cash payment of an amount and intermediate remuneration under service contracts for continued consulting and business development services.

In addition to the above mentioned payments, BP agreed to pay the respondents long term remuneration and participation in the form of leasehold interests in BP's oil concessions expressed as 1.5% of net interest in the oil produced from any oil mining lease allocated it.

The appellant refused to pay 1.5% net profit interest from its production of oil to the respondents, contending that it was not part of the agreed consideration for the respondent's service to it and refused to execute a written agreement between it and the respondents to pay 1.5% net profit interest to it, stating that such payment is not commercially and ethically justifiable as it is a nationally owned company.

The respondents contended that being a partner of BP, the appellant had the obligation to enter into an agreement to pay them the said net profit interest from oil produced from its oil block, just as BP had done, in so far as the appellant had represented to them that it would enter into such agreement with them and that it was this representation that made them provide its brokerage services to the benefit of the appellant and influenced the allocation of oil blocks by the Ministry of Petroleum to it.

The basis of the respondents' claim and the material facts necessary to establish the said claims were all pleaded in detail by the respondents. Pleaded also is the fact that in order to obtain the concessions in question, the appellant represented to the Federal Government of Nigeria that it had a local partner, which encouraged the having of a local partner as a major consideration for allocation of a concession. At some point, BP exited the concessions, and the appellant became the full beneficiary of the Assets and the programmed operations that brought them into Nigeria. Prior to its leaving, the BP had consistently honoured its obligations and confirmed in writing to the respondents that the same obligations were understood by and would be honoured by the appellant.

Production of hydrocarbons from the assets such as the Agbami Oil Field started in 2008 after BP exited and the respondents stepped forward to claim their share by making a formal demand for it by from the appellant. At this point, the appellant responded by denying any knowledge of the respondents, and stated that they had no record of any dealings with them. It was the first time the appellant had made such a categorical denial of any knowledge of the respondents and their business development efforts on behalf of the appellant.

Aggrieved by this turn of events, the respondents petitioned the Minister for Petroleum Resources who convened a meeting and attempted a mediation between the parties. The failure of the said mediation led to the institution of this case at the trial court by the respondents, who are piqued by the refusal of the appellant to pay net profit interest to them.

The appellant in joining issues with the respondents, relied on its amended statement of defence. It denied the partnership it had with BP. It denied the existence of the 50:50 sharing of costs. It denied that there was any agreement at all, oral or written, that it would assign a net profit or a leasehold interest to the respondents. It claimed that the respondents were merely consultants to the Alliance, that the oral agreement cannot be enforced and that the requisite statutory and regulatory approvals for such agreements were not obtained. It posited that at no time did it misrepresent itself to the respondents and assuming but not conceding that it did, no one relied on its misrepresentation and as such, no relief is due to the respondents.

Prior to the trial, and consequent upon an application for an injunction brought by the respondents, the trial court on the 26th of April 2010, restrained the appellant from repatriating funds out of the country, with leave to carryon normal banking operations.

At the close of trial, the trial Federal High Court, Lagos, made the following consequential orders:

a. The specific performance of the respondents' 1.5% net profit or

Leasehold Interest Agreement with the defendant in respect of the defendant's oil and gas interests in Nigeria to be enforced by the Ministry of Petroleum Resources, the Department of Petroleum Resources, the Nigerian National Petroleum Corporation, the Ministry of Finance, the Federal Inland Revenue Service and the Nigerian Customs Service.

b. The appointment of the Firm of J.K Randle Professional Services to conduct a forensic audit of all the defendant's relevant accounts with access to all relevant databases, both with the defendant and regulatory and tax authorities, as it relates to the claimants' 1.5% equity stake in the defendant's portfolio of Oil Mining Leases granted to it by the Federal Government of Nigeria.

c. The defendant's payment of the sum of ₦150,000,000 (One Hundred and Fifty Million Naira) only into the court being the fund from which J. K. Randle Professional Services will be paid their expenses and fees and if the amount is not sufficient, the defendant will be required to pay more.

d. A direction to the Department of Petroleum Resources and the Ministry of Petroleum Resources to approve and register the claimant's 1.5% equity stake in the encumbered 50% of the defendant's interest in Oil Mining Leases granted to it by the Federal Government of Nigeria.

e. A direction to the Department of Petroleum Resources and the Ministry of Petroleum Resources to fix the claimants' long term equity in the 50% unencumbered interests of the defendant in Oil Mining Leases granted to it by the Federal Government of Nigeria, using the claimants' 1.5% equity stake in the defendant's encumbered 50% as a benchmark.

f· An injunction restraining the appellant from alienating, transferring or passing on all or part of its interests in any of the oil concessions in issue and non-repatriation of its profits pending the determination of the appropriate accounts, inquiries and further direction of the court to give effect to the terms of the agreement.

Dissatisfied by the judgment of the trial court, the appellant herein, by a notice of appeal filed on the 7th of December 2010, appealed to the Court of Appeal against the said judgment. In its judgment delivered on the 5th of June 2012, the Court of Appeal affirmed the decision of the trial court, hence this appeal to this court.

The appellant's amended notice of appeal was filed on the 7th of January 2016.

On the 17th of November, 2020, at the hearing of this appeal, learned counsel on both sides adopted and relied on their respective briefs of arguments, in support of their positions.

Chief Wole Olanipekun SAN, leading Adeniyi Adegbonmire (SAN) and Bode Olanipekun (SAN), adopted the appellant's amended brief of argument filed on the 28th of May 2020, as well as the amended reply brief. Twelve issues were distilled in the appellant's amended brief of argument. They are:

1. Considering the contractual nature of the claim of the respondents and the reliefs granted by the trial court, whether the Federal High Court had the statutory jurisdiction to have entertained the claim and make the orders granted by it and affirmed by the Court of Appeal?

2. Whether the writ of summons by which the claim at the trial court was instituted, was/is valid?

3. Whether the claims of the respondents were/are statute barred?

4. Considering the fact that the decision affirmed by the Court of Appeal granted reliefs in favour of and against persons who were not parties to the suit, whether the said decision is not liable to be set aside for breach of fair hearing?

5. In view of the trial court's finding that there was no agreement between the appellant and the respondents, whether the Court of Appeal was right to have affirmed the trial court's judgment on the ground that there was an agreement between the appellant and the respondents.

6. Whether the Court of Appeal was right when it struck out issue three (and all arguments therein formulated), in the appellant's brief of argument dated 7th March 2011.

7. Whether the Court of Appeal was right to have affirmed all the orders made by the trial court when none of the principal reliefs sought by the respondent was granted?

8. Considering that the trial court had resolved that there was no agreement between the appellant and the respondents, was the Court of Appeal right to have upheld the trial court's judgment on the bases that the appellant had inherited an encumbered interest

from British Petroleum (BP); the respondents were entitled to an assignment of an interest on the strength of some Federal Government Policy; and (c) representations made by BP, bound the appellant because both of them were in partnership/alliance?

9. Was the Court of Appeal correct to have affirmed the trial court's decision on the admissibility of exhibits AA and the original copy of the amendment to the BP Net Profit Interest Agreement?

10. Was the Court of Appeal correct to have affirmed the trial court's judgment which was inconclusive and extended the life span of its interlocutory order for non-repatriation of the appellant's profits?

11. Was the Court of Appeal correct when it held that the entitlement of the respondents could not be capped by a monetary sum after production started in the oilfields?

12. Was the Court of Appeal right when it affirmed the trial court's orders for the grant and the registration of an equity stake in the appellant's holdings?

Learned counsel for the respondents, Uche Nwokedi (SAN), adopted the respondents' amended brief of argument, wherein were formulated, thirteen issues, reproduced hereunder:

1. Whether the Federal High Court had the jurisdiction to entertain the suit and make the orders granted by it and affirmed by the Court of Appeal?

2. Whether the writ of summons was valid?

3. Whether the claims of the respondents were statute barred?

4. Whether the decision of the Court of Appeal affirming the decision of the trial court was made in favour of and against persons who were not parties to the suit, and thereby occasioned a breach of fair hearing?

5. Whether the finding of the trial court was at variance with findings of the lower court with respect to whether there was an agreement between the parties?

6. Whether the Court of Appeal was right when it struck out issue three and the appellant's arguments in paragraph 73 to 99 of

its brief of argument dated 7th March 2011, which were made in respect of the said issue three?

7. Whether the judgment of the trial court, which was affirmed by the lower court, granted the principal reliefs sought by the respondents?

8. Whether the Court of Appeal was right to have affirmed the findings of the trial court that by the BP/Statoil Partnership, the appellant was bound by the BP's representations and also inherited the BP's interest; and (b) the Federal Government Policy on indigenization also entitled the respondents to a percentage stake in the appellant's oil concessions?

9. Whether the Court of Appeal was correct to affirm the decision of the trial court rejecting the appellant's copy of the amendment to the BP Net Profit Interest Agreement?

10. Whether the admissibility of exhibit AA was an issue before the Court of Appeal?

11. Whether the Court of Appeal was right to have affirmed the trial court's judgment on non-repatriation of the appellant's profits?

12. Was the Court of Appeal correct when it held that the entitlement of the respondents could not be capped by a monetary sum after commencement of production from the oil fields?

13. Whether the Court of Appeal was right when it affirmed the trial court's orders for the grant and registration of the respondents' equity stake in the appellant's leasehold interests?

I adopt the issues canvassed by the appellants as the issues to be determined in this appeal. Issues one and three are considered together.

Issue One

Considering the contractual nature of the claim of the respondents and the reliefs granted by the trial court, whether the Federal High Court had the statutory jurisdiction to have entertained the claim and make the orders granted by it and affirmed by the Court of Appeal?

Issue Three

Whether the claims of the respondents were/are statute barred?

It is the contention of learned senior counsel for the appellant that a court's jurisdiction is the basis for the exercise of judicial power and any proceedings conducted in absence of jurisdiction is void ab initio. He continued by saying that in examining jurisdiction, recourse must be made to the reliefs sought in the amended statement of claim. He referred this court to these cases, amongst others: *Madukolum v. Nkemdilim* (1962) 1 All NLR (Pt. 4) 587, (1962) 2 SCNLR 341; *Oloruntoba-Oju v. Abdulrahim* (2009) 13 NWLR (Pt.1157) 83.

He argued that based on the main reliefs in the respondent's claim before the trial court, an analytical interrogation of the reliefs would reveal it was a contractual obligation between the parties which was supported by the trial court in its decision at pages 2164 to 2165 Vol 5 of the record.

He maintained that since the reliefs sought for are contractual in nature, the appropriate court with which the suit ought to be instituted is the state High Court and not the trial court. In support of this argument, he referred to the case of *ITTP Ltd v. UBN Plc* (2006) 12 NWLR (Pt. 995) 483.

It is his view that the respondent's amended statement of claim was for the grant of a simple contract sum and net profit interest particularly the declaratory reliefs for net profit interest. He invited this court's attention to exhibit PE21.

Learned Silk posited that only the State High Court can grant an order for a specific performance of a contract. He relied on the case of *Tukur v. Government of Gongola State* (1988) 1 NWLR (Pt.68) 39 and argued that the relief of specific performance must be rooted in the existence of a contract and these issues are outside the jurisdiction of the Federal High Court.

On whether the respondent's case is statute barred, it is postulated for the appellant that by the provisions of section 8 sub(1)(a) of the Limitation Law of Lagos state a claim for breach of contract must be instituted within six years from when the contract arose.

Learned senior counsel for the appellant argued that the cause of action arose in 1992 and the instant suit was initiated in 2010, 18years after, which presupposes that the action is statute barred. He submitted that the 3 witnesses of the respondents failed to give an insight as to the date the alleged breach of agreement occurred.

It is his view that all the appellant's witnesses and exhibit PE 14, exhibit D9, exhibit PE 15 and exhibit D24 all supported the appellant's claim that the cause of action arose in 1992. He continued that during cross-examination which is contained on pages 1399 and 1400 of Vol 4 of the record the respondent admitted that the agreement to enter into an NPIA was made in 1991. He referred this court to the case of *Yare v. NSWIC* (2013) LPELR 20520; (2013) 12 NWLR (Pt. 1367) 173.

This court is urged to resolve these issues in favour of the appellant.

On the other hand, it is submitted for the respondents that the Federal High Court has the requisite constitutional, statutory and inherent jurisdiction to entertain the suit.

Relying on section 251 (1)(n) & (s) of the CFRN 1999 as amended, as well as section 7(1)(n)(3) of the Federal High Court Act, and section 8(1) of the Petroleum Act, learned senior counsel for the respondents posited that the trial court had the jurisdiction, to settle disputes in respect of matters relating to mines and mineral interests (including oilfields, oil mining, geological surveys and natural gas).

It is his view that the grant of an Oil Prospecting Licence (OPL) or Oil Mining Lease (OML) and indeed the creation of any kind of leasehold or mineral interest must be done in accordance with the provisions of the Petroleum Act for which the approval of the Minister of Petroleum Resources is a sine qua non for the creation of such interests in the oil industry. The entire arguments, therefore, put forward by the appellants that this is a simple contract, according to him, are therefore untenable. He made reference to these cases: *MPNU v. SPS Ltd* (2020) 9 NWLR (Pt. 1728) 1; *SPDC Nig Ltd v. Isaiah* (2001) 11 NWLR (Pt. 723) 168 @ 183 - 185

Learned senior counsel for the respondent argued that this court, in the sister appeal, held that the relief for specific performance is not a principal relief and it, therefore, cannot be the basis for determining whether the trial court had jurisdiction to entertain the case, and the cases of *ITPP Ltd v. UBN Plc (supra)*; *P & C.H.S Co. Ltd v. MIGFO Nig Ltd supra* and *Adelekan v. Ecu-line NV supra*; heavily relied upon by the appellant, does not help its case.

On whether the claims of the respondents are statute-barred, it is the view of senior counsel for the respondents that the suit leading to this appeal is not statute-barred.

Learned senior counsel commended this court to exhibit PE40 and opined that the Lagos State Limitation Law does not apply in the instant case.

It is his view that the issue now raised that the suit at the trial court was statute-barred was not a matter brought up by the appellants at the court below and no evidence proffered at the trial court on the matter for it evaluation on whether or not the matter was statute-barred to handle a matter of statute barring a suit evidence must be laid on which the trial court would make an evaluation hence the necessity that it must be pleaded and evidence led. Therefore, it is wrong to raise it here in counsel's brief. The case of *Okafor v. Abumofuani* (2016) 12 NWLR (Pt. 1525) 117 @ 34 was cited in reliance.

Learned senior counsel for the respondents opined that the appellant did not raise

the issue of statute bar at the court below for that court to evaluate the evidence on whether or not the action was statute barred and raising it for the first time in this court which leave is required. He argued that assuming, but without conceding that the issue of statute bar is a matter of jurisdiction and can be raised at any time even for the first time before this court, this court would still come to the conclusion that the cause of action is not statute barred.

He maintained that the appellant ought to be consistent in presenting its case, and that the inconsistency in the appellant's presentation of its case is fatal as grounds 8, 9, and 10 of the third amended notice of appeal ought to be struck out for being formulated to attack an issue not decided by the judgment complained against.

He placed reliance on these cases:

Okafor v. Abumofuani (2016) 12 NWLR (Pt. 1525) 117, *Adeniran v. Interland Transport Ltd* (1991) 9 NWLR (Pt. 214) 155, *Jallco Ltd v. Owoniboys Tech Service* Ltd (1994) 4 NWLR (Pt. 391) 534.

This court is urged to resolve these issues against the appellant.

I have before now, set out the reliefs claimed by the respondents at the trial court. For avoidance of doubt, the two principal reliefs are:

i. A declaration that the plaintiffs are assignees of a leasehold interest or net profit interest of 1.5% out of the defendant's interest in the Agbami Field inconsideration of the business development successes it achieved for the defendant.

ii. A declaration that the plaintiffs are entitled to a net profit interest of 1.5% in any and all of the defendant's oil and gas interests resulting from the business development efforts of the plaintiffs.

On what determines the jurisdiction of court to entertain a cause/matter, this court, per Ogbuagu JSC (as he then was), in *Integrated Timber and Plywood Products Ltd v. U.B.N Plc* (2006) LPELR 1519 SC, held thus: (2006) 12 NWLR (Pt.995) 485.

> "Let me therefore stress here and reproduce the principle enunciated by this court - per Obaseki JSC, which is now firmly settled in the case of *Alhaji Tukur v. The Government of Gongola State* (1989) 4 NWLR (Pt. 117) 517 at 549; (1989) 9 SCNJ 1. It is as follows: "It is a fundamental principle that jurisdiction is determined by the plaintiff's claim. In other words, it is the claim before the court that has to be looked at or examined to ascertain whether it comes within the jurisdiction conferred on the court..."

It is not in doubt that leasehold interest or net profit interests which is derived from

interests held in oil concessions, which interests concern oil production sharing contracts, and joint venture agreements, which govern such relationships including acts which are dependent on ministerial consent, are governed by section 251 of the 1999 Constitution, which is the exclusive domain of the Federal High Court. More particularly, subsection (1)(n) of section 251 of the 1999 Constitution (as amended), provides as follows:

> 'Notwithstanding anything to be contained in this Constitution and in addition to such order jurisdiction as may be conferred upon it by an act of National Assembly, the Federal High Court shall have an exercised jurisdiction to the exclusion of any other court in civil cause and matter …
>
> (n) mines and minerals (including oil fields, oil mining, geological survey and natural gas).

This court has on numerous occasions interpreted the provisions of section 251 of the 1999 Constitution, as amended.

In the case of *Adetona and Ors v. Igele General Enterprise Ltd* (2011) LPELR-159 SC; (2011) 7 NWLR (Pt. 1247) 535 this court held as follows;

> "The exclusive jurisdiction of the Federal High Court is provided by section 251 sub 1 of the Constitution as follows ... [n], mines and minerals including oil fields, oil mining, geographical survey and natural gas ...."

Most recently, in the case of *MPNU v. SPS Ltd supra*, this court held thus:

> "The question which should be answered in this appeal is whether the facts of this case falls within the definitions of matters connected with or pertaining to mines and minerals including oil fields, oil mining, geographical survey and natural gas? His lordship's response provides an illuminating guide to the conundrum which the question under consideration provokes ... It is relevant to refer to the practice of the oil prospecting license holders during mining operations. These have been described in the petroleum act 1960 and oil pipelines act 1956 ... In all, from my survey of the contract documents, I have no hesitation in adopting the position in *S. P. D. C. Nig. Ltd. v. Isiah (supra)* in holding that they appertain to mines and minerals including oil fields, mining, geological surveys, and so on pursuant to section 251 of the Constitution of Federal Republic of Nigeria, 1999 (as amended). The suit can thus only be entertained by the Federal High Court to the exclusion of the State High Courts."

What is in issue here, is whether the respondents' claim falls under section 251 of the CFRN 1999 (as amended)?

It is obvious from the clear terms of the amended statement of claim that this is a contractual dispute. The respondents, as plaintiffs, assert therein that there exists an agreement between them that the appellants are to pay them 1.5% of the net profit interest from the oil produced from the oil fields licensed or leased to it, due to the brokerage efforts of the respondents; that the cause of this action is that after they had helped the appellant secure the licence or lease of some oil blocks and it had started producing oil therefrom, it has refused to fulfil its contractual obligation to pay them the 1.5% of the net profit made from oil produced. They therefore claimed reliefs in their amended statement of claim, on the basis of their above assertions.

Looking at the respondents' claims already reproduced above, it is obvious that the main relief in the respondents' claim is the breach of the contractual obligations between the parties, for which the respondent sought redress at the trial court.

It follows, therefore, that the claims of the respondents do not come within the scope of section 7(1)(p) of the Federal High Court Act.

In the case of *SPDC (Nig) Ltd v. Isaiah & Ors.* (2001) LPELR3205 SC, (2001) 11 NWLR (Pt. 723) 168 this court held that for the Federal High Court to have exclusive jurisdiction under section 7(1)(p) of the Federal High Court Act, the cause or matter should be connected with or pertaining to mines and minerals, including oil field, oil mining, geological surveys and natural gas and the jurisdiction shall be construed to include jurisdiction to hear and determine all issues relating to, arising from or ancillary to mines and minerals, oil fields, oil mining etc.

Since disputes founded on simple contracts are not among those included in the jurisdiction conferred on the Federal High Court, that court therefore, had no jurisdiction to entertain the respondents' claim. I refer to the case of *Onuorah v. Kaduna Refining& Petrochemical Co. Ltd* (2005) LPELR 2707 SC; (2005) 6 NWLR (Pt. 921) 393. This issue is resolved in favour of the appellant.

The appellant has also argued that the respondents' action at the Federal High Court was statute barred. The issue of statute bar generally touches on when the cause of action arose and when the suit was initiated.

It must be noted that the issue of statute bar, was raised at the trial court, but abandoned at the court below. The appellant is not allowed to set up issues here, not raised in the court below. See*: Idufueko v. Pfizer Products Ltd & Anor* (2014) LPELR 22999 SC;(2014) 12 NWLR (Pt. 1420) 96. Be that as it may, the issue of whether a suit is statute barred goes to the jurisdiction of the court to entertain the matter and as such can be entertained here.

I have thoroughly perused the exhibits admitted in evidence, and of particular interest to me are exhibits PE 14, PE 15 and PE16. In exhibit D24 dated 3rd June

1993, the appellant stated that the respondents were aware that it did not intend to assign an NPI to them. Also in exhibit PE19, dated 12th September, 1993, BP confirmed the subsistence of the respondents' entitlement to an NPI from both itself, and the appellant. In addition, the NPIA (NPI agreement) between BP and the respondents was made on 12th November, 1993 (See exhibit PE 21), and by exhibit PE 22 they assured the respondents and reiterated that the respondents could approach the appellant and conclude a similar NPI, as agreed by the Alliance (BP and the appellant). See also exhibit AA of July 1997, whereby the appellant recognized and confirmed the fact that the respondents' claim to the NPI was very much under consideration by the appellant; exhibit PE 33 of 10th October 1998 which was a follow up to the contents of exhibit AA, exhibit PE 35 of 10th March2004 and exhibit PE 36 of 12th July 2005.

A detailed look at the above mentioned exhibits would indicate the correspondences, between the appellant and the respondents.

Exhibit PE14 is the demand for payment of net profits interest that was first made by the respondent on 29th June 1992, by their Letter (exhibit PE14) to the appellant, which reads inter alia:

> "Following my discussions with you yesterday, I am putting down on paper, the various issues which have got to be agreed upon by Statoil and Inducon before any more movement on the outstanding issues in Lagos. I am under strict instructions not to come back to Lagos, until these issues are resolved.
>
> 1. Inducon to be paid 10% of the agreed bonuses and revenue value of OPL 213, 217, and 218...
>
> 2. 2-3% NPI Agreement on all three Blocks (213, 217 and 218)
>
> 3. 1% of this NPI to be traded in now....
>
> These are critical issues I have left unresolved until now because I wanted things to progress very well. I have however been instructed to conclude these now."

The appellant wrote exhibit PE15 on the 10th of July 1992, In reply to exhibit PE 14, stating thus:

> "Let me now refer to your letter of June 29th regarding compensation for your services. There are, however, essentially, three elements with you.
>
> a. Bonus payment for delivery of deep water license agreements

with the Nigerian authorities. Compensation in this category is covered by separate agreements with BP and Statoil to pay you USD 400,000 and USD 300,000 respectively each in equal stages.

b. Consultancy fees to cover the expenses of you and your company in pursuit of the deep water licenses. This is covered by your agreement with Statoil, Nigeria.

c. A Net Profits Interest Agreement which you are separately negotiating with BP Exploration.

These agreements should be adequate to cover the services you are providing to the Statoil/BPX Alliance.

With respect to the specific points raised in your letter, I can answer as follows:

> ... 2 & 3 Net Profits Agreements are subject of your separate discussions with BPX, and do not involve Statoil. Our understanding is that such an agreement with BPX is intended to cover the part you played in successfully bringing BPX back to Nigeria. As such, Statoil has no part to play in these discussions."

The 2nd respondent, who is the alter ego of the 1st respondent wrote exhibit D24 on the 3rd of June 1993. It reads in essence thus:

> "I have come to accept the inability of Statoil to have a long term profit share agreement with me for some unique reasons. BPX has of course agreed to a 1.5% profit share with me"

The court below held that the cause of action arose in 2009, when the respondents received exhibit PE 40 of 8th June 2009. An excerpt of the said exhibit PE 40 reads thus:

> "Attn: Dr. Henry Abebe Induction (Nigeria) Limited ...Reference is made to your letters dated 25 May 2009 to Mr. Rolf Magne Larsen, and 22 September 2008 to the undersigned. I would appreciate to receive copies of any written documentation forming the basis for the claims presented by you in the above mentioned correspondence to Statoil Nigeria Limited. Finally, I would request that all possible correspondence in this case is sent to the undersigned as Statoil Hydro's representative in Nigeria."

I find nothing in the said exhibit PE40, indicating that the cause of action arose in 2009. Evidence abounds on record that the dispute leading to this action was ignited by the appellant's letter of 10th July 1992 (exhibit PE15), rejecting the

respondents' proposal in its letter dated 29th June 1992 (exhibit PE 14), stating that it is unable to participate in such discussions. The letter of 10th July 1992 disputed the existence of any agreement or understanding between the appellant and the respondents concerning sharing of net profit interest between them and the appellant therein refused to participate in any discussions on the matter. So it is not correct that the respondents became aware of such a dispute for the first time in 2009 following exhibit PE40.

The law is settled that a cause of action arises on the date or from the time the breach of duty occurs which warrants the person adversely affected by the breach or the injury therefrom to sue in a law court to assert or protect his legal right that has been violated.

Thus, a cause of action enures to the plaintiff the very momenta wrong is done to him by another which factual situation entitles the former to seek relief in the law court by way of enforcement. See: *Bello v. Yusuf & Ors* (2019) LPELR 47918 SC; (2019) 15 NWLR (Pt. 1695) 250; *A.G. Adamawa v. A.G. Federation* (2014) LPELR 23221 (SC); (2014) 14 NWLR (Pt. 1428) 515; *Zubair v. Kolawole* (2019) LPELR - 46928 (SC); (2019) 11 NWLR (Pt.1682) 66.

That being the case, I hold the firm view that the cause of action in the instant case arose in 1992, pursuant to exhibits PE 14 & 15, and I discountenance the respondents' position that the suit is not statute barred.

This issue is also resolved in favour of the appellant.

Having held that the trial court has no jurisdiction to entertain a case of simple contract, no useful purpose would be served in determining the remaining issues.

It is established law that where a court discovers that it has no jurisdiction to entertain a matter, the proper order to make is to strike it out. See *Adetayo & Ors v. Ademola & Ors* (2010) LPELR-155 SC; (2010) 15 NWLR (Pt. 1215) 169.

The respondents' suit at the Federal High Court is hereby struck out, as the Federal High Court lacked the jurisdiction to entertain same.

The judgment of the court below delivered on the 5th of June 2012, affirming the trial court's decision, is hereby set aside.

I abide by the consequential orders contained in the lead Judgment of my learned brother, M.D. Muhammad, JSC.

AGIM, JSC: I had a preview of the judgment delivered by my learned brother, Lord Justice Musa Dattijo Muhammad JSC.

Let me express my views on issues Nos. 1, 5, 7, 8 and 11.

It is obvious from the clear terms of the amended statement of claim that the subject matter of this suit is a dispute over the existence of a contract that entitles the respondents to a 1.5% share of the net profits accruing to the appellant from the oil it produced from the oil fields or blocks licensed or leased to it. The respondents as plaintiffs assert therein that there exist an agreement between them and the appellant for the appellant to pay them 1.5% of its net profit interest from the oil produced from the oil fields licensed or leased to it due to the brokerage efforts of the respondents, that the cause for this action is that after they had helped the appellant secure the license or lease of some oil blocks and it had started producing oil therefrom, it has refused to fulfil its contractual obligation to pay them the 1.5% of the net profit made from the oil produced. The respondents claimed for the reliefs in their amended statement of claim on the basis of their above assertions. The appellant in its amended statement of defence denied the existence of such a contract. The issue joined by both sides in their pleadings is whether they did enter into such agreement. This was the question that was tried and decided by the trial court and further considered by the Court of Appeal.

While the trial court found that no such agreement was made, the Court of Appeal found that it was made in oral form and that the appellant refused to put it in writing.

This is clearly a contractual dispute arising from the license or lease of oil and gas fields or blocks to the appellant and the mining or production of oil from the said fields or blocks. S.251(l)(n) and of the 1999 Constitution and S.7(1)(n) and of the Federal High Court Act as amended expressly vest exclusive jurisdiction in the Federal High Court over civil cases and matters whose subject matter is mines and minerals (including oil fields, oil mining, geological surveys and natural gas).

S.251 and of the 1999 Constitution provides that -

> "(1) Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters-
>
> (n) Mines and minerals (including oil fields, oil mining, geological surveys and natural gas)
>
> (s) Such other jurisdiction civil or criminal and whether to the exclusion of any other court or not as may be conferred upon it by an Act of the National Assembly".

S.7 (l)(n) of the Federal High Court Act as amended provide that

1. The court shall to the exclusion of any other court have and exercise jurisdiction in civil causes and matters-

(n) mines and minerals (including oil fields, oil mining, geological surveys and natural gas)"

3. Where jurisdiction is conferred upon the court under subsections and of this section, such jurisdiction shall be construed to include jurisdiction to hear and determine all issues relating to, arising from or ancillary to such subject matter.

The question I will consider here is whether a contractual dispute arising from the license or lease of oil and gas fields or blocks to the appellant and the mining or production of oil from the said fields or blocks is within the subject matter prescribed in S.251(1)(r) of the 1999 Constitution and S.7(1)(n) of the Federal High Court Act as being within the exclusive jurisdiction of the Federal High Court. It is the wordings of S.251(1)(r) of the 1999 Constitution and S.7(1)(n) and of the Federal High Court Act and nothing else that must be considered in determining this question. There are no words in these provisions limiting the civil cases and matters relating to or arising from mines and minerals (including oil fields, oil mining, geological surveys and natural gas) within the exclusive jurisdiction of the Federal High Court. It used the general phrase "civil causes and matters" without limiting words. Even the subject matter of the civil cases and matters is stated generally as follows - mines and minerals (including oil fields, oil mining, geological surveys and natural gas). There is nothing in these words limiting the civil cases involving these subject matters that are subject to the exclusive jurisdiction of the Federal High Court only to specific types. Therefore, by the clear and unambiguous words of these provisions, the Constitution intends that all civil cases and matters arising from the mining of oil from oil fields are within the exclusive jurisdiction of the Federal High Court. Where the Constitution states a word or phrase generally or without any limiting words, it is obvious that it intends that the word or phrase should have a general meaning and application, unless other provisions in the Constitution state or suggest the contrary. If there are no other provisions of the Constitution requiring or suggesting the contrary, the court must apply the word or phrase generally, and will have no power to restrict its application to specific situations.

S.7(3) of the Federal High Court Act clarifies the scope of the subject matters listed in subsection therein to include all issues relating to, or arising from or ancillary to the named subject matter.

There is nothing in the provisions of S.251(1) of the 1999Constitution that excludes from the jurisdiction of the Federal High Court civil cases and matters whose subject matter is a contractual dispute over the existence of a contractual right to a share of the profit accruing from the production of oil from an oil field. The

paramount consideration is that the dispute relates to or arises from the mining of oil from oil fields licensed or leased to the appellant. In my opinion, once the subject matter of the dispute is within the subject matter jurisdiction of the court, the nature of the disputed agreement or contract is irrelevant. There is nothing in S.251(1)(n) and of the 1999 Constitution and S.7(1)(n) and of the Federal High Court Act as amended that justify the exclusion of a contractual dispute arising from mining oil from an oil field from the exclusive jurisdiction of the Federal High Court on the ground that it is a simple contract. It is settled law that jurisdiction that is expressly vested by the Constitution or statute can only be expressly ousted by the Constitution or Statute as the case may be.

The decisions of this court in *Adelekan v. Ecu-Line NV(supra), Onuorah v. Kaduna State Refinery & Petrochemical Co (Supra)* and *Ports & Cargo Handling Services Co. Ltd. & Ors v. Migfor Nig Ltd & Anor (supra)* cited in the lead judgment as stating that the exclusive jurisdiction vested in the Federal High Court does not extend to simple contracts, did not lay down a principle of general application in all cases irrespective of the peculiar facts of each case. The decision of this court in those cases were rendered in the context of their peculiar facts having regard to the relationship between their respective subject matters to the subject matter jurisdiction vested on the Federal High Court by S.251(1) of the 1999 Constitution and S.7(1) of the Federal High Court Act. In *Adelekan v. Ecu-Line*, this court agreed with the argument of learned counsel for the respondent that the claim was simply a contract not an admiralty matter and held that the Federal High Court had no jurisdiction over the said contract and negligence claims. In *Onuorah v. Kaduna Refinery & Petrochemical Company* this court found that the respondent is not a Federal Government Agency because as a limited liability company incorporated under the Companies Act, it is a body corporate distinct from its shareholders, that it is not a subsidiary of NNPC, that therefore an action against it for breach of its contract with the appellant for supply to appellant of a specified number of empty tins is not an action against an agency of Federal Government and is not within the jurisdiction given to the Federal High Court by S.230(1)(q),(r) and of the 1979 Constitution (equivalent of S.251(1) of the1999 Constitution), and the claim not being related to any item in S.230(1) of the 1979 Constitution, is simply a claim in contract that is within the jurisdiction of the State High Court. In *Ports & Cargo Handling Services Co Ltd & Ors v. Migfor Nig Ltd & Anor (supra)* this court found that the subject matter of the suit, a contractual dispute over a joint venture bid to manage and operate Terminal C, Tin Can Island Port, Apapa has no relationship with the subject matter in S. 251(l)(g) of the 1999 Constitution and is therefore not within the subject matter jurisdiction of the Federal High Court in S.251(1)(g). In *Mobil Production (Nig) Unlimited v. Suffolk Petroleum Services* (2020) 9 NWLR (Pt.1728) 1, even though this court distinguished the contract in that case from a simple contract by finding that the transaction involved "an Armada of Technical Contracts", what influenced its decision that the case is within the subject matter jurisdiction in S.251(1)(n) of the 1999 Constitution is the fact that the contracts pertain to oil fields and oil mining.

Where the subject of a contractual dispute has no relationship with any of the subject matters listed in S. 251(1) of the 1999 Constitution and S.7(1) of the Federal High Court Act within the exclusive jurisdiction of the Federal High Court or does not arise from any transaction in such subject matters, it remains simply a contractual dispute that is not within the jurisdiction of the Federal High not because it is a simple contract, but because it is not related to or arising from any of the items in S.251(1) of the Constitution and S.7(1)(n) of the Federal High Court Act. If it is a contractual dispute relating to or arising from the said items, then it is within the exclusive jurisdiction of the Federal High Court.

In the light of the foregoing, I hold that the trial court had the jurisdiction to entertain and determine this case and properly exercised its jurisdiction to do so when it entertained and tried it.

Issue No.1 is resolved in favour of the respondent.

Let me now consider issues Nos. 5, 7, 8 and 11 in the appellant's brief together.

I have carefully read and considered all the arguments in the respective brief on these issues. Let me now determine the merit of those arguments.

Let me begin the determination of these issues with are statement of the undisputed and established facts of this case. In 1979 the Federal Government of Nigeria, had, by virtue of Decree No.56 of 1979, the Acquisition of Assets (British Petroleum Company Limited) Act, nationalized all the interests and assets of British Petroleum in BP Nigeria Ltd, and transferred same to the Nigerian National Petroleum Corporation. As a result of this nationalization exercise, British Petroleum was effectively precluded from doing any business in Nigeria and was thereby compelled to leave Nigeria. In 1990, the 2nd respondent approached BP Exploration Operation Company (BP) in UK offering to help it re-enter the Nigerian Oil Industry. BP UK accepted the offer and engaged the 2nd respondent for that purpose. About the same time or shortly thereafter, in April 1990, BP UK agreed with the appellant's parent company, Statoil Stavanger in Norway to cooperate in the exploration, development and exploitation of oil and gas assets in Africa, the USSR, The Pacific Margin of China and Vietnam, formed an alliance for that purpose and entered into a memorandum of understanding containing the terms of their relationship. The main objectives of the alliance were spelt out in a document titled "The Alliance-International Exploration and Production". At the time of the entry into this Alliance, BP was no longer in Nigeria and Statoil Norway had never operated in Nigeria. It was BP UK that introduced Statoil Norway to the respondents soon after the formation of the Alliance, as its partner in the oil and gas venture in Nigeria. To carry out their oil business in Nigeria, each of them registered a separate Nigerian subsidiary company, namely, BP Nigeria and Statoil Nigeria. These two companies carried on their joint venture oil business in Nigeria on equal (50:50) basis.

BP UK discussed and negotiated with the 2nd respondent the consideration and terms of payment for the facilitation and brokerage services to be rendered by the respondents and represented to the respondents that the appellant would endorse and accept the terms of the consideration agreed between BP and the respondents. But while BP and the appellant agreed to co-ordinate their efforts, they remained, and acted, as separate legal entitles. Neither company had the authority to bind the other in any way without the other's express consent.

The respondents succeeded in bringing BP into Nigeria in 1991 to participate in oil industry opportunities. The appellant came along with BP to carry out joint oil and gas ventures. They jointly applied for and were granted some oil blocks or fields or concession acreages.

Due to the facilitation and brokerage services of the respondents, the appellant now holds a portfolio of leasehold or participating interests, and or joint venture interests in a number of concessions interest in Nigeria.

As consideration for the brokerage services rendered to BP Nigeria and the appellant, each of them separately paid the respondents short term remuneration in the form of an upfront cash payment of an amount and intermediate remuneration under service contracts for continued consulting and business development services.

In addition to the above mentioned payments, BP agreed to pay the respondents long term remuneration and participation in the form of a leasehold interest in BP's oil concessions expressed as1.5% of net profit interest in the oil produced from any oil mining lease allocated it.

The appellant refused to pay 1.5% net profit interest from its production of oil to the respondents contending that it was not part of the agreed consideration for respondent's service to it and refused to execute a written agreement between it and the respondents to pay 1.5% net profit interest to it, stating that such payment is not commercially and ethically justifiable as it is a nationally owned company.

The respondents contend that being a partner of BP, the appellant had the obligation to enter into an agreement to pay them the said net profit interest from oil produced from its oil block, just as BP had done, that the appellant had represented to them that it would enter into such agreement with them and that it was this representation that made it provide its brokerage services to the benefit of the appellant and influenced the allocation of oil blocks by the Ministry of Petroleum to it.

It is this refusal of the appellant to pay net profit interest to the respondents that is the cause for this action. The central issue in dispute in this action is whether there was any form of agreement by the appellant to pay the respondents net

profit interest and if there was no such agreement, was the appellant under any legal obligation to pay such net profit interest to the respondents?

The trial court in its judgment resolved this dispute thusly -

"it is not in dispute that BP agreed or reached understanding with the plaintiffs that "inconsideration of the plaintiffs procuring the lifting of the ban by the Federal Government of Nigeria and renegotiating the re-entry of BP In Partnership With Statoil (Emphasis Mine) into Nigeria and further procuring ... concession acreage for the Partnership of BP and Statoil, the plaintiffs would receive from each member of the Alliance.

Short term remuneration in the form of an upfront cash payment of an amount or amounts that was or were eventually paid and settled.

Intermediate remuneration in the form of service contracts for continued consulting and business development services.

Further, whether disputed or not, whether represented accurately or not in the pleadings, or the final submissions of counsel I find as fact from the totality of the testimony deposed and orally given and from the exhibits tendered and admitted in evidence, that BP concluded a long term remuneration and participation agreement with the plaintiffs in relation to the initial petroleum interests to be awarded BP in Nigeria; BP's interest being defined as BP's fifty percent (50%) participating interest in each of the Blocks and each of the Production Sharing Contracts (PSC).

Clearly this was an agreement entered into when there was no production in any of the oil concession; and was therefore contingent on production under the aegis of production sharing contracts.

The one and one-half percent ceded by BP to Inducon Nigeria Limited on the 12th November, 1993 signified a long term commitment by BP to the Nigerian Oil Industry (already as it was). In Alliance (emphasis mine) with Statoil; hence the reference to BP's 50% participating interest.

Further, whether disputed or not, whether represented accurately or not in the pleadings or the final submissions of counsel, I find as fact that though Statoil initially, most probably following BP's lead, indicated an intention or willingness to enter a long term Net Profit/Royalty agreement with Inducon "to be negotiated at a late date", the parties never put pen to paper, and Statoil later actively resisted such an arrangement or agreement with the plaintiffs or either of them.

In *Courtney & Fairbairn Limited v. Tolaini Brothers (hotels) Limited* before the Court of Appeal (1971 C no. 6262). Lord Denning Master of the Rolls presiding

with Lord Diplock and Lord Lawton.

It was here that there being no agreement upon such a fundamental matter as the price in a building contract, or the method by which it was to be calculated, there was no contract.

Secondly that the law did not recognize a contract to negotiate and where a fundamental matter was left to be the subject of negotiation there was no contract. The Directorate of the Department of Petroleum Resources and the Ministry of Petroleum Resources are, in the absence of an agreement between the plaintiffs and the defendants at the time the defendant was granted entry to the Nigerian Oil Industry, and that absence is acknowledged, and found as fact to be lacking, - these authorities are directed to fix the plaintiffs' long term equity in the 50% presently unencumbered interests of Statoil in Nigerian Oil Mining Licenses/ Leases, using the 1.5% equity stake the plaintiffs already have in the defendants encumbered 50% as a benchmark. This is consistent with public policy at the time and I believe now as well.

Should the Ministry of Petroleum Resources and Directorate of the Department of Petroleum Resources have revised its Policy that would be a matter for transactions other than the instant one. Let the Authorities give teeth to their policy of indigenous representation and participation in the exploitation of Production Sharing Contracts or abandon it as the case maybe. In the instant case, let them follow through on the policy climate enveloping the parties when the plaintiffs acted to develop the defendants' business interests in the Nigerian Oil Industry."

The Court of Appeal reviewed the above decision of the trial court and held inter alia that:

> "This issue in controversy at the court below and the findings of fact we are asked to review is whether or not the respondents were entitled to the1.5% interest in the oil producing well expressed as a net profit interest. At page 925 - 934 Vol. 3 of the records, paragraphs 8, 9, 10, 11, 12, 13, 14, 16, 19 and 20 of the amended statement of claim was consistent with the findings of the trial Judge that the respondents' interest was contained or embedded in the production proceeds of the assets of the appellants. This was pleaded in detail and the respondents tendered exhibit PE19, PE21 and PE22. I have reviewed the evidence of the trial court and I am of the opinion that the findings of the said court cannot be faulted. The respondents proved that they worked to use their connections to develop the business of the BP/Statoil Alliance. See Mr. C.A. Wright's letter of 12th September, 1993 where it was stated inter alia that:
>
> > "… I can confirm and allay your worries that BP and Statoil will give you a net profit interest as agreed and stated in our

Memorandum of Understanding in 1991, titled the Alliance…."

See page 2135 of the record Vol. 5 Similarly Steven P. Edrich's letter of 10th December 1993 to the 2nd respondent stated inter alia:

> "Congratulations once again for getting the Net Profit Interest with BP in place. I hope you can now approach Statoil and conclude a similar NP1 as agreed by the Alliance."

See Pg. 2135 of the record, Volume 5.

The 2nd respondent had said under re-examination that even though he signed an agreement with BP in November 1993, he did not sign the same with Statoil because they told him he should wait until actual production started. To further induce the respondents, the appellant granted the 2nd respondent some of its founder's shares and appointed him as a Director and Vice Chairman of the Company. The entire respondents' witnesses testified to the nature of the partnership called "Alliance" between BP and Statoil. In effect they were joined at the hip as it were in all their endeavours and agreements. The evidence on record shows that the appellant kept on promising the respondents the Net Profit agreement that would be effected immediately production started while inducing him with titbits. I am of the view that there was abundant proof that the Alliance comprising of BP and Statoil made certain representations to the respondents by which they were both bound. The issue of lack of privity of contract does not arise since the Alliance was a party on one hand and the respondent was a party on the other hand. I am of the view that the first issue of whether the trial Judge decided the case on unpleaded issues must be resolved against the appellant.

I have read the evidence on record. I am convinced that there was an oral agreement entered into when there was no production any of the oil concessions and the written agreement was therefore contingent on production.

The appellant in this further appeal to this court has challenged the above finding of the Court of Appeal, contending that the finding is contrary to the finding of the trial court that was not challenged in the appeal before it and that it is not supported by any evidence.

The respondents in their brief argued in reply that the Court of Appeal findings are not at variance with the findings of the trial court and the evidence on record.

The respondents' brief did not respond to the argument that the findings of the Court of Appeal are in conflict with those of the trial court on this issue. Be this as it is, the merit of the argument must still be considered to determine if it is wrong or correct. Where one party in a case has argued a point whether of law or fact, he thereby invites the court to judicially determine the issue so argued.

The argument serves to invoke and guide the courts judicial inquiry into the issue. The contrary or alternative argument by the other side is to provide an alternative or balanced guide for the court on the matter. The absence of such reply cannot be taken to mean that the pending argument represents the law and the facts of the case. The court should not treat the argument not replied to as automatically correct merely because it was not replied to. It should still find out if the said argument as it stands has merit. If the court finds that it has merit, uphold it. If it finds that it has no merit dismiss it. The arguments remain mere inferences or opinions of law and facts on the basis of the evidence on record. It is the state of the facts on record and the existing relevant law that will determine the validity of such argument and not the absence of an alternative or contrary opinion. See *Echere v. Ezirike* (2006) All FWLR (Pt. 323) 1597 at 1608 (SC); (2006) 12 NWLR (Pt. 994) 386 and *Onwugbelu v. Ezebuo & Ors* (CA/E/56/2009 of 21-2-2013).

It is clear that the findings of the Court of Appeal are in conflict with those of the trial court. The Court of Appeal finding that there was in existence an oral agreement by the appellant to pay the respondents 1.5% net profit interest once it starts production of oil from its oilfields is contrary to the finding of the trial court that no form of such agreement was entered into between appellant and respondents. The trial court was clear in its finding that only BP entered into an oral agreement to pay net profit interest to the respondents and that the oral agreement was reduced into writing in 1993. It found that the appellant did not enter into such agreement. The respondents in their brief restated this finding of the trial court and thereby showed that they correctly understood them. This is clear from the argument of Learned SAN for the respondents that -

> "in as much as there was an oral agreement between BP and the respondents on the NPI when there was no production in any of the oil concessions before BP and the respondents entered into the NPIA in 1993, the lower court was right to find as it did. This finding of the lower court concurred with that of the trial court to the effect that there was no written agreement between the respondents and the appellant at the time the appellant was granted entry into the Nigerian oil industry, that is before 1993, but there was an oral agreement between BP and respondents before 1993 which was formally put in writing in 1993. This is also consistent with the concurrent findings of the lower court to the effect that, "Clearly this was an agreement entered into when there was no production in any of the oil concession; and was therefore contingent on production under the aegis of production sharing contracts. The one and one-half per cent ceded by BP to Inducon Nigeria Limited on the 12th November 1993 signified along term commitment by BP to the Nigerian Oil industry (already as it was) IN ALLIANCE (emphasis mine) with Statoil," and as admitted by the appellant in paragraphs 22.4 and 22.5 of its amended brief that: "understandings and agreements reached which though enforceable were unperfected in parts."

I think that the exercise of the appellate jurisdiction of the lower is supported by ground one of the appeal before it as follows-

> "The Learned Judge was wrong in law to hold that the respondents had established, on the evidence, a legal right to a 1.5% net profit interest in the appellant's oil and gas assets in Nigeria (including the Agbami oilfield)".

It is also supported by ground two as follows -

> "The Learned Trial Judge was wrong in law to hold that the alleged oral agreement was valid and came 'alive' in July 2008 when production started in the Agbami oilfield."

This ground of appeal gives the false impression that the trial court found that there was in existence an oral agreement between the appellant and the respondents. The trial court never found so. Its finding was that such agreement exists only between BP and the respondents. It is because of this finding that it resorted to public policy as a basis for directing the Ministry of Petroleum Resources and the Directorate of the Department of Petroleum Resources to give the respondents 1.5% net profit interest from the oil produced from the appellant's oil fields under oil mining licenses/leases. This false impression encouraged the above finding of the Court of Appeal and therefore created the room for the contrary findings.

Let me now consider if the Court of Appeal finding of the existence of an oral agreement by the appellant to pay the respondents 1.5% net profit interest when it starts producing oil in the oilfields allocated to it is supported by any evidence.

The respondents had averred in paragraphs 14 and 17 of their amended statement of claim thusly -

> "14. At all material times, BP took the lead in discussion and negotiations with the plaintiffs, with the understanding that Statoil would automatically endorse and accept any agreements reached.
>
> 17. In accordance with the agreement of the parties, BP continued to negotiate with the plaintiffs, with the knowledge and acquiescence of Statoil on the percentage of the leasehold, which will determine the net profit interest that would accrue to the plaintiffs, with the clear understanding that the same terms would apply to the other partner in the Alliance Statoil."

The 2nd respondent as sole witness for the respondents testified in his examination in chief contained in his witness statement on oath that -

"7. In 1990, in the course on my consulting work with foreign business interests in the oil and gas industry in Nigeria, I recognized that there were some new opportunities in the upstream sector of the oil industry and set about putting a structure in place that would effectively harness those opportunities, especially the offshore concession acreages which were to be awarded for the first time.

8. An essential part of my strategy at the time was to identify a multi-national group with a strong tradition in exploration and production because offshore exploration and production activity requires a high level of technical competence and very deep pockets for its funding. So it was important to identify a strong group for this venture. The strategy at the time was also that I would thereby gain at least a participating interest in any successful bid.

9. Consequently, I approached British Petroleum and invited them to consider going into business with me in Nigeria. Initially, they expressed some reservations and the fear that having been completely excluded in the past it would be impossible for any opportunities to be availed them, so that they can carry on business in Nigeria.

10. I assured them that I would ensure their return to Nigeria, and then I undertook the responsibility to sort this matter out and to negotiate their re-entry into Nigeria. I also undertook to procure at least one offshore concession acreage as a viable venture for us, and to re-integrate them back into the Nigerian oil industry. They accepted my proposals and we agreed on the arrangement. Later on, at some point, I was informed of a partnership with the Norwegian national oil company otherwise known as Statoil, and that their ventures in Nigeria would be conducted via the arrangement known as the BP/Statoil Alliance (the Alliance). I was presented with a document evidencing the nature of their partnership and both BP and Statoil explained to me that the nature of their relationship was such that Statoil would accept and generally give the same undertaking and be bound equally on any matter accepted by the Alliance. It was stated that all terms and obligations would be borne on a 50:50 basis and that anything done by one partner to the Alliance would be "mirrored" by the other partner."

It is not in dispute on the pleadings and evidence and it is conceded by all that BP did orally agree to pay the respondents 1.5% net profit interest from its own oil concessions when production of oil starts. It is glaring from the pleading and evidence that when BP informed the appellant of its discussions and oral

agreements with the respondents, the appellant rejected the proposal that it enters into similar agreement with the respondents to pay them net profit interest when it starts oil production from its own oil concessions.

The appellant in paragraph 9 of its amended statement of defence averred concerning this matter thusly -

> "9. Paragraph 9 is denied. In particular, it is denied that the defendant ever represented to the plaintiffs or either of them that "all agreements reached (with BP) would be performed in equal terms by both parties, without more." In this regard:
>
> 9.1 As early as October 1990, prior to the signing of a Memorandum of Understanding between Statoil AS and BP for the Alliance in December 1990, BP had apparently agreed in principle to enter into a Net Profit Interest ("NPI") agreement with the plaintiffs. Statoil AS was not informed by BP about its in principle agreement to enter into the NPI agreement with the plaintiffs until May/June 1991. When it did Statoil informed BP that Statoil found a NPI agreement unacceptable both commercially and in principle and that Statoil for its part would not enter into such an agreement.
>
> 9.2 Statoil's position was reiterated to BP at a meeting held by BP and Statoil AS in November 1991 in London. At the meeting BP informed Statoil that it would go ahead and sign a NPI agreement with Inducon alone. BP stated, as was also recorded in the recital to its NPI agreement of 12 November 1993 with the first plaintiff, that the plaintiffs facilitated its recommencement of business in Nigeria. Statoil had never been banned from entering Nigeria and therefore could not justify on commercial or ethical grounds the payment of an NPI to the plaintiffs.
>
> 9.3 In April 1992, Statoil had exhaustive internal discussions on the question of an NPI payment to the plaintiffs and concluded that such an agreement was unacceptable commercially and in principle. Statoil's conclusion was communicated to BP and to the plaintiffs as hereafter pleaded.
>
> 9.4 Statoil's position was also recorded by BP in its own document entitled "Final Briefing for EJPB visit to Lagos, 1st June 1992", which was prepared by BP's Rob Huddart. It appears that "EJPB" stands for Edmund John Philip Browne, the CEO of BP Exploration at that time and later the CEO of BP Amoco. In relation to what the document refers to as "John Abebe Contract", the document records that:

> "BP has concluded negotiations with John Abebe, and will shortly execute an agreement that includes a Net Profits Interest in the event of Alliance success (BP Share).
>
> Statoil Company Rules preclude this type of agreement, but they have now agreed with John that their separate agreement will include staged bonus payments and a fixed monthly fee, payable in any event.
>
> John Abebe is reportedly happy with this arrangement, and the matter should not be an issue during the visit to Lagos."

9.5 In a letter dated 10 July 1992 to the plaintiffs, Statoil As unequivocally repudiated the suggestion that it had agreed to pay the plaintiffs any sum of money based on a NPI calculation which the first plaintiff appears to have agreed with BP. The letter stated inter alia that:

> "Net profits agreements are the subject of your separate discussions with BPX, and do not involve Statoil. Our understanding is that such an agreement with BPX is intended to cover the part Inducon has played in successfully bringing BPX back to Nigeria. As such, Statoil has no part to play in these discussions. "

9.6 Statoil's position was reconfirmed in another letter to the plaintiffs dated 13 August 1992.

9.7 Whatever might have been the plaintiffs' understanding prior to the July and August 1992 Statoil letters pleaded above and whatever might have been said to the plaintiffs previously by BP or any officer of the defendant, on receipt of the letters the plaintiffs could not reasonably have had any belief that the defendant had agreed that all agreements reached by the plaintiffs with BP would be performed in equal terms by BP and Statoil AS, whether as alleged or at all.

9.8 The plaintiffs' letter to Statoil dated 3 June 1993 confirmed that the plaintiffs understood and accepted that Statoil would not enter into a net profit share agreement with them. The letter stated inter alia that the plaintiffs had "come to accept the inability of Statoil to have a long term profit share agreement with (them) for some unique reasons. BPX has of course agreed to a 1 ½ %

profit share".

9.9 Between 1991 and 1994 the plaintiffs and Statoil AS entered into four written agreements and between 1995 and 1997, the defendant and Inducon Overseas entered into at least three written agreements which were not in identical terms to any agreements entered into by the plaintiffs or either of them with BP (to the best of the defendant's knowledge). On 28 November 1993 a further written agreement was entered into between Statoil AS and Inducon Overseas.

10.1 As was known to the plaintiffs at all times material to these proceedings, neither Statoil AS nor the defendant was ever banned from participating in the Nigerian oil industry. Accordingly, the defendant had no need for the plaintiff's services in that regard.

10.2 The plaintiffs did not negotiate the entry of Statoil AS or the defendant into the Nigerian oil industry, whether as alleged or at all."

The respondents responded to the above averment in paragraph 2 of their reply to the amended statement of defence thusly-

"2. The plaintiffs state in response to paragraphs 9.8, 11.12, 11.13 and 11.14 of the amended statement of defence that the 2nd plaintiff's letter dated 3 June 1993 addressed to Kai Killared, a former Vice President of the defendant was written in response to an attempt by the defendant to novate the long term Net Profit Interest Agreement."

It is glaring that this averment in paragraph 2 of the respondent's reply did not deny the direct and specific averments in paragraph 9 of the amended statement of claim particularly the appellant's letter of 10-7-1992 to them repudiating the suggestion that it had agreed to pay them any net profit interest and the appellant's letter of 13-8-1992 reconfirming its position. These facts are not contained in the amended statement of claim and are new facts introduced by the amended statement of defence. Being such new facts, the respondents were mandatorily bound by law to directly answer them. By not denying the averments in paragraph 9 of the amended statement of defence, the respondents admitted the facts therein and the facts became established. Issues were therefore not joined on them. See *A.G. Abia State v. A.G. Federation* (2005) 6 SC (Pt.1) 63 (2005) 12 NWLR (Pt. 940) 452 in which this court restated the law on the effect of failure of a plaintiff to file a reply to defence or averment in a statement of defence. This court held thusly;

> "Having regard to the several complaints of the plaintiff, one would have expected the plaintiff to file a reply to this averment so that the defence proffered by the 1st defendant would at the very least, be put in doubt. This would at the very least, be put in doubt. This the plaintiff did not do. Then the legal effect of such a failure surely is recognised as an admission of those facts pleaded by the 1st defendant. It is therefore not a question of estoppel as argued by the plaintiff. The situation therefore is not for the plaintiff to argue that the 1st defendant had wrongly raised the defence of estoppel in law. In my humbly view, what the 1st defendant had stated in plain language is, that the plaintiff cannot be heard to complain about the averments made by the 1st defendant that meetings were held to resolve whatever payments were due from the plaintiff in respect of the debts it inherited and those which the State incurred after its creation. In my humble view, the position of the 1st defendant in the circumstances, is that the plaintiff having not pleaded anything to the contrary to the averments made by the 1st defendant on the point is estopped from denying that such meetings were held as copiously pleaded in the statement of the 1st defendant as amended."

In addition to the respondents' admission of the facts showing that the appellant had no form of agreement or understanding with the respondents to pay them net profit interest, exhibits PE 14, PE15, D7, D8 and D24 corroborate the said admitted facts that the appellant had no form agreement or understanding to pay net profit interest to the respondent.

Exhibit PE 14, a letter written by the 2nd respondent to the appellant reads thusly:

> "Following my discussions with you yesterday, I am putting down on paper the various issues which have got to be agreed upon by Statoil and Inducon before any more movement on the outstanding issues in Lagos. I am under strict instructions not to come back to Lagos until these issues are resolved.
>
> Inducon to be paid 10% of the agreed bonuses and reserve value on OPL 213, 217 and 218.
>
> 1. 2 - 3% net profit interest agreement on all three blocks (213, 217 and 218)
>
> 2. 1% of this NPI to be traded in now."
>
> These are critical issues. I have left these issues unresolved until now because I wanted things to progress very well. I have however been instructed to conclude these"

The appellant replied in exhibit 15 thusly:

> "Let me now refer to your letter of 29th June 1992, regarding compensation for your services ...
>
> With respect to the specific points raised in your letter, I can answer as follows:
>
> 2 & 3 Net Profits agreements are the subject of your separate discussions with BPX, and do not involve Statoil. Our understanding is that such an agreement with BPX is intended to cover the part you played in successfully bringing BPX back to Nigeria. As such, Statoil has no part to play in these discussions."

The 2nd respondent in exhibit D24, his handwritten letter to the appellant, accepted the inability of the appellant to enter into a profit sharing agreement with them. The letter reads thusly:

"Thank you for your hospitality Stavanger and for giving me the opportunity to say congratulations on the success of the Nigerian PSC agreement.

I would like to put in writing for your urgent consideration, issues we discussed. You promised to address the issues and to come back to me as soon as possible after the usual consultations. I mentioned to Chris Wright about a year ago, the need to appoint me vice Chairman of Statoil (Nig). This will go down well with the Nigerian authorities and to the public in general. It is useful that I am not seen as only a name on a letter headed paper. It certainly will not carry any importance in terms of decisions but will be a good public relations ploy.

I have come to accept the inability of Statoil to have a long term profit share agreement with me for some unique reasons. BPX has of course agreed to a 11/ 2% profit share with me. With this in mind, I have always believed that the medium term compensation for the services I am carrying out for the Alliance should reflect this. I am thus appealing that the monthly fee be restored to $40,000.

With the signing of the PSC, were are going into the medium term operational phrase.

I am pleading for a lump sum bonus/allowance payment to Inducon of between $300 - 400,000. As I explained, the previous payments were really for the success on the blocks (213, 217, 218) and the work out in the past 3 year on them. The success on signing and the concessions achieved on the negotiations need to be recognized and we are not really asking for anything big. I also believe this can be cost recovered. This is the most pressing issue for me right now and I hope you can consider this favourably.

I promised to continue to work effectively and quietly for the success of the Alliance

Nigeria. I believe there is a lot of work/lobby to do from now on especially on the cost recovery of the huge Pre-operational expenses, new business development, management committee lobby, branch office establishment, Port-Harcourt operations and putting the necessary legislation in place.

My wife and I look forward to our trip to Norway at the end of the month and I would like to thank you for this kind gesture.

I hope to hear from you soon.

In exhibit D BP stated thusly:

> "BP has concluded negotiations with John Abeba, and will shortly execute an agreement that includes a Net Profits Interest in the event of Alliance success (BP share)

Statoil company rules preclude this type of agreement, but they have now agreed with John that their separate agreement will include staged bonus payments and a fixed monthly fee, payable in any event.

John Abebe is reportedly happy with this arrangement, and the matter should not be an issue during the visit to Lagos.

Clause 9 of exhibit 18, the termination agreement between BP, appellant, Inducon Overseas and respondents' states thusly:

> "John Abebe hereby confirms that neither he nor any company, partnership or other entity in which he has an interest is entitled to any outstanding payment or remuneration by reason of services provided to Statoil or any affiliate of Statoil or to BP or any affiliate of BP in relation to their activities in Nigeria except for:
>
> a. The payments expressly provided for by the Service Agreement as amended by this Agreement;
>
> b. The payments expressly provided for by the Net Profit Interest Agreement dated 12th November 1993 between BP and Inducon (Nigeria) Limited as same has been amended from time to time.

The above exhibits support the consistent testimonies of DW1, DW2 and DW3 (officials of the appellant) that the appellant had from the beginning maintained that it cannot enter into profit sharing agreement with the respondents and cannot pay them Net Profit Interest.

The respondents were not consistent in their case. In paragraphs 14 and 17 of their amended statement of claim they averred that BP discussed and negotiated with them on the understanding that the appellant would automatically endorse and accept any agreement reached including the agreement to pay net Profit Interest or percentage of the leasehold, but the 2nd respondent testified as PW1, both in his examination in chief in paragraphs 10 and 11 of his written statement on oath and even under cross examination that he agreed right from the beginning with BP and the appellant. His very words in cross-examination read thusly:

> "I agreed right from the onset with top officials of BP and Statoil"

He even mentioned the names of the officials of Statoil that were involved in that agreement. The testimony of 2nd respondent that right from the onset it agreed with the officials of BP and officials of the appellant to pay the respondents net profit interest in addition to other remuneration is at variance with their pleadings in paragraphs 14 and 17 of their amended statement of claim that the agreement was with BP who represented to the respondents that the appellant would certainly accept the terms. The said testimony of PW1 on who the 2nd respondent negotiated and agreed with at the onset is legally inadmissible evidence for being at variance with the respondent's pleading on the issue. It is therefore wrongly admitted evidence and must accordingly be expunged from the evidence in the case. It is hereby expunged as such evidence. Issues are joined in the pleadings and not on the evidence. Any evidence that is at variance with the issues joined in the pleading goes to no issue and is inadmissible. This court has made this restatement in several cases without exception. In *Bamgboye v. University of Ilorin* (1999) 6 SC (Pt. 11) 72, (1999) 10 NWLR (Pt. 622) 290 this court held that:

> "Issues, it must be emphasized, are joined in the pleadings, not in the evidence. See *Ehimare v. Emhoyon (supra)*; *Adeosun v. Adisa* (1986) 5 NWLR (Pt. 40) 225 at 235 and *Akintola v. Solano* (1986) 2 NWLR (Pt. 24) 598 at 623 SC. Evidence which is at variance with the pleadings goes to no issue and should be rejected and if admitted should be expunged from the record. See *Emegokwue v. Okadigbo* (1973) 4 SC 113 at 117; *Dike v. Nzeka* (1986) 4 NWLR (Pt. 34) 144. 156 and *Lana v. University of Ibadan* (1987) 4 NWLR (Pt. 64) 245, 258 - 259, 262.

In *Okoko v. Dakolo* (2006) 14 NWLR (Pt. 1000) 401 held thusly - It is elementary law that oral evidence must be consistent with the pleadings, whether it be the statement of claim or the statement of defence. This is because the case of the parties is erected by the pleadings and parties do not have the freedom to move out of the pleadings in search of a better case. Evidence which is at variance with the pleadings will go to no issue. See generally; *Adimora v. Ajufo* (1988) 3 NWLR (Pt. 80) 1; *Atanda v. Ajani* (1989) 3 NWLR (Pt. 111) 511; *Uredi v. Dada* (1988) 1 NWLR (Pt. 69) 237; *Ajao v. Alao* (1986) 5 NWLR (Pt. 45) 802)" see also *Woluchem v. Gudi* (1981) 5 SC 291, *Enang & Ors. v Adu & Ors.* (1981) 11 - 12

SC 25. (Reprint) 17 *Okhuarobo v. Aigbe* (2002) 3 SC (Pt. 1) 41, (2002) 9 NWLR (Pt. 771) 29; *Yusuf v. Adegoke & Anor.* (2007) 6 SC (Pt. 1) 126, (2007) 11 NWLR (Pt. 1045) 332 etc.

It is obvious from the forgoing that right from the onset, it was BP that negotiated and agreed with the respondent and undertook that the appellant would certainly endorse or accept the agreements. It is not in dispute on the pleadings and evidence of both sides, that each company would enter into separate agreements with the respondents and that the respondents believed, based on discussions with BP, that the appellant shall accept to enter into agreements with them on terms identical with those of BP with them. What is clear from the pleading and evidence of both sides is that when BP presented the terms of its discussions and negotiations to the appellant, it rejected the part proposing that it enters into an agreement with the respondent to pay them 1.5% net profit interest on oil productions from the Oil Fields allocated it by the Government of Nigeria. All sides agree in their pleadings and evidence that it was BP that orally agreed with the respondents to pay them 1.5% net profit interest from oil produced from the fields allocated to it and in 1993, the oral agreement was put into writing. By the respondents own showing in paragraph 14 of their amended statement of claim, their discussions and negotiations with BP for itself and the appellant was subject to the appellant's endorsement or acceptance. Now that the appellant has rejected the part of the discussion or negotiation requiring or proposing that it agrees to pay the respondent's net profit interest when it starts producing oil from its own oil fields, as commercially and ethically not justifiable, because it is a nationally owned company and has refused to enter into any such agreement in writing, it is difficult to conceive how an oral agreement by it to make such payment to the respondents can be said to exist in this whole process.

I have carefully read and considered the Alliance document mentioned by PW1, which document the respondents relied heavily on for their contention that the appellant was bound to enter into agreements on terms similar to those between BP and respondents and that the appellant was bound by the representations BP made to them. The document did not state in any of its part that the appellant would accept and be bound by any matter accepted by BP and that anything done by one partner to the Alliance would be accepted by the other partner. In any case the document contains a joint venture agreement between the parent companies of BP Nigeria and the appellant defining how they should jointly co-operate in oil explorations and productions in USSR, China, Vietnam, Nigeria, Angola and other African countries. The agreement does not define the relationship between the overseas subsidiaries of the Alliance Partners and those who facilitate their oil businesses overseas. The respondents are not parties to that agreement and have no enforceable legal rights in that agreement. Their reliance on the Alliance agreement for their claims against the appellant has no legal basis.

To prove that the appellant had indicated its willingness to accept the net profit

interest agreement, the respondents relied on a letter dated 15-11-1991 from appellant to 2nd respondent, particularly the portion that reads thusly -

> "Lastly I am to convey to you Statoil's willingness to agree/accept your proposal for a service contract and along term Net Profit/Royalty agreement with Inducon to be negotiated at a later date."

This letter rather further shows that the appellant did not enter into any agreement with the respondents to pay them net profit interest. The willingness to accept the proposal for a net profit interest agreement to be negotiated at a later date, does not create a legally binding agreement. The acceptance of a proposal for the negotiation of an agreement does not bring into existence the agreement yet to be negotiated. It is only after the conclusion of negotiations and the acceptance of the terms agreed upon by both parties that an agreement or a contract comes into existence. It is during negotiation that offer and acceptance is made. The acceptance of a proposal for the negotiation of a contract is not legally enforceable. See *Dangote Gen. Textile Products Ltd & Ors v. Hascon Associates Nig Ltd & Anor* (2013) LPELR-20665, (2013) 16 NWLR (Pt. 1379) 60; *Chukwuma v. Ifeloye* (2008) 18 NWLR (Pt.1118) 204 and *BPS Construction and Engineering Co. Ltd v. FCDA* (2017) 1 SC (Pt.2) 125 @ 181; (2017) 10 NWLR (Pt. 1572) 1.

In any case, assuming the appellant had by the letter of 15-11-1991 indicated its willingness to accept the proposal for a net profit interest agreement to be negotiated at a later date, exhibits PE14, PE15, D7 D24 and D18 show clearly that it refused to accept the said proposal. Exhibit 14, a letter dated 25-6-1992 from the 2nd respondent state clearly that the issue was yet to be resolved and requesting that both sides resolve same. Exhibit PE15 from the respondent rejected the respondents' proposal in exhibit PE 14 stating that - Net Profits agreements are the subject of your separate discussions with BPX, and do not involve Statoil. Our understanding is that such an agreement with BPX is intended to cover the part you played in successfully bringing BPX back to Nigeria. As such, Statoil has no part to play in these discussions.". The 2nd respondent in exhibit 024, his handwritten letter to the appellant, accepted the inability of the appellant to enter into a profit sharing agreement with them. The letter reads thusly:

I have come to accept the inability of Statoil to have a long term profit share agreement with me for some unique reasons. BPX has of course agreed to a 1 1/2 % profit share with me. With this in mind, I have always believed that the medium term compensation for the services I am carrying out for the Alliance should reflect this. I am thus appealing that the monthly fee be restored to $40,000. With the signing of the PSC, we are going into the medium term operational phrase.

I am pleading for a Lump sum bonus/allowance payment to Inducon of between $300 - 400,000. As I explained, the previous payments were really for the success on the blocks (213, 217, 218) and the work out in the past 3 year on them. The

success on signing and the concessions achieved on the negotiations need to be recognized and we are not really asking for anything big. I also believe this can be cost recovered. This is the most pressing issue for me right now and I hope you can consider this favourably.

I promised to continue to work effectively and quietly for the success of the Alliance Nigeria. I believe there is a lot of work/lobby to do from now on especially on the cost recovery of the huge pre-operational expenses, new business development, management committee lobby, branch office establishment, Port-Harcourt operations and putting the necessary legislation in place.

In exhibit D7 BP acknowledged that the company rules of the appellant preclude it from it paying net profit interests from its oil transactions to its brokers. Therein BP stated thusly:

> "BP has concluded negotiations with John Abeba, and will shortly execute an agreement that includes a Net Profits interest in the event of Alliance success (BP share) Statoil company rules preclude this type of agreement, but they have now agreed with John that their separate agreement will include staged bonus payments and a fixed monthly fee, payable in any event. John Abebe is reportedly happy with this arrangement, and the matter should not be an issue during the visit to Lagos.

Clause 9 of exhibit 18, the termination agreement dated 28-5-1997, 5 years after the appellant entered the oil industry in Nigeria, terminated the agreement between BP, appellant, Inducon Overseas and respondents stating thusly:

> "John Abebe hereby confirms that neither he nor any company, partnership or other entity in which he has an interest is entitled to any outstanding payment or remuneration by reason of services provided to Statoil or any affiliate of Statoil or to BP or any affiliate of BP in relation to their activities in Nigeria except for:
>
> a. The payments expressly provided for by the service agreement as amended by this agreement;
>
> b. The payments expressly provided for by the Net Profit Interest Agreement dated 12th November 1993 between BP and Inducon (Nigeria) Limited as same has been amended from time to time.

In the light of exhibits D18 and D24 the respondents have no right of action in this case, having accepted the appellant's inability to enter into profit sharing agreement with them and having asked for and accepted what he considered as adequate remuneration for his services and having, in the agreement of 28-5-1997 terminating its agreement with BP and appellant, accepted that it is not

entitled to any remuneration outside the ones expressly provided for by the service agreements between them. The respondents having admitted in exhibit D24 the appellant's inability to enter into a profit sharing agreement with them and having therein asked for and accepted what they considered as adequate remuneration for their services to the appellant, cannot turn around and assert the existence of the same agreement between them and the appellant and on that basis is claiming to be paid percentage of 1.5% of the net profit the appellant has received from oil produced from the oil fields licensed or leased to it. The respondents cannot deny the fact that the appellant did not enter into any form of agreement with them to pay them 1.5% of its net profits from oil produced from its oil fields by virtue of S.169 of the Evidence Act 2011 which provides that -

> "When one person has, either by virtue of an existing court judgment, deed or agreement, or by his declaration, act or omission, internationally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative in interest shall be allowed, in any proceeding between himself and such person or such person's representative in interest, to deny the truth of that thing."

This is a statutory enactment of the equitable principle of estoppel or estoppel by conduct. It is a rule of evidence that operates to prevent one from denying what he or she had admitted. It inhibits one from asserting a right, benefit or advantage as a consequence of a previous admission or conduct. In *Ude v. Nwara & Anor* (1993) 2 SCNJ 47; (1993) 2 NWLR (Pt. 278) 638 this court restated that:

"By operation of the rule of estoppels a man is not allowed to blow hot and cold, to affirm at one time and deny at the other, or, as it is said, to approbate and reprobate. He cannot be allowed to mislead another person into believing in a state of affairs and then turning round to say to that person's disadvantage that the state of affairs which he had represented does not exist at all or as represented by him. "

The Court of Appeal held concerning the nature of the statement made by the 2nd respondent in exhibit D24 thusly -

> "I have read the respondents letter exhibit D24 at page 1980 of the record. A comprehensive reading does not appear to me to be an admission of the fact that there was no formal agreement but rather a subtle protest that no formal agreement had been reached."

This view of the Court of Appeal is perverse as it is not supported by the clear and unambiguous words of exhibit D24. The words are so clear and literal in their meaning that they do not call for any construction. The words mean what they say. The Court of Appeal was wrong to have read into them a meaning they do not bear and thereby changed the nature and purpose of the document. A protest

is a statement or action expressing disapproval of or objection to something. The statement "I have come to accept the inability of Statoil to have a long term profit share agreement with me for some unique reasons" is not a disapproval of or objection to or disagreement with the fact that the appellant is unable to enter into net profits sharing contract with them for certain unique reasons. Exhibit D24 is consenting and conciliatory. It must be recalled that the 2nd respondent wrote exhibit D24 after the appellant had written exhibit PE15 rejecting the respondents' proposal in exhibit 14 for the appellant to enter into a profit sharing contract with them as BP had done.

The respondents are estopped from claiming that they are entitled to 1.5% of the net profits from oil produced from oilfields licensed or leased to appellant because they had entered into an agreement with the appellant and BP in exhibit D18 that they, appellant and BP are not entitled to any outstanding payment or remuneration by reason of services provided to Statoil or any affiliate of Statoil or to BP or any affiliate of BP in relation to their activities in Nigeria except for:

a. The payments expressly provided for by the service agreement as amended by this agreement;

b. The payments expressly provided for by the Net Profit Interest Agreement dated 12th November 1993 between BP and Inducon (Nigeria) Limited as same has been amended from time to time.

By signing a contract, each party to the contract has accepted the promise of the other in the agreement and acted on it and have become bound by the agreement. As this court held in *Abalogu v. SPDC Nig Ltd* (2003) 6 SC (Pt.11) 19; (2003) 13 NWLR (Pt. 837) 308. It is now well settled that where one party has by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party had taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him. He must accept their legal relations as modified by himself, even though it is not supported in point of law by any consideration, but only by his word. See also *BPS Construction & Engr Co Ltd v. FCDA* (2017) LPELR 516 (SC); (2017) 10 NWLR (Pt. 1572) 1.

The huge efforts by the respondents in their evidence to conjure an oral agreement by the appellant to pay the respondents net profit interest into existence as a response to their failure to get the appellant enter into such agreement in writing failed woefully.

The trial court correctly found as a fact that only BP agreed with the respondents to pay them net profit interest. The said finding of fact reads:

It is not in dispute that BP agreed or reached understanding with the plaintiffs that "in consideration of the plaintiffs procuring the lifting of the ban by the Federal Government of Nigeria and renegotiating the re-entry of BP in partnership with Statoil into Nigeria and further procuring ... concession acreage for the partnership of BP and Statoil, the plaintiffs would receive from each member of the alliance.

(a) Short term remuneration in the form of an upfront cash payment of an amount or amounts that was or were eventually paid and settled.

(b) Intermediate remuneration in the form of service contracts for continued consulting and business development services.

Further, whether disputed or not, whether represented accurately or not in the pleadings, or the final submissions of counsel, I find as fact from the totality of the testimony deposed and orally given and from the exhibits tendered and admitted in evidence, that BP concluded a long term remuneration and participation agreement with the plaintiffs in relation to the initial petroleum interests to be awarded BP in Nigeria; BP's interest being defined as BP's fifty per (50%) participating interest in each of the blocks and each of the production sharing contracts (PSCS)

Clearly this was an agreement entered into when there was no production in any of the oil concession; and was therefore contingent on production under the aegis of production sharing contracts.

The one and one-half percent ceded by BP to Inducon Nigeria Limited on the 12th November, 1993 signified a long term commitment by BP to the Nigerian Oil Industry (already as it was) in Alliance with Statoil; hence the reference to BP's 50% participating interest.

Further, whether disputed or not, whether represented accurately or not in the pleadings or the final submissions of counsel, I find as fact that though Statoil initially, most probably following BP's lead, indicated an intention or willingness to enter a long term Net Profit/Royalty agreement with Inducon "to be negotiated at a late date, the parties never put pen to paper, and Statoil later actively resisted such an arrangement or agreement with the plaintiffs or either of them.

The Directorate of the Department of Petroleum Resources and the Ministry of Petroleum Resources are, in the absence of an agreement between the plaintiffs and the defendants at the time the defendant was granted entry to the Nigerian Oil Industry, and that absence is acknowledged, and found as fact to be lacking, - these authorities are directed to fix the plaintiffs' long term equity in the50% presently unencumbered interests of Statoil in Nigeria Oil Mining Licenses/ Leases, using the 1.5% equity stake the plaintiffs already have in the defendants

encumbered 50% as a benchmark. This is consistent with public policy at the time and I believe now as well.

This finding of fact was not appealed against. There was no ground of appeal complaining against it in the appeal to the Court of Appeal. There was no cross appeal against it. By not appealing against this finding to the Court of Appeal, the parties to the trial proceedings accepted it as correct conclusive and binding on them. See *Iyoho v. Effiong* (2007) 4 SC (Pt.111) 90, (2007) 11 NWLR (Pt.1044) 31; *Dabup v. Kolo* (1993) 9 NWLR (Pt. 317) 254; *SPDC Nig. Ltd. & Anor v. X.M. Federal Ltd. & Anor* (2006) 7 SC (Pt.11) 27; (2006) 16 NWLR (Pt. 1004) 189 and *Adedayo v. Babalola* (1995) LPELR - 85 (SC); (1995) 7 NWLR (Pt. 408) 383.

Contrary to the above findings of the trial court, the Court of Appeal found as follows:

> "The issue in controversy at the court below and findings of fact we are asked to review is whether or not the respondents were entitled to the 1.5% interest in the oil producing well expressed as a net profit interest. At page 925 - 934 vol. 3 of the records, paragraphs 8, 9, 10, 11, 12, 13, 14, 16, 19 and 20 of the amended statement of claim was consistent with the findings of the trial judge that the respondents interest was contained or embedded in the production process of the assets of the PE19, PE21 and PE22. I have reviewed the evidence of the trial court and I am of the opinion that the findings of the said court cannot be faulted.
>
> "I have read the evidence on record. I am convinced that there was an oral agreement entered into when there was no production in any of the oil production."

The finding of the Court of Appeal that the trial court found that the respondent's interest was contained or embedded in the production proceeds of the assets of the appellants is wrong and perverse. The trial court did not make such finding concerning the appellant. The trial court made that finding in respect of BP, after finding that BP had concluded an agreement with the respondents to pay them net profit interest from its oil blocks constituting 50% participation in the alliance. After making this finding of fact concerning the agreement between BP and the respondents on net profit interest, it then proceeded to make findings of the facts that the appellant refused to enter into such agreement with the respondents. The said finding reads thusly:

> Clearly this was an agreement entered into when there was no production in any of the oil concession; and was therefore contingent on production under the aegis of production sharing contracts.
>
> The one and one-half percent ceded by BP to Inducon Nigeria Limited on the 12th November, 1993 signified a long term commitment by BP to

> the Nigerian Oil Industry (already as it was) in Alliance with Statoil hence the reference to BP's 50% participating interest."

Further, whether disputed or not, whether represented accurately or not in the pleadings or the final submissions of counsel, I find as fact that though Statoil initially, most probably following BP's lead, indicated an intention or willingness to enter a long term Net Profit Royalty agreement with Inducon "to be negotiated at a late date, the parties never put pen to paper, and Statoil later actively resisted such an arrangement or agreement with the plaintiffs or either of them.

With due respects, it is obvious that the Court of Appeal misread and misunderstood the trial court to have found that the respondents' net profit interest was embedded or contained in the production proceeds of the assets of the appellant. The trial court did not say so. It is clear from its finding that it was referring to the production proceeds from the assets of BP and not that of the appellant.

The Court of Appeal again found as follows:

> "The entire respondents' witnesses testified to the nature of the partnership called "Alliance" between BP and Statoil. In effect they were joined at the hip as it were in all their endeavours and promising the respondents the Net Profit agreement that would effected immediately production started while inducing him with titbits. I am of the view that there was abundant proof that the Alliance comprising of BP and Statoil made certain representations to the respondents by which they were both bound."
>
> This finding is not supported by the evidence. It is perverse. The pleadings and evidence of both sides show that the cooperation alliance entered into between the Overseas parent companies of BP Nigeria and the Statoil Nigeria, did not exist as a separate legal entity. The respondents in paragraph 8 of their amended statement of claim averred that at all material times, it was the representation of the Alliance to the plaintiffs that BP and Statoil would be equal partners on a 50:50 bases in the alliance, and that although the alliance would not be set up as a separate legal personality, the two companies would operate as one".

Both sides also agree in their pleading and evidence that BP entered into separate agreement to pay net profit interest from oil produced from the oil field allocated to it and promised or represented to the respondents that the appellant would enter into a similar agreement with them. It is clear from the pleadings that the business relationship with BP and the appellant had with the respondents in Nigeria was not regulated by the memorandum of the alliance between their parent companies overseas. The relationship was regulated by the agreements each company separately entered into with the respondents and any agreement

they jointly entered into with them. These agreements are listed in paragraph 11 of the amended statement of reproduced at page of this judgment. As I had held herein, the respondents admitted this paragraph of the amended statement of defence by not denying it.

In their joint applications on or about 7-1-1991 under the Nigerian First Licensing round in respect of Oil Prospecting Licenses (OPL) for deep sea Oil blocks 217, 218, 219, 220, 221, 222 and 223, BP and the appellant did not mention the respondents as their local partners. The letters awarding each of them Oil blocks and Production sharing Contract (PSC) did not mention the respondents as local partners. The DPR's letter of award 4/7/1991 to the BP and appellant and the Minister's letter of award of 20/11/1991 to the appellant did not state that the companies must partner with a local company as a pre-condition for the grant of any oil acreage.

The evidence on record does not show that the appellant kept on promising the respondents that a net profit agreement would be effected immediately production started, while inducing him with titbits. The respondents severally corresponded with the appellant requesting for negotiation of agreement for net profit interest from appellant. The correspondences confirm the absence of any form of agreement between them and the appellant on the issue. The correspondences with the appellant was not on the basis that there was in existence an oral or any form of agreement with the appellant to pay net profit interest to the respondent, but to continue discussions and negotiations to see if such an agreement could be entered into. Their letter of 10/7/2009 to the appellant, stated inter alia that:

> "The negotiations for a long term net profit interest agreement between the Alliance and Inducon has been on-going for a long time now, but a mutually acceptable ratio could not be reached with the Statoil half of the alliance."

The finding of the Court of Appeal that "to further induce the respondent, the appellant granted the 2nd respondent some of its founder's shares and appointed him as a Director and Vice Chairman of the company "is perverse having regard to the totality of the pleadings and evidence of both sides, particularly the letter of 4/6/1993 from the 2nd respondents to the appellant begging the appellant to appoint him Vice Chairman of the appellant. The handwritten letter reads thusly:

Thank you for your hospitality Stavanger and for giving me the opportunity to say congratulations on the success of the Nigerian PSC agreement.

I would like to put in writing for your urgent consideration, issues we discussed. You promised to address the issues and to come back to me as soon as possible after the usual consultations. I mentioned to Chris Wright about a year ago, the need to appoint me vice Chairman of Statoil (Nig). This will go down well with the

Nigerian authorities and to the public in general. It is useful that I am not seen as only a name on a letter headed paper. It certainly will not carry any importance in terms of decisions but will be a good public relations ploy.

I have come to accept the inability of Statoil to have a long term profit share agreement with me for some unique reasons. BPX has of course agreed to a 11/2% profit share with me. With this in mind, I have always believed that the medium term compensation for the services I am carrying out for the Alliance should reflect this. I am thus appealing that the monthly fee be restored to $40,000.

With the signing of the PSC, were are going into the medium term operational phrase.

I am pleading for a lump sum bonus/allowance payment to Inducon of between $300 - 400,000. As I explained, the previous payments were really for the success on the blocks (213, 217, 218) and the work out in the past 3 year on them. The success on signing and the concessions achieved on the negotiations need to be recognized and we are not really asking for anything big. I also believe this can be cost recovered. This is the most pressing issue for me right now and I hope you can consider this favourably.

I promised to continue to work effectively and quietly for the success of the Alliance Nigeria. I believe there is a lot of work/lobby to do from now on especially on the cost recovery of the huge Pre-operational expenses, new business development, management committee lobby, branch office establishment, Port Harcourt operations and putting the necessary legislation in place.

My wife and I look forward to our trip to Norway at the end of the month and I would like to thank you for this kind gesture.

I hope to hear from you soon.

In the light of the foregoing, the above quoted findings of facts of the Court of Appeal are hereby set aside for being perverse.

In the light of the glaring evidence that the appellant entered into some separate written agreement with the appellant, that BP also entered into such separate written agreement with appellant, that both BP and appellant jointly entered into agreement with appellant in respect of some transactions, that the written agreements are not in identical terms with those BP separately entered with appellant, any representation made by BP to respondents cannot bind the appellant.

The next issue that I think should be considered is whether the court was right in affirming the decision of the trial court holding the appellant liable to pay net profit

interest from oil produced in the oil blocks allocated to it on the basis of the holding that there was in existence a Nigerian Federal Government Policy framework that entitled the respondents to a percentage of the profits from oil blocks allocated a foreign company as a result of their effort as an indigenous broker.

The trial court instead of dismissing the respondent's claim after finding as a fact that there was no agreement between the appellant and respondents for the appellant to pay them any net profit interest, proceeded to order as follows:

> "The Directorate of the Department of Petroleum Resources and the Ministry of Petroleum Resources are, in the absence of an agreement between the plaintiffs and the defendants at the time the defendant was granted entry to the Nigerian Oil Industry, and that absence is acknowledged, and found as fact to be lacking, - these authorities are directed to fix the plaintiffs' long term equity in the 50% presently unencumbered interests of Statoil in Nigerian Oil Mining Licenses/ Leases, using the 1.5% equity stake the plaintiffs already have in the defendants encumbered 50% as a benchmark. This is consistent with public policy at the time and I believe now as well.
>
> Should the Ministry of Petroleum Resources and Directorate of the Department of Petroleum Resources have revised its Policy that would be a matter for transactions other than the instant one. Let the Authorities give teeth to their policy of indigenous representation and participation in the exploitation of Production Sharing Contracts or abandon it as the case maybe. In the instant case, let them follow through on the policy climate enveloping the parties when the plaintiffs acted to develop the defendants business interests in the Nigerian Oil Industry."

The Court of Appeal affirmed this decision thusly:

> "Let me first deal with the findings of fact by the trial judge to effect that the equity of 1.5% interest in favour of the respondent out of the appellant's oil and gas interests was consistent with the public policy in place at the time under which the appellant was obliged to cede 1.5% of its interests in gas and oil exploration to the respondent. Let us look at the witness statement; that is, the lead evidence of Dr Abdulahi Oyekan MFR on pages 940 941 vol. 3 of the record. It is obvious that Dr Abdulahi Oyekan MFR was the Director of the Department of Petroleum Resources at the material time and was charged with implementing Government Policy at the material time which was 1990 - 1994. Dr Oyekan's testimony regarding the existence of a policy was a direct one and I find no reason to disbelieve it was also the learned the learned trial judge did not disbelieve him. It would be rather strange to believe the evidence of Mr. Gbenga Biobaku who is external solicitor to the appellant and had nothing to do with the

parties at the material time to know the nature of their interaction or how it was or was not propelled by public policy. I believe as credible the evidence of PW3 Dr Abdulahi Oyekan MFR on page 1419 - 1421 Vol. 4 of the record who was the other in charge of implementing the policy and was actually the government official who pre-qualified the BP /Statoil partnership and signed the grant of the allocation to it after believing the representation made to the department of petroleum resources that respondents had a minor percentage stake in the business. It is trite that when faced with conflicting evidence on the same matter the discretion of which to believe is exclusively that of the trial judge. See *Ajadi v. Ajibola supra*; *FGN v. Zebra Energy Ltd* (2002) 18 NWLR (Pt. 798) pg.162.

On the issue of whether a public policy existed in relation to the issue in controversy, the Supreme Court has held that the Petroleum Industry in Nigeria is governed by public policy. In *Okonkwo v. Okagbue* (1994) 9 NWLR (Pt. 368) Pg 301, the Supreme Court defined public policy as the ideals which for the time being prevail in any community as to the conditions necessary to ensure its welfare, so that anything is treated as against public policy if it is generally injurious to the public interest. Public policy holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against public good, which may be termed as it sometimes has been the policy of the law, or policy in relation to the administration of the law.

The arguments in relation to expropriation are quite irrelevant in the circumstances of this case. This is because expropriation is defined in the Cambridge Advance Learners Dictionary as "To take away money or property especially for public use without payment to the owner or for personal use illegally". I agree with learned respondent's counsel that the Nigerian Investment Promotion Act NPIC does not apply in this case section 25 of the NPIC Act refers to ownership of capital investment in public companies which is specifically defined as opposed to equity interest in oil concessions.

The fact of the matter as argued by the respondent's counsel and with which I agree is that by paragraph is of the first schedule to the Petroleum Act, the law allows the creation of leasehold interests and gives the Federal Government the right to enter into a concession upon the conversion from an oil prospecting licence to oil mining lease. Usually title in these concessions is held by NNPC on behalf of the Federal Government. The interest of the foreign companies crystallizes when there is production from the field. Such interest cannot be expropriated as a matter of policy if not all the international oil companies would be wary of doing business with Nigeria. It is conceded that the recent policy as enumerated by DW4is that where the Federal Government required a local company to partner a foreign company in an oil block, it expressly named the local company as an LCV as it did for example, in the letter award of OPL 315 to the Petrobras Consortium (of which of which the appellant was a member) dated 5th September, 2005 which

named ASK Petroleum Company Ltd as the LCV.

However, there is proof that, that was the policy between 1990-1993, when the oral agreement between the parties was initially made. My understanding of the facts here is that the 2nd respondent was a consultant to the Alliance of BP/Statoil to procure oil prospecting licenses with an agreed remuneration and fees for such services. However, where fortuitously the oil fields or blocks turn out to be fruitful and move from the realm of prospecting to production, then the respondent was entitled to an equity share in the proceeds. I have read the respondents letter exhibit D24 at page 1980 of the record. A comprehensive reading does not appear to me to be an admission of the fact that there was no formal agreement but rather a subtle protest that no formal agreement had been reached. It is important to emphasise that all the agreements gleefully referred to by the appellants had to do with the scenario in 2005. I am of the view that there was a public policy frame work as enunciated by PW3. Under cross examination he had admitted that in the 1990s the Federal Government had encouraged foreign companies which had no presence in Nigeria to invest and even though there was no written law as such, the Department of Petroleum Resources usually looked to see that foreigners came with Nigerian stakeholders. The issue whether there was in a fact a public policy framework under which the partners operated with the understanding that when the prospecting bore fruit that the Nigerian consultant or stakeholder would have a share has to be resolved in favour of the respondents and against the appellant.

It is not part of the case of the respondents in their pleadings that they were relying on any existing government policy as the basis for their claims in their amended statement of claim. The basis of the respondent's case is that BP, the appellant's partner in the Alliance, with whom the respondents discussed and negotiated had represented to them that the appellant would certainly enter into an agreement to pay them net profit interest in the same terms with that between them and BP, that the appellant refused to enter into the said agreement and kept promising the respondents that it would do so and never did and that even though the appellant refused to enter into such agreement in writing, the agreement existed orally on account of BP's representation and the appellant's failed promises to enter into such agreement.

Clearly, on the pleadings, it was a claim founded on the existence an oral contract and representations to the respondents and Nigerian Regulatory Authorities. The claim was not founded on the existence of any government policy. Apart from averring in paragraph 15 of the amended statement of claim that "the grant of the concession to the defendant at the time was in line with the Federal Government's avowed policy to encourage indigenous participation in the upstream sector of the Nigerian Oil and Gas Industry, the particulars of the Government policy, how it encourages indigenous participation, how the concessions to the appellant were in keeping with said policy or resulted from it were not pleaded. It is glaring

from the pleading that the claim is not for the enforcement of compliance with any government policy and is rather for the enforcement of the alleged oral agreement between the appellant and respondent or the representations and promises allegedly made by the BP and by the appellant to the respondents and Nigeria Regulatory Authorities.

The appellant in their tender or application to Ministry of Petroleum Resources for allocation of oil concession blocks did not represent or promise to pay a percentage of its net profits to the respondents or any indigenous company from the oil blocks as a pre-condition for the allocation. The various letters of allocation from the Ministry of Petroleum and even the production sharing contract between the Nigerian Government and the appellant did not state that the appellant must engage an indigenous consultant or partner or collaborator as a precondition for the allocation and did not require the appellant to pay any percentage of its profits from oil produced from the blocks to its indigenous consultant, facilitator or collaborator. The award letters did not refer to the existence of any government policies and did not require the appellant to comply with same before the allocation can be effective. It is obvious from the application for allocation of oil blocks and the letters of awards that the appellant was not allocated the oil blocks as a result of any representation to Ministry of Petroleum Resources or any other Regulatory authority in the oil and Gas Industry that it would pay a percentage of its net profits from oil produced from its blocks to its indigenous consultant or facilitator or employee.

There is no evidence of any document from the Ministry of Petroleum Resources or any other agency of the Federal Government of Nigeria stating the existence of any policy of the government concerning the oil industry. There is none, stating that an oil prospecting and producing company cannot be allocated oil blocks if there is no indigenous participation in the venture. The only evidence relied on by the Court of Appeal in concurring with the finding of the trial court on the issue is the testimony of PW3 a Director in the Department of Petroleum Resources.

The said PW3 in his examination in chief contained in his witness statement on oath testified thusly:

> "I make this witness statement on the basis of what I know in relation to the steps taken by the plaintiffs in facilitating applications for and perfecting conditions of the grant of Oil Prospecting Licenses (OPLs) at the time during which the BP/Statoil Alliance was led by Dr. John Abebe.

In the first instance, I know that it was Dr. John Abebe who introduced the BP / Statoil Alliance to the Department of Petroleum Resources, and he was the main promoter of their business development efforts and their bid to procure the grant of oil concession acreages.

At the time it was the policy of the Federal Government of Nigeria to encourage indigenous participation in the oil industry as a way to build the capacity of Nigerians to take advantage of the opportunities in the upstream sector of the oil industry. The participation was usually done through technical and or financial agreements with foreign companies who had the technical and financial ability to carry on business in this area. At the time, we sought to open up the industry by encouraging the participation of companies who were not already in Nigeria. The main thing was that there had to be participation of Nigerian company.

In the line with avowed policy, applications for OPLs by Nigerian companies or arrangements that involved Nigerian companies were given prime consideration as against applications made by their foreign counterparts. With Dr. Abebe promoting the BP/Statoil Alliance, we were convinced by representations and press statements at the time that Dr. Abebe was a partner in the progress of the Alliance, and that he had an interest or some equity in the operations of the alliance. Consequently, we took the view that the alliance had met with the indigenous participation play of the Federal Government, and therefore they were allocated the concession acreages which they got on this basis.

We understood at the time of BP/Statoil Alliance's application for POLs 213, 216, 217 and 218, based on Dr. Abebe's efforts, that Dr. Abebe had a certain percentage in the concessions granted the alliance. Indeed, the representations made to me in the course of my dealings with Dr. Abebe and the BP/Statoil Alliance was that, for Dr. Abebe promoting both companies in Nigeria, he was entitled to founders shares of some sort. He was also a shadow director and Vice Chairman of both companies. The fact that he was always around with the top brass of the alliance went to buttress these impressions.

As previously stated, the understanding we had was that Dr. Abebe was part and parcel of the BP /Statoil alliance and that in line with the Indigenous Participation Exploration Policy of the Federal Government, he was naturally entitled to receive some equity for his business development efforts. His presumed participation in the prospecting licenses to the BP/Statoil Alliance.

The above is my understanding and knowledge of the arrangement between the parties.

Under cross examination PW3 testified that:

I remember BP Statoil were working very close together with Inducon. Details are not what I can recollect now. Application was successful.

They were awarded Oil Blocks. I do not recollect details of the award whether Inducon was mentioned as a beneficiary signature Bonuses is normally mentioned in the letter of award.

Local interest is not normally included but it is recognised and more or less on requirement. You come along, you come with your local partner. It was not necessary to mention the local partner in the award letter as long as we were satisfied there was one.

We would be satisfied by the presence of the Nigeria partner in the processes and evidence of close working relationship and positions given to a Nigeria or Nigerians in the organisation.

These were indicatives we looked for Local participation did not mean a transfer of interest to the local partner.

We would be satisfied with signing of substantial participation of the local partner. I cannot recollect the details of this particular collaboration.

A consultancy? No we mean having a stake in the licence by the local party. The Nigeria party could have a stake in the oil business Nigeria however minor. We will satisfy myself through correspondence through meetings.

I do not remember that you have to declare the stake. That influenced our granting the award. I cannot remember the details. Dr. Abebe was appointed a Director I remember and eventually a Vice Chairman. From where the indications that he was a stake holder. I recollect that policy. Government had that policy of approaching Nigerians of sufficient financial account the likes of M.K.O. Abiola, Alhaji Dangote to identify technical partners and participate in the oil industry also to dilate the position of the older operating multinationals by the participation of other newer multinationals such as BP and Statoil.

The evidence does not show that there is in existence, any formal government policy that establishes the requirement of indigenous participation in any oil prospecting and production venture in Nigeria. It merely states that the policy is in the form of an informal practice of the presence of an indigenous facilitator in the process of application for the allocation of oil blocks. It is unreasonable to believe that an informal practice or understanding that has not been shown to be derived from any law or even government official administrative document, such as circular, gazette of public notice or executive order and that is not stated or referred to or incorporated by reference in the award letters is a government policy.

Government policies are usually contained in the official administrative documents of the government as the official principle or plan of official action of government in any given area. The fact that record of acts and decisions of government are usually in documentary form, is common knowledge, is not open to question and does not require proof by virtue of S.124(1) of the Evidence Act 2011. Their existence can be proven only by the production of the official document of the government containing them and not by oral evidence of government officials,

because by virtue of Ss. 89(e) and 90(1)(c) of the Evidence Act 2011 oral evidence of a public document is legally inadmissible. Oral evidence of the existence of a government decision or practice or fact of a public nature is legally inadmissible evidence, especially in view of S. 54 of the Evidence Act 2011 which provides that -

> "When the court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any enactment or in any enactment or in any proclamation or speech of the President in opening the National Assembly, or in any proclamation or speech, or in any statement made in a Government or public notice appearing in the Federal Gazette or in a State notice or a State public notice appearing in a State Gazette or the Government Gazette of any other country is admissible".

In *Abdulkareem v. Lagos State Gov't* (2016) 15 NWLR (Pt. 1535) 177... "the existence of a Government Policy was proved by depositions in an affidavit and the said depositions were not controverted. In setting aside the decision which took judicial notice of the said policy, on the ground amongst others that government policies are documented and can only be so proved, the court held at page 210 thus:

> "A simple perusal of any of these definitions or synonyms of the word "policy" would in my view brings to mind some form of documentation. If the lower court was entitled to take judicial notice of the existence of some old policy with respect to school uniforms in Lagos State, it must additionally also take judicial notice of the fact that such policy must have been embodied, as is usual with government at all levels to issue circulars, rules, regulations, orders, guidelines etc. With respect to the management control, observance etc of certain subject matters. It is compelling and necessary, in my view for the lower court to consider and take judicial notice of these collateral circumstances for a proper decision in the matter before it. A court is not allowed to make findings on documents that have not been laid in evidence before it. I am of the view that it would amount to an undue speculation for the lower court to do more than hold that there is in existence an old policy of Lagos State Government on school uniforms in public schools ... Whether that old policy is relevant and up to date as to ban or restrict the wearing of Hijab by female students must remain a mute question subject to a proper perusal of its actual contents".

In the light of the foregoing, I hold that there is no evidence of the existence of a Federal Government policy that foreign oil companies must pay a percentage of their net profit interest accruing from oil produced from oil blocks allocated them to indigenous facilitators or brokers of such allocation.

Assuming such a government policy was correctly found to exist, it would be of no legal effect. See Judicial Review of Administrative Action (6th edition) which restates at Page 285 that government policies have no binding effect. The exact text reads thusly –

> "In a number of cases the question has arisen of whether regard may or must be had to various forms of government advice or indication of government policy. Normally such policy will be expressed through the government circular or code of practice which lacks binding effect."

As I had held herein, there is nothing in the award letters or the Production Sharing Contract (PSC) that show its incorporation therein as part of the contract of award. A government policy cannot create contract between parties. Unless parties to a contract make it part of the terms of their contract by incorporation, it cannot create legal rights or obligations in that contract. So neither party to a contract can rely on a government policy to assert or claim a legal right or enforce a legal obligation that the parties did not expressly create in their contract. In *Ebhota v. P.I. & P.D Co. Ltd* (2005) 15 NWLR (Pt. 948) 266 at 289 this court acknowledged that a government policy cannot create a contract between parties when it held thusly-

> "In my humble view, the above excerpt of part of paragraph 3 of exh. 2 is merely a policy statement or guideline, the non-implementation of which does not entitle the appellants to a legal redress against the respondent. It did not create a contractual relationship between the parties to this appeal."

See also *Cookey v. Fombo* (2005) 15 NWLR (Pt. 947) 182 at 207.

A government policy is not law and cannot override the autonomy and freedom of contract. The freedom and autonomy of contract is the fundamental principle of contract law. Parties to a contract have the freedom to determine the terms of their contract. No other person, not even the court can determine the terms of the contract between the parties thereto. The duty of the court is to enforce the terms of the agreement. See *Nika Fishing Co. Ltd v. Lavina (Corporation)* (2008) 6-7 SC (Pt. 11) 200, (2008) 16 NWLR (Pt.1114) 509; *West Construction Co. Ltd v. Santo M. Batalha* (2006) 4 SC (Pt. 1) 88; (2006) 9 NWLR (Pt. 986) 595. A court has no power to make contract for parties. The duty of the court is to enforce the terms of the contract as agreed upon by the parties and has no power to introduce into the contract terms that the parties did not agree on. See *BFI Group Corporation v. BPE* (2012) LPELR - 9339 (SC); (2012) 18 NWLR (Pt. 1332) 209.

Assuming such a government policy was proven to exist, it would be contrary to S.44(1) of the Constitution of the Federal Republic of Nigeria 1999 and S. 25(1) (b) of the National Investment Promotion Commission Act.

S.44(1) of the Constitution provides thusly -

> "No movable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things-
>
> (a) requires the prompt payment of compensation therefore; and
>
> (b) gives, to any person claiming such compensation right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria".

S. 25(1) (b) of the National Investment Promotion Commission Act provide thusly -

> "1. subject to subsections and of this section-
>
> b. no person who owns, whether wholly or in part, the capital of any enterprise shall be compelled by law to surrender his interest in the capital to any other person (Emphasis added)

The Court of Appeal restated the policy which existence it held was established by the facts thusly –

> "My understanding of the facts here is that the 2nd respondent was a consultant to the Alliance of BP/Statoil to procure oil prospecting licenses with an agreed remuneration and fees for such services.
>
> However, where fortuitously the oil fields or blocks turn out to be fruitful and move from the realm of prospecting to production, then the respondent was entitled to an equity share in the proceeds."

This policy clearly involves the compulsory acquisition and takeover of part of the appellant's profits from the oil fields licensed or leased to it and the transfer of same to the respondents merely because they are Nigerians that facilitated the appellant's investment in Nigeria. The policy is therefore unconstitutional, illegal and void.

In the light of the foregoing, I set aside the concurrent findings and holdings of the Court of Appeal and the trial court that a government policy on indigenous participation in an oil prospecting and producing venture exists and that on the

basis of this policy the appellant was bound to pay the respondents net profit interests from oil produced from the oil blocks licensed or leased to it.

I noticed that the trial court and the Court of Appeal used the terms 'Public policy' and 'government policy' interchangeably as if they have the same meaning. They have different meanings and requirements of proof. A public policy is a principle that is generally accepted by members of Society as the accepted value for the general well-being of the society. Its existence as a fact does not require proof because it is common knowledge in that society and the knowledge is not reasonably open to question. This is so by virtue of S.124(1) of the Evidence Act 2011. There is no such public policy for the compulsory acquisition and transfer of part of the proceeds of the oil and gas investment of a foreign owned company to a Nigerian that facilitated the investment in Nigeria.

A government policy is the official principle or plan of official action of government in any given area. It does not arise and exist by virtue of its general acceptance by the community as a value for the general wellbeing of the community. It is made or issued by government in administrative circulars, gazettes of public notices and executive orders. Its existence must be proved by the production of the original copy or the certified true copy of the circular, gazette of the public notice or executive order. The government policy enforced by the trial court and the Court of Appeal is described by the PW3 as the "Indigenous Participation Exploration Policy of the Federal Government". Its existence was not proven.

The trial court having found that there was no agreement between the respondents and appellant for the payment of net profit interest by the appellant to the respondents, should have dismissed the respondent's claim that was founded on the existence of that agreement and nothing else, and not order Ministry of Petroleum Resources to impose such obligation on the appellant from its oil blocks on the basis of public or government policy. The decision of the trial court is rather against the public policy that courts should not make contracts for parties or compel them to enter into agreements, must enforce the terms of the contract as made by the parties and should not introduce a term not agreed upon by the parties to the contract. This court in *West Construction Co. Ltd v. Santo M. Batalha (supra)* described this policy on autonomy and sanctity of contracts as a paramount policy.

Since the respondents claim was predicated on the existence of the agreement found to be absent by the trial court, the claim ought to have been dismissed. The respondents as the plaintiff had the primary legal burden to prove their claim, and in doing so must rely on the strength of their case and not on the weakness or absence of the defence. Should they fail to discharge this burden, fair and legitimate adjudication requires that their claim be dismissed and not for the trial court to proceed to assume the existence of a public or government policy and invoke the public or government policy to make a case for them and on that basis

grant them reliefs. See. *Omerede v. Eleazu* (1996) LPELR-2673 (SC), (1996) 6 NWLR (Pt.452) 1; *Efetiroroje & Ors v. Okpalefe* (1991) 7 SC (Pt.1) 105, (1991) 5 NWLR (Pt. 193) 517; *Adeniji & Ors v. Adeniji & Ors* (1972) 1 All NLR (Pt. 1) 298 (SC), *IBWA Ltd & Anor v. Pavex International Co. Ltd* (2000) LPELR-1523 (SC); (2000) 7 NWLR (Pt. 663) 105 and *Orisakwe v. The State* (2004) LPELR-2764 (SC); (2004) 12 NWLR (Pt. 887) 258. It was wrong for the Court of Appeal to have concurred with this decision instead of setting it aside.

Let me consider the whether the findings of the trial court and the concurrent findings of the Court of Appeal that BP quit Nigeria, and that the appellant under an agreement with it took over its oil assets in Nigeria is supported by the pleadings and evidence.

The pleadings and evidence in this case do not support the findings of the trial court that:

Specifically, when BP decided to quit Nigeria, it upon whatever terms agreed with its partner Statoil, its 5% interest in production sharing contracts prospective at the time were taken over by Statoil. That 50% interest was encumbered with a 1.5% Net Profit Interest in favour of the 1st plaintiff. That interest subsists and is enforceable. They equity is not a transferred interest but an embedded interest that came alive upon the commencement of production in oil fields in which the defendant currently has equity or operating interest.

That facts that BP quit Nigeria, and that the appellant under an agreement with it took over its oil assets in Nigeria that constitute 50% of the holdings by the Alliance is not pleaded by the respondents in any of their pleadings. The claim of the respondent is not for the payment by the appellant of the 1.5% net profit interest from BP's Oil assets in Nigeria. The parties never argued such an issue in their addresses in the trial court. The trial court suo motu raised and decided it without giving the parties the opportunity to address on it. The claim of the respondents is for the appellant to pay them 1.5% net profit interest from its own oil assets.

The trial court made an entirely new case for the respondents i.e. the case that BP transferred its obligation to pay respondents 1.5% of its net profit from its own oil holdings to the appellant under a contract between BP and appellant, hence the respondents were entitled to the enforcement, against the appellant, of the agreement. A court is not permitted to make assumptions. See *U.T.B. v. Ozoemena* (2007) 3 NWLR (Pt. 1022) pg. 448 at pg. 487 para C). A court is also not permitted to make out a case different from the case made by the parties before it. See *Adetoun Oladeji Nigeria Ltd v. Nigeria Breweries Plc* (2007) 1-2 SC. (Pt. 2) 183; (2007) 5 NWLR (Pt. 1027) 415. In *University of Calabar v. Essien* (1996) 10 NWLR (Pt. 477) 225 at 260, this court restated the law thusly:

> "With greatest respect to the Court of Appeal, it is neither permissible nor

> the duty of any court of law to endeavour by examination of the evidence, to deduce what it conceives ought to be or might be the true nature of the claim and then proceed to hand down a decision which the plaintiff has not specifically sought or may in fact desire. It would be improper for the court so to do unless it were prepared to order an amendment of the pleadings in which case, it would be necessary to give the defendant an opportunity of what would be an entirely different case ... in the same vein, it is not the function of a court of law by its own exercise or ingenuity to supply or imagine evidence or work out the mathematics of arriving at an answer to a case ...on the contrary, it is an elementary and fundamental principle of the determination of dispute between parties that judgment must be confined to issues raised by the parties in their pleadings"

The Court of Appeal was wrong to have concurred with the trial court's findings of facts that were not pleaded.

Issues nos. 5, 7, 8 and 11 are hereby resolved in favour of the appellant.

In the light of the foregoing determinations, no useful purpose would be served determining issues nos. 4, 6, 9, 10, and 12.

On the whole, this appeal succeeds as it has merit. It is accordingly allowed. The judgment of the Federal High Court in Suit No. FHC/L/CS/244/2010 delivered on 6-12-2010 by Charles Effanga Archibong J. and the concurring judgment of the Court of Appeal sitting at Lagos delivered on 5-6-2012 in Appeal No.CA/L/284/2011 are hereby set aside. It is hereby adjudged that the plaintiffs' claim in Suit. No. FHC/L/CS/244/2010 was statute barred, that the plaintiffs failed to prove their claim on the pleading and evidence and that the plaintiffs said claim is hereby dismissed.

Appeal allowed.

Cases cited in the Judgment

A.G. Abia State v. A.G. Federation (2005) 6 SC (Pt.1) 63 (2005) 12 NWLR (Pt. 940) 452
A.G. Adamawa v. A.G. Federation (2014) LPELR 23221 (SC); (2014) 14 NWLR (Pt. 1428) 515
A.G. Lagos State v. Eko Hotels Ltd & Anor (2006) LPELR- 3161(SC); (2006) 18 NWLR (Pt. 1011) 378
Abalogu v. SPDC Nig Ltd (2003) 6 SC (Pt.11) 19; (2003) 13 NWLR (Pt. 837) 308
Abdulkareem v. Lagos State Gov't (2016) 15 NWLR (Pt. 1535) 177
Adamu Abubakar v. Michelin Motor Services Ltd (2020) LPELR-50837; (2020) 12 NWLR (Pt. 1739) 579
Adedayo v. Babalola (1995) LPELR - 85 (SC); (1995) 7 NWLR (Pt. 408) 383
Adelekan v. Ecu-Line NV (2006) 12 NWLR (Pt. 993) 33

Adeniji & Ors v. Adeniji & Ors (1972) 1 All NLR (Pt. 1) 298 (SC)
Adeniran v. Interland Transport Ltd (1991) 9 NWLR (Pt. 214) 155
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Section 8(1) of the Petroleum Act
Section 8(1)(a) of the Lagos State Limitation Law 2003
Section 25(1) (b) of the National Investment Promotion Commission Act
Section 44(1) of the Constitution of the Federal Republic of Nigeria 1999
Section 54 of the Evidence Act 2011
Sections 89(e) and 90(1)(c) of the Evidence Act 2011
Section 169 of the Evidence Act 2011
Section 124(1) of the Evidence Act 2011
Section 230(1)(q), (r) and of the 1979 Constitution
Section 251 (1)(n) & (s) of the Constitution of Federal Republic of Nigeria, 1999 (as amended)

History:

HIGH COURT
Federal High Court, Lagos
ARCHIBONG, J.
Suit No.: FHC/L/CS/224/2010
Monday 6th December, 2010

COURT OF APPEAL (Lagos Division)
Helen Moronkeji Ogunwumiju, JCA ***(Presided & Read the leading Judgment)***
John Inyang Okoro, JCA
Sidi Dauda Bage, JCA
Appeal No.: CA/L/284/2011
Tuesday 5th June, 2012

SUPREME COURT OF NIGERIA
Mary Ukaego Peter-Odili, J.S.C. ***(Presided)***
Musa Dattijo Muhammad, JSC ***(Read the leading Judgment)***
Amina Adamu Augie, JSC
Abdu Aboki, JSC
Emmanuel Akomaye Agim, JSC
Appeal No.: SC.411/2012
Friday 5th February, 2021

APPEARANCES:
Chief Wole Olanipekun, SAN; Adeniyi Adegbonmire, SAN; and Bode Olanipekun, SAN with Uzoma Azikiwe, Esq; Imaobong Haastrup, Esq and Shola Bojuwoye,

Esq., for the Appellant
Uche Nwokedi, SAN with Pascal Ememonu, Esq., for the Respondents

POLARIS BANK LIMITED (substituted by the order of the Honourable Court of Appeal dated 8th December, 2020) **v. FIDEL ASSOCIATES; MR. GEORGE OBI**

COURT OF APPEAL
(LAGOS DIVISION)

CA/L/1 010/2016
MONDAY 29TH MARCH, 2021

(OGBUINYA; UMAR; BAYERO, JJ.CA)

APPEAL – Tort – Damages – Interference with grant of damages by an appellate court – An appellate court does not usually interfere with award of damages.

COMMERCIAL LITIGATION – Evidence – Admissibility of an affidavit – section 109 of the Evidence Act, 2011 – Any affidavit sworn before any judge, officer or other person duly authorized to take affidavits in Nigeria may be used in the court in all cases affidavits are admissible.

COMMERCIAL LITIGATION – Evidence – Admission defined – admission connotes a statement, oral or documentary, made by a party which suggests an inference as to any fact in issue or relevant fact.

TORT – Damages – General damages – Damages defined – A pecuniary compensation which law awards to a person for the injury he has sustained by reason of the act or default of another whether that act or default is a breach of contract or tort.

TORT – Detinue – Remedies for the tort of detinue – A person who has a right of action in detinue has three optional remedies open to him.

TORT – Detinue – Right of the plaintiff to damages in detinue – the defendant cannot deprive the plaintiff of his right to damages for retention of the chattel simply because he was not earning anything from its use.

TORT – Detinue defined – Conditions for the establishment of detinue – Detinue connotes the wrongful detention of a person's chattel after the holder/person, who is in actual possession of it, has refused to deliver it upon demand by the owner/person who has an immediate right to its possession.

Facts:

This is an appeal which emanates from the decision of the High Court of Lagos State, Lagos Division (trial court), *coram judice:* F. Bankole-Oki, J., in Suit No. LD/2116/2009, delivered on 31st May 2016.

The appellant, an incorporated financial institution in Nigeria, who was the defendant in the trial court, granted overdraft facilities to the first respondent in the sum of ₦1,500,000.00 and ₦5,000,000 respectively. The two overdraft facilities were secured by a deposit of the nine share certificates of the second respondent, the *alter ego* of the first respondent. The respondents subsequently liquidated the overdraft facilities and formally demanded the release of the share certificates, of which only three share certificates were returned to the respondents. The respondents being frustrated by the non-release of the remaining six share certificates by the appellants instituted an action as plaintiffs via a writ of summon against the appellant seeking for pecuniary and non-pecuniary damages as a result of the appellant's failure to release the remaining six share certificates.

The appellant joined issues with the respondents and denied liability by filing a statement of defence, and in a considered judgment, the trial court granted the respondents' claim.

Aggrieved by the decision of the trial court, the appellant appealed to the court of appeal.

Held ***(Unanimously dismissing the appeal):***

[1] ***Appeal – Tort – Damages – Interference with the grant of damages by an appellate court – An appellate court does not usually interfere with award of damages.***

An appellate court does not usually interfere with award of damages unless: (a) the trial court acted under a mistake of law; or (b) where the trial court acted in disregard of some principles of law; or (c) where the trial court acted under misapprehension of facts; or (d) where it has taken into account irrelevant matters or failed to take into account relevant matters; or (e) where injustice would result if the appellate court does not interfere; or (f) where the amount awarded is ridiculously low or high that it must have been a wholly erroneous estimate of the damages, see *Cameroon Airlines v. Otutuizu* (2011) 4 NWLR (Pt. 1238) 512; *British Airways v. Atoyebi* (2014) 13 NWLR (Pt. 1424) 253; *Agu v. General Oil Ltd.* (2015) 17 NWLR (Pt. 1488) 327. **(P. 101 lines 33 - 42)**

[2] ***Commercial Litigation – Evidence – Admissibility of an affidavit – section 109 of the Evidence Act, 2011 – Any affidavit sworn before any judge, officer or other person duly authorized to take affidavits in Nigeria may be used in the court in all cases affidavits are admissible.***

The provision of section 109 of the Evidence Act, 2011, displayed above, amply, demonstrates that the commissioner for oaths does not enjoy

the monopoly/prerogative right of administration of oaths to deponents of affidavits. The provision, in unmistakable terms, grants an unbridled licence to "other person duly authorised to take affidavits in Nigeria". A notary public of Nigeria, usually appointed by the Chief Justice of Nigeria, pursuant to the provision of section 2 (1) of the Notaries Public Act, falls within the wide canopy of "other person" contemplated in section 109 of the Evidence Act, 2011. The provision of section 2(2) of the Notaries Public Act equips a notary public with the authority to perform the same duties and functions like his counter-part in England. In England, a notary public administers oaths. This has received the blessing/imprimatur of the case-law, see *Buhari v. INEC* (2008) 19 NWLR (Pt. 1120) 246 (2009) All FWLR (Pt. 459) 419. **(P. 96 lines 14 - 25)**

[3] ***Commercial Litigation – Evidence – Admission defined – admission connotes a statement, oral or documentary, made by a party which suggests an inference as to any fact in issue or relevant fact.***

In the mind of law, admission connotes a statement, oral or documentary, made by a party which suggests an inference as to any fact in issue or relevant fact, see section 20 of the Evidence Act, 2011; *UBA Plc. v. Jargaba* (2007) 11 NWLR (Pt. 1045) 237; *Oguanuhu v. Chiegboka* (2013) 6 NWLR (Pt. 1351) 588. It "is a concession or voluntary acknowledgement made by a party of the existence of certain facts; a statement made by a party of the existence of a fact which is relevant to the cause of his adversary; a voluntary acknowledgement made by a part of the existence of the truth of certain facts which are inconsistent with his claims in an action", see *Adusei v. Adebayo* (2012) 3 NWLR (Pt. 1288) 534 at 558 Per Fabiyi, JSC; *UBA v. Jargaba* (2007) 31 NSCQR 144; *N.B.C.I. v. Integrated Gas (Nig.) Ltd.* (2005) 4 NWLR (Pt. 916) 617; *Omisore v. Aregbesola* (2015) 15 NWLR (Pt. 1482) 205; *N.A.S Ltd. v. UBA Plc.* (2005) 9 NWLR (Pt. 1463) 133. **(P. 93 lines 15 - 27)**

[4] ***Tort – Damages – General damages – Damages defined – A pecuniary compensation which law awards to a person for the injury he has sustained by reason of the act or default of another whether that act or default is a breach of contract or tort.***

Damages have been defined as: "that pecuniary compensation which law awards to a person for the injury he has sustained by reason of the act or default of another whether that act or default is a breach of contract or tort", see *Iyere v. B.F.F.M Ltd* (2008) 18 NWLR (Pt. 1119) 300 at 345, Per Muhammad, JSC; *Agbanelo v. Union Bank* (2000) 4 SCNJ 353; *Ukudie v. SPDCN* (1975) 8-11 SC 155 at 162; *Neka B.B.B. Mfg. Co. Ltd. v. A.C.B. Ltd* (2004) 2 NWLR (Pt. 858) 521. General damages are those damages that the law presumes as flowing from the wrong complained of

by the victim. They need not be specifically pleaded and strictly proved, see *U.B.N. Plc v. Ajabule* (2011) 18 NWLR (Pt. 1278) 152; *Neke B.B.B. Mfg. Co. Ltd. v. A.C.B. Ltd. (supra)*; *Ajigbotosho v. R.C.C. Ltd.* (2019) 3 NWLR (Pt. 1659) 289; *UBN Plc v. Nwankwo* (2019) 3 NWLR (Pt. 1660) 474; *Ibrahim v. Obaje* (2019) 3 NWLR (Pt. 1160) 389; *Onyiorah v. Onyiorah* (2019) 15 NWLR (Pt. 1695) 227. It is at the discretion of the court to award general damages, see *Cameroon Airlines v. Otutuize* (supra); *Ahmed v. CBN* (2013) 2 NWLR (Pt. 1339); *Unity Bank Plc v. Ahmed* (2020) 1 NWLR (Pt. 1705) 364. **(P. 101 lines 13 - 27)**

[5] ***Tort – Detinue – Remedies for the tort of detinue – A person who has a right of action in detinue has three optional remedies open to him.***

In an avowed bid to castrate the respondent's claim in detinue, the appellant erected the defence of inapposite relief of general damages. A person who has a right of action in detinue has three optional remedies, which trace their paternity to Diplock, LJ:, in *General Finance and Facilities Ltd. v. Cooks Cars (Romford) Ltd.* (1963) 1 WLR 664 at 650-651, open to him: (a) claim for value of the chattel and damages for its detention; (b) claim for the return of the chattel and damages for its detention or (c) claim for the return of the chattel, or its value as assessed, and damages for its detention. This hallowed principle of law, claims in detinue, is, firmly, propagated in our *corpus juris,* see *Widman & Walters (Nig.) Ltd. v. Mojibolu Oluwa* (1968) 1 All NLR 383; *Ordia v. Piedmont* (1995) 2 SCNJ 175; *Iheanacho v. Uzochukwu* (1997) 1 SCNJ 117; *Oshievire Ltd. v. Tripoli* (1997) 4 SCNJ 246; *NACENN (Nig.) Ltd. v. B.A.P. Ltd* (2011) 11 NWLR (Pt. 1257) 193; *Enterprise Bank Ltd. v. Aroso* (2014) 3 NWLR (Pt. 1394) 256; *Adefunke v. Ikpenai* (1958) SCNLR 189; *Odumosu v. ACB Ltd.* (1976) 11 SC 55; *Kosile v. Folarin* (1989) 3 NWLR (Pt. 107) 1; *Agbanelo v. Union Bank* (2000) 45 SCNJ 353. Suffice to say that claim for damages is recurrent in the three options open to a party that alleges against a tortfeasor of the tortious act of detention of chattel.
(P. 98 lines 41 - 45; P. 99 lines 1 - 12)

[6] ***Tort – Detinue – Right of the plaintiff to damages in detinue – the defendant cannot deprive the plaintiff of his right to damages for retention of the chattel simply because he was not earning anything from its use.***

In the interest of consolidation, in *Ordia v. Piedmont (Nig.) Ltd.* (1995) 2 SCNJ 175 at 184/ (1994) 2 NWLR (Pt. 379) 516 at 528. Belgore, JSC (later CJN), incisively, declared:

In an action like this, where chattel is withheld by the de-

fendant from the plaintiff, the action in detinue is for either the return of the chattel plus damages for its retention; or the value of the chattel plus damages for its retention. Thus, the defendant even cannot deprive the plaintiff of his right to damages for retention of the chattel simply because he was not earning anything from its use... In a case in detinue, however, the court will award what is reasonable as damages for retention of chattel by the defendant. The measure of damages in detinue, therefore, has always been the value of the chattel (if unreturned or lost) and damages for its retention of the chattel simply because he was not earning anything from its use... In a case in detinue, however, the court will award what is reasonable as damages for retention of chattel by the defendant. The measure of damages in detinue, therefore, has always been the value of the chattel (if unreturned or lost) and damages for its detention. Each case is determined by its facts and special circumstance as it is still an uncharted field...
(P. 99 lines 24 - 44)

[7] ***Tort – Detinue defined – Conditions for the establishment of detinue – Detinue connotes the wrongful detention of a person's chattel after the holder/person, who is in actual possession of it, has refused to deliver it upon demand by the owner/person who has an immediate right to its possession.***

Detinue connotes the wrongful detention of a person's chattel after the holder/person, who is in actual possession of it, has refused to deliver it upon demand by the owner/person who has an immediate right to its possession, see *J.E. Oshevire Ltd. v. Tripoli Motors* (1997) 5 NWLR (Pt. 503) 1; *Julius Berger Nig. Plc v. Omogui* (2001) 6 SC 185 at 192; *A.J. Inv. Ltd. v. Afribank (Nig.) Plc* (2013) 9 NWLR (Pt. 1359) 380. To succeed in an action in detinue, the person, usually the plaintiff, must establish the fact that: (a) He is the owner of the chattel. (b) He has immediate right to possession to it. (c) The holder, (the defendant) is in actual possession of it. (d) He made a demand on the defendant to deliver it to him. (e) The defendant continues to hold unto it, without lawful justification, and failed to deliver it to the owner despite repeated demands, see *Enterprise Bank Ltd. v. Aroso* (2014) 3 NWLR (Pt. 1394) 256.
(P. 99 lines 24 - 44)

OGBUINYA, JCA (Delivering the leading Judgment): This appeal probes into the correctness of the decision of the High Court of Lagos State, Lagos Division (herein under address as "the lower court"), *coram judice:* F. Bankole-Oki, J., in Suit No. LD/2116/2009, delivered on 31st May, 2016. Before the lower court, the

appellant and the respondents were the defendant and the claimants respectively.

The facts of the case, which transfigured into the appeal, are amendable to brevity and simplicity. In May, 2000 and 2003, the appellant, an incorporated financial institution in Nigeria, granted overdraft facilities to the first respondent in the sum of ₦1,500,000.00 and ₦5,000,000 respectively. The two overdraft facilities were secured by a deposit of the nine share certificates of the second respondent, the *alter ego* of the first respondent. The respondents fully liquidated the overdraft facilities and formally demanded for the release of the share certificates. The appellant, despite repeated demands on it by the respondents, only returned three out of the nine share certificates. The respondents alleged that they suffered pecuniary and non-pecuniary damages as a result of the appellant's failure to release the remaining six share certificates. Sequel to that, the respondents beseeched the lower court, via a writ of summons filed on 14th December, 2009, and tabled against the appellant the following relief:

> **The sum of ₦5,000,000 (Five Million Naira) being general damages for detinue of share Certificates deposited with the Defendant to secure a facility granted it by the Defendant and which said share certificates was wrongfully detained from the Claimant.**

In an expected reaction, the appellant joined Issue with the respondents and denied liability by filing a statement of defence.

Following the competing claims, the lower court had a full-scale determination of the case. In proof of the case, the respondents fielded one witness, CW1. In disproof of the case, the appellant called one witness, DW1. Tons of documentary evidence were tendered before the lower court by the parties. At the closure of evidence, the parties, through their counsel, addressed the lower court by way of adoption of written addresses. In a considered judgment, delivered on 31st May, 2016, found at pages 93-102 of the record, the lower court granted the respondents' claim.

The appellant was aggrieved by the decision. Hence, on 29th June, 2016, the appellant lodged a 5-ground notice of appeal, copied at pages 103-106 of the record, wherein it prayed this court: "To allow the appeal of the appellant by setting aside the decision of the High Court". Thereafter, the parties, through their counsel, filed and exchanged their respective briefs of argument in line with the procedure for hearing civil appeals in this court. The appeal was heard on 18th January, 2021.

During its hearing, learned appellant's counsel, Richard Okwudili, Esq., adopted the appellant's brief of argument, filed on 14th January, 2021, as representing his arguments for the appeal. He urged the court to allow it. Similarly, learned respondents' counsel, C.E. Anaenugwu, Esq., adopted the respondents' brief of

argument, filed on 15th January, 2021, as constituting his reactions against the appeal. He urged the court to dismiss it.

In the appellant's brief of argument, learned counsel distilled three issues of determination to wit:

1. **Whether it does not amount to raising the standard in civil proceedings to require evidence in proof of a fact admitted by the adversary.**

2. **Whether the judgment of the High Court is not perverse.**

3. **Whether in the circumstance of this case, the sum of ₦1,000,000.00 is a nominal sum.**

In the respondents' brief of argument, learned counsel crafted three issues for determination namely:

i. **Whether the lower court was right in holding that the Defendant/Appellant was liable in detinue?**

ii. **Whether the findings of the learned Judge that the Defendant/Appellant had not placed before the court any document to or from the Central Securities Clearing System as to the status of the Shares Certificates of the Respondents is perverse?**

iii. **Whether the learned trial Judge was right when he allowed the Respondents' witness statement on oath sworn before a notary public?**

A close look at the two sets of issues shows that they are identical in substance. In fact, the respondents' issues can be, conveniently, subsumed under the appellants. For this reason of sameness, I will decide the appeal on the issues nominated by the appellant: the undoubted owner of the appeal.

Arguments on the issues.

Issue one.

Learned appellant's counsel submitted that admitted fact would not need any proof. He relied on section 123 of the Evidence Act, 2011; *Akaninwo v. Nsirim* (2008) All FWLR (Pt. 410) 510; *Veritas Insurance* Co. *Ltd. v. Citi Trust Investments Ltd.* (1993) 3 NWLR (Pt. 281) 349; *Asika v. Atuanya* (2008) All FWLR (Pt. 433) 1293; *Onisese v. Oyeleye* (2008) All FWLR (Pt. 447) 1826. He asserted that the

respondents neither contradicted nor disputed the material averment that the share certificates were already in their possession and deemed to have admitted it. He noted that matters not denied in pleadings are taken as admitted. He cited *Ogunleye v. Oni* (1990) 21 NSCC (Pt. 2) 72. He added that a court would act on unchallenged evidence. He referred to owners of *MV Gongola Hope v. Smurfit Cases Nig. Ltd.* (2007) MJSC 90; *Anigbogu v. Uchejigbo* (2002) 10 NWLR (Pt. 776) 272; *Cappa & D'Alberto Ltd. v. Akintilo* (2003) 9 NWLR (Pt. 824) 49. He reasoned that the respondents' witness, under cross-examination, admitted that the Central Securities Clearing System (CSCS) reduced the certificates into electronic form. He opined that the lower court wrongly held that the appellant had the onus to show what happened to the share certificates.

On behalf of the respondents, learned counsel contended that the respondents made no admission about the share certificates. He stated that the respondents gave evidence which contradicted the averment in paragraph 7 of its statement of defence. He added that facts in that paragraph never existed and could not be admitted. He cited *Nwadinobi v. MCC Nig. Ltd* (2016) 1 NWLR (Pt. 1494). He opined that the respondents' witness never admitted that the CSCS reduced the share certificates into electronic form. He relied on CW1's evidence under cross-examination which was on general operation of CSCS. He stated the meaning of admission as defined in section 20 of the Evidence Act, 2011; *Akpagher v. Gbunugu* (2015) 1 NWLR (Pt. 1440) 209; *Omisore v. Aregbesola* (2015) 5 NWLR (Pt. 1482) 205.

Issue two.

Learned appellant's counsel contended that it gave evidence, the exhibit at Page 28 of the record, to show that there was no lien on the shares and same were credited to the respondents' account with the CSCS. He claimed that the respondents' amended statement of claim was not supported by evidence and it went to no issue. He relied on *Sanyaolu v. INEC* (1994) 7 NWLR (Pt. 612) 611; *Owners* of *MV Gongola Hope v. Smurfit Cases Nig. Ltd.* (supra); *Amaechi v. INEC* (2008) All FWLR (Pt. 407) 1. He stated that the respondents' CW1's statement on oath was inadmissible because it was not sworn in, the registry of the lower court, but before a lawyer. He cited order 3 rule 2 (C) of the High Court of Lagos State (Civil Procedure) Rules, 2012 (the High Court Rules); Schedule 2 of the Oaths Law of Lagos State, Cap. 01, 2003. He insisted that the lower court did not properly evaluate the evidence before it, namely: the appellant never disputed the respondents' right to possession of the share certificates, the share certificates had been returned to the respondents and the respondents never claimed for their return or value in the alternative. He enumerated the ingredients of the tort of detinue as noted in *J.E. Oshevire v. Tripoli Motors* (1997) 5 NWLR (Pt. 503) 1; *Lufthansa Airlines v. Odiase* (2006) 7 NWLR (Pt. 978) 34; *M.F. Kent (WA) Ltd. v. Martchem Ind. Ltd.* (2000) 8 NWLR (Pt. 669) 459. He took the view that the lower court did not consider the evidence in line with the above cases. He opined that

shares do not qualify as chattels for purposes of law of detinue. He cited *Aminu Ishola Investments Ltd. v. Afribank Plc* (2014) All FWLR (Pt. 716) 498.

Learned counsel posited that the appropriate remedy for detinue is not general damages but return of detained chattel or its assessed valued. He referred to *Enterprise Bank v. Aroso (2014)* 3 NWLR (Pt. 1394) 256; *A.T.P* & *JAS v. Drake* & *Skull* (2003) NWLR (Pt. 649) 484; *Geonesons Pharmaceuticals v. Francis Adeku* (2007) 14 NWLR (Pt. 1055) 333. He maintained that the decision was perverse and caused the appellant a miscarriage of justice. He cited *FBN v. Ozokwere* (2014) 3 NWLR (Pt. 1395) 439; *Civil Design Const. Nig. Ltd. v. SCOA Nig. Ltd.* (2007) 6 NWLR (Pt. 1030) 300.

For the respondents, learned counsel argued that the respondents established the ingredients of detinue. He relied on *P.I.P.C Security Ltd. v. George X Vlachos* (2008) 4 NWLR (Pt. 1076) 1; *Unipetrol (Nig.) Plc v. Bureimoh* (2004) 15 NWLR (Pt. 897) 641; *S.C.O.A. (Nig.) Ltd. v. J.A. Kehinde & Sons Nig. Ltd.* (2004) 8 NWLR (Pt. 874); *N.A.C.B. Ltd. v. Achagwa* (2010) 11 NWLR (Pt. 1205) 339. He stated that the appellant gave the reason for its failure to return the shares in exhibit 85 which was at variance with that in its statement of defence and evidence unreliable. He cited *NBC Plc v. Obah* (2000) 11 NWLR (Pt. 677) 212. He added that the appellant failed to prove its assertion that the shares were with the CSCS. He referred to *Rilwan & Partners v. Skye Bank Plc* (2015) 1 NWLR (Pt. 1441) 460; *Ogundele v. Agiri* (2009) 18 NWLR (Pt. 1173) 219. He described the evidence of the respondents as unchallenged and the lower court was right to act on the same. He relied on *Monkem v. Odili* (2010) 2 NWLR (Pt. 1179) 419; *Kopek Construction Ltd. v. Ekisola* (2010) 3 NWLR (Pt. 1182) 18; *Gbafe v. Gbafe* (1996) 6 NWLR (Pt. 455) 417. He said the appellant had the burden to prove that the share certificates had been reduced to electronic form by the CSCS. He stated that averments not supported by evidence would be deemed abandoned. He cited *Rilwan & Partners v. Skye Bank Plc (supra)*; *Yashe v. Umar* (2003) 13 NWLR (Pt. 838) 465; *Yusuf v. Oyetunde* (1998) (sic) (2014) 1 NWLR (Pt. 1387) 80.

Learned counsel posited that the lower courts finding on the status of the share certificates was not perverse. He explained that the document, dated 9th November 2010, the appellant's counsel referred to at page 28 of the record, was smuggled in as it was not an exhibit before the lower court nor mentioned in the DW1's statement on oath. He listed the documents mentioned to be relied on. He persisted that the document was never received by the respondents. He observed that it was made during the pendency of proceedings and inadmissible. He referred to *P.I.P.C.S Ltd. v. Vlachos (supra)*.

It was learned counsel's further argument that every breach of legal right would imply damages. He cited *Akudo v. Guinness Nig. Plc* (2012) 15 NWLR (Pt. 1322) 150. He postulated that damages served as remedy for detinue. He referred to *Paul Ordia v. Piemont Nig. Ltd.* (1995) 2 SCNJ 175; *J.C. Oshevire Ltd. v. Tripoli*

Motors (1997) 5 NWLR (Pt. 503) 1; *P.I.P.C.S Ltd. v. Vlachos* (supra). He reasoned that the appellant did not deny the respondents' averment on its duty to redeliver the share certificates and the same deemed admitted. He relied on *P.I.P.C.S Ltd. v. Vlachos* (supra).

Learned counsel submitted that the respondents filed written statement on oath after filing the amended statement of defence and complied with section 108 of the Evidence Act. He observed that the statement on oath was rightly deposed before a notary public. He cited section 12 of the Oaths Act Cap. 01, Laws of the Federation of Nigeria, LFN, 2004; section 2 (2) of the Notaries Public Act, Cap N 141, Laws of the Federation of Nigeria, LFN, 2004; *Buhari v. INEC* (2008) 19 NWLR (Pt. 1120) 246. He stated that the objection was overruled by the lower court, but not appealed against and could not be raised at this stage. He maintained, in the alternative, that the adoption of the statement on oath regularised it. He cited *Udeagha v. Omegara* (2010) 11 NWLR (Pt. 1204) 168. He concluded that the appellant's argument would have been valid if the statement on oath was sworn before a lawyer or his clerk. He referred to *Buhari v. INEC* (2008) 19 NWLR (Pt. 1120) 246; section 112 of the Evidence Act, 2011; section 19 of the Notaries Public Act, Cap N 141, LFN 2004.

Issue three.

Learned appellant's counsel culled the meaning of nominal and nominal damages from the *Black's Law Dictionary)* 6th edition, at pages 1049 and 392 respectively. He observed that the sum of ₦1,000,000 was not nominal damages but substantial or exemplary damages which called for the intervention of the court. He cited *Gari v. Seirafina* (2008) All FWLR (Pt. 399) 434; *Akinkugbe v. Ewulum Holdings* (2008) All FWLR (Pt. 423) 1269.

Resolution of the issues.

It is germane to place on record, upfront, that a flood of documentary evidence were furnished before the lower court by the parties. Interestingly, the case-law gives the courts the nod to evaluate documentary evidence, see *Fagunwa v. Adibi* (2004) 17 NWLR (Pt. 903) 544. Admirably, the law, in order to foreclose any injustice, donates concurrent jurisdiction. to this court and the lower court in evaluation of documentary evidence, see *Gonzee (Nig.) Ltd. v. NERDC* (2005) 13 NWLR (Pt. 943) 634; *Olagungu v. Adesoye* (2009) 9 NWLR (Pt. 1146) 225; *Ayuya v. Yorin* (2011) 10 NWLR (Pt 1254) 135; *Eyibio v. Abia* (2012) 16 NWLR (Pt. 1325) 51; *Odutola v. Mabogunje* (2013) 7 NWLR (Pt. 1354); *CPC v. Ombugadu* (2013) 18 NWLR (Pt.1385) 66; *UTC (Nig) Plc. v. Lawal* (2014) 5 NWLR (Pt. 1400) 221; *Ogundalu v. Macjob* (2015) 8 NWLR (Pt. 1460) 96; *Onwuzuraike v. Edoziem* (2016) 6 NWLR (Pt. 1508) 215; *Ezechukwu v. Onwuka* (2016) 5 NWLR (Pt. 1506) 529; *C.K. & W.M.C. Ltd. v. Akingbade* (2016) 14 NWLR (Pt. 1533) 487; *Emeka v. Okafor* (2017) 11 NWLR (Pt. 1577); 410; *Okoro v. Okoro* (2018)

16 NWLR (Pt. 1646) 506; *D.M.V (Nig) Ltd. v. NPA* (2019) 1 NWLR (Pt. 1652); *Olamoda v. Mustapha* (2019) 6 NWLR (Pt. 1667) 36; *APC v. Marafa* (2020) 6 NWLR (Pt. 1721) 383. I will tap from this co-ordinate jurisdiction in the appraisal of the army of documents in the appeal. Having been adequately fortified by the above position of the law, I will proceed to resolve the three nagging issues in this appeal.

For the sake of orderliness, I will attend to the issues in their numerical sequence of presentation by the parties. To this end, I will kick start with the treatment of issue one. The nucleus of the issue is plain and canalised within a narrow compass. It quarrels with the lower court's failure to declare that the respondents admitted the whereabouts of their six shares certificates which was the *casus belli* between the parties.

By way of prefatory remarks, In the mind of law, admission connotes a statement, oral or documentary, made by a party which suggests an inference as to any fact in issue or relevant fact, see section 20 of the Evidence Act, 2011; *UBA Plc. v. Jargaba* (2007) 11 NWLR (Pt. 1045) 237; *Oguanuhu v. Chiegboka* (2013) 6 NWLR (Pt. 1351) 588. It is a concession or voluntary acknowledgement made by a party of the existence of certain facts; a statement made by a party of the existence of a fact which is relevant to the cause of his adversary; a voluntary acknowledgement made by a part of the existence of the truth of certain facts which are inconsistent with his claims in an action", see *Adusei v. Adebayo* (2012) 3 NWLR (Pt. 1288) 534 at 558 Per Fabiyi, JSC; *UBA v. Jargaba* (2007) 31 NSCQR 144; *N.B.C.I. v. Integrated Gas (Nig.) Ltd.* (2005) 4 NWLR (Pt. 916) 617; *Omisore v. Aregbesola* (2015) 15 NWLR (Pt. 1482) 205; *N.A.S Ltd. v. UBA Plc.* (2005) 9 NWLR (Pt. 1463) 133. It constitutes a concession against the interest of a party making it, see *Onovo v. Mba* (2014) 14 NWLR (Pt. 1427) 391. Hence, in the view of the law, an admitted fact does not need any proof, see *Our Line v. S.C.C. Nig. Ltd.* (2009) 7 SCNJ 358; *Jolasun v. Bamgboye* (2010) 18 NWLR (Pt. 1225) 285; *Offor v. State (2012)* 18 NWLR (Pt. 1333) 421; *Jitte v. Okpulor* (2016) 2 NWLR (Pt. 1497) 542; *Cole v. Jibunoh* (2016) 4 NWLR (Pt. 1503) 499; *Orianezi v. A.G., Rivers State* (2017) 6 NWLR (Pt. 2017) 6 NWLR (Pt. 1561) 224; *Mba v. Mba* (2018) 15 NWLR (Pt. 1641) 177; *Adeokin records v. M.C.S.N (Ltd/GTE)* (2018) 15 NWLR (Pt. 1643) 550; *N.R.M.A. & FC v. Johnson* (2019) 2 NWLR (1656) 247.

Now, the gravamen of the appellant's chief grievance, indeed its trump card on the lean issue, is submissive to clarity. A resume of the agitation is this. The appellant pleaded, in paragraph 7 (1)-(iv) of its statement of defence, which colonises pages 18-20 of the record, that the remnants of the respondents' share certificates, six in number, were sent to the Nigerian Stock Exchange, by the appellant, which refused to return them to the appellant on the ground that they were, to the respondents' knowledge, reduced to an electronic form and credited to the respondents' account under the Central Security Clearing System (CSCS) procedure. The contention of the appellant is that the averment was never con-

tradicted/disputed by the respondents.

It is trite elementary law that an admission is binding on its maker if it is clear, unequivocal and devoid of misapprehension of facts, see *Al-Hassan v. Ishaku* (2016) 10 NWLR (Pt. 1520) 230. A court has a bounden duty to examine the entire pleadings of a party in order to determine if there is admission, see *Okoye v. Nwankwo* (2014) 15 NWLR (Pt. 1429) 93; *Agi v. PDP* (2017) 17 NWLR (Pt. 1595) 366; *NNPC v. Roven Shipping Ltd.* (2019) 9 NWLR (Pt. 1676) 67.

I have, taking shelter under this bounden duty imposed on the court by law, given a clinical and global/universal examination to the respondents' 21-paragraph 2nd amended statement of claim which monopolises pages 41-43 of the record. I have perused it with the finery of a tooth comb. Incidentally, I am unable to find, even with the prying eagle-eye of an appellate court, in that holistic judicial exercise, where the respondents, impliedly, directly or circuitously, made a categorical admission of the residence of their six share certificates in the Nigerian Stock Exchange. The respondents, in paragraph 11 of their amended statement of claim, pleaded that the appellant promised to take urgent steps to obtain duplicate copies of the six share certificates from the registrar of companies concerned.

The averment is an offspring of the appellant's letter to them, which later transfigured into exhibit 85, that it misplaced the six share certificates. This critical averment, to my mind, does not come within the perimeter of admission in the sense that it is, totally, divorced from being clear and unequivocal acceptance that the six share certificates were domiciled in the possession of the Nigerian Stock Exchange which transformed the same into electronic form/value under the auspices of the CSCS.

The appellant chastised the evidence of the respondents' star and only witness, CW1, under the cross-fire of cross-examination, as an admission of its pleading on the status of the six share certificates. In due fidelity to the desire of the law, I have visited the record, the spinal cord of every appeal, especially at the abode of the cross-examination of CW1 which is wrapped between pages 90 and 91 of the record. I have given it an intimate reading. Interestingly, it is rebellious to ambiguity. To begin with, the witness; CW1, was never quizzed on the location of the six share certificates while fielding questions from the appellant's counsel in the crucible of cross-examination. The questions were weaved around the general organisation and functions of the CSCS which is incompatible with the appellant's averment' on the retention of the six certificates by the Nigerian Stock Exchange the regulator of the Nigerian capital market. In effect, the CW1, in the furnace of cross-examination, never conceded that the respondents were aware that their six share certificates were in the custody of the Nigerian Stock Exchange.

In the light of this brief legal anatomy on admission, the respondents did not, in the least, both in their pleading and *viva voce* evidence, make an undiluted

admission of the appellant's assertion, that the six share certificates were with the Nigerian Stock Exchange, as contemplated and ordained by law. In this wise, the lower court did not fracture the adjectival law when it restrained itself from imputing admission of the status of the six share certificates to the respondents. In effect, all the diatribes, which the learned appellant's counsel heaped on the lower court's immaculate finding, that it had the *onus probandi* on what happened to the share certificate, pale into insignificance. It will smell of judicial sacrilege to tinker with a finding that has not disclosed any hostility to the law. In the end, I have no choice than to resolve the issue one against the appellant and in favour of the respondents.

Having dispensed with issue one, I proceed to settle issue two. The meat of the issue is simple. It castigates the lower court's decision as being perverse. Since perversion is the cynosure of the point, it is germane to x-ray its purports for easy appreciation. A verdict of court is perverse when: it runs counter to the pleadings and evidence before it, a court takes into account matters it ought not to take into consideration, a court shuts its eyes to the evidence, a court takes irrelevant matters into account or it has occasioned a miscarriage of justice, see *Udengwu v. Uzuegbu* (2003) 13 NWLR (Pt. 836) 136; *Nnorodim v. Ezeeni* (1995) 2 NWLR (Pt. 378) 448; *Lagga v. Sarhuna* NWLR (Pt. 1114) 427; *Onyekwelu v. Elf Pet (Nig.) Ltd.* (2009) 5 BWKR (Pt. 1133) 181; *Momoh v. Utnoru* (2011) 15 NWLR (Pt. 1270) 217; *Ihunwo v. Ihunwo* (2013) 8 NWLR (Pt. 1357) 550; *Olaniyan v. Fatoki* (2013) 17 NWLR (Pt. 1384) 477; *Udom v. Umanah* (No.1) (2016) 12 NWLR (Pt. 1526) 179 *Adeokin Records v. M.C.S.N. (Ltd)/GTE)* (supra); *Mamonu v. Dikat* (2019) 7 NWLR (Pt.1672) 495; *MTN (Nig.) Comm. Ltd. v. Corporate Comm. Inv. Ltd.* (2019) 9 NWLR (Pt. 1678) 427; *Offodile v. Offodile* (2019) 16 NWLR (Pt. 1698) 189; *Bi-Courtney Ltd. v. A.G. Fed.* (2019) 10 NWLR (Pt. 1679) 112; *Fredrick v. Ibekwe* (2019) 17 NWLR (Pt. 1702) 467; *Uzodinma v. Ihedioha* (2020) 5 NWLR (Pt. 1718) 529.

The appellant's foremost grouse, under this issue, which hosts other adjunct sub-issues, is that the CW1's statement on oath was inadmissible/disqualified as evidence because, *inter alia,* it was not sworn to before the commissioner for oaths as decreed by section 2 of the Oaths Law of Lagos State, Cap. 01, 2003. For a dispassionate consideration of this auxiliary sub-issue, the provision of section 109 of the Evidence Act, 2011 comes in handy. Being pivotal to the issue, it is imperative to pluck it out from where it is ingrained in the statute book, *ipsissima verba,* as follows:

> **109. Any affidavit sworn before any judge, officer or other person duly authorized to take affidavits in Nigeria may be used in the court in all cases affidavits are admissible.**

The provision does not harbour any ambiguity. On this score, the law compels the court to accord its ordinary grammatical meanings without any interpolation,

see *Bakare v. NRC* (2007) 17 NWLR (Pt. 1064) 606; *PDP v. Okorocha* (2012) 15 NWLR (Pt. 1323) 205; *Kawawu v. PDP* (2017) 3 NWLR(Pt. 1553) 420; *Setracto (Nig) Ltd. v. Kpayi* (2017) 5 NWLR (Pt. 1558) 280; *Adeokin Records v. MCSCN* (2018) NWLR (Pt. 1643); *Ecobank v. Honeywell Flour* (2019) NWLR (Pt. 1655) 55.

The CW1's statement on oath, which occupies pages 44 – 46 of the record, was made on 12th May, 2014. It was adopted as his evidence-in-chief in the bowel of the lower court as manifest in the proceedings of 4th November 2014 showcased at page 89 of the record. I have given an in-depth study to the deposition which is a mirror image of the respondents' amended statement of claim. It was sworn to before a notary public of Nigeria: Tochukwu N.T. Okonkwo of No. 20 Enitan Street, Aguda, Surulere, Lagos State.

The provision of section 109 of the Evidence Act, 2011, displayed above, amply, demonstrates that the commissioner for oaths does not enjoy the monopoly/prerogative right of administration of oaths to deponents of affidavits. The provision, in unmistakable terms, grants an unbridled licence to "other person duly authorised to take affidavits in Nigeria". A notary public of Nigeria, usually appointed by the Chief Justice of Nigeria, pursuant to the provision of section 2 (1) of the Notaries Public Act, falls within the wide canopy of "other person" contemplated in section 109 of the Evidence Act, 2011. The provision of section 2(2) of the Notaries Public Act equips a notary public with the authority to perform the same duties and functions like his counterpart in England. In England, a notary public administers oaths. This has received the blessing/imprimatur of the case-law, see *Buhari v. INEC* (2008) 19 NWLR (Pt. 1120) 246 (2009) All FWLR (Pt. 459) 419.

Besides, by virtue of the provision of section 10 (1) of the Oaths Act, it shall be lawful for a notary public to administer any lawful oath or take any lawful affirmation or affidavit which may be required to be taken or made for the purpose of complying with the requirements of any law for the time being in force throughout Nigeria and elsewhere. Thus, the provision clearly donates legitimate power of administration of oath or taking affidavit to the office of the notary public. In the second schedule to the Oaths Act, affidavit is listed under court proceedings. In the course of performance of that statutory duty, section 6 thereof commands and mandates a notary public to state the place and date the oath or affidavit is taken or made. Section 112 of the Evidence Act, 2011 declares/renders an affidavit inadmissible if it is proved to be sworn to before a person on whose behalf it is offered, a legal practitioner or his partner or clerk. Indisputably, the CW1's deposition was not sworn before any of those disqualified in section 112 (supra) as to erode its admissibility, see *Buhari v. INEC* (supra); *Chidubem v. Ekenna* (2009) All FWLR (Pt. 455) 1692. It stems from this legal exposition that the CW1's statement on oath was duly sworn before the statutorily authorised officer/person. It, therefore, was/is not tainted/infested with any vices to earn it the stigma of incompetence. I am drained of any legal justification to crown it with the underserved toga of inadmissibility. I welcome it as admissible deposition

which is usable for the determination of the appeal. In essence, the lower court's utilisation of it was not offensive to the law.

Another grudge, nursed by the appellant, orbits around the lower court's failure/neglect to utilise a letter, dated 9th November, 2019, written by the appellant to the first respondent. The letter is copied at page 28 of the record. Curiously, the appellant, in its infinite wisdom, did not furnish the lower court with it during the trial proceedings. The failure is a costly one. The reason is not far-fetched. It never acquired the enviable status of an exhibit with the adjudicatory gains attendant to it. An exhibit denotes a document, record or other tangible objects formally introduced as evidence in court, see *Lucky v. State* (2016) 13 NWLR (Pt. 1528) 128. A court of law can only rely on a document tendered as an exhibit before it and *vice versa)* see *Nigerian Ports Plc. v. B.P.P.T.E. Ltd* (2012) 18 NWLR (Pt. 1333) 454; *The People of Lagos State v. Umaru* (2014) 7 NWLR (Pt. 1407) 584; *Wassah v. Kara* (2015) 4 NWLR (Pt. 1449) 374. In the wide realm of adjectival law, a rejected document cannot be relied on by the court, see *Nigerian Ports Plc. v. B.P. PTE Ltd.* (2012) 18 NWLR (Pt. 1333) 454; *Agboola v. State* (2013) 11 NWLR (Pt. 1366) 619, *Wassah v. Kara (supra)*; *State v. Ajayi* (2016) 14 NWLR (Pt. 1532) 196; *Kekong v. State* (2017) 18 NWLR (Pt. 1596) 108.

Alas, the crucial letter, which would have assisted the appellant to prove the location of the six share certificates, became/was a document *ex facie curia* to the benefit of the respondents. A court of law, both trial and appellate, is divested of the jurisdiction to act on a document that is not furnished before it. To do so will smack of speculation which is an aberration in adjudication. The lower court was disrobed of the quality of clairvoyance as to know the contents of the letter. It, therefore, did not insult the law when it failed to rely on it in the determination of the case. The absence of the letter, as an exhibit before the lower court, constitutes a serious *coup de grace* to the appellant's already limping case. Its exit from the lower court, with due reverence, punctures and exposes the poverty of the learned appellant's counsel's scintillating argument on the point. It is disabled from its birth. It cannot fly!

The other grouse, which the appellant raked against the decision, revolves around the lower court's finding on detinue against the appellant.

It is foremost to appreciate the import and features of the tort of detinue. Detinue connotes the wrongful detention of a person's chattel after the holder/person, who is in actual possession of it, has refused to deliver it upon demand by the owner/person who has an immediate right to its possession, see *J.E. Oshevire Ltd. v. Tripoli Motors* (1997) 5 NWLR (Pt. 503) 1; *Julius Berger Nig. Plc v. Omogui* (2001) 6 SC 185 at 192; *A.J. Inv. Ltd. v. Afribank (Nig.) Plc* (2013) 9 NWLR (Pt. 1359) 380. To succeed in an action in detinue, the person, usually the plaintiff, must establish the fact that: (a) He is the owner of the chattel. (b) He has immediate right to possession to it. (c) The holder, (the defendant) is in actual possession of

it. (d) He made a demand on the defendant to deliver it to him. (e) The defendant continues to hold unto it, without lawful justification, and failed to deliver it to the owner despite repeated demands, see *Enterprise Bank Ltd. v. Aroso* (2014) 3 NWLR (Pt. 1394) 256.

In total loyalty to the expectation of the law, I have married the respondents' evidence with the conditions to be established in proof of detinue chronicled above. The raison *d'etre* for the juxaposition is simple. It is to ascertain if the respondents' evidence, parol and documentary, satisfied those outlined conditions which are desiderata in proof of the tort of detinue.

To begin with, it is not in doubt that the respondents were the owner of the six share certificates. Exhibits B and B1 were the vehicles by which the respondents deposited those share certificates as security for the two overdraft facilities of ₦1.5m and ₦5m granted to them by the appellant. The two documents are concrete and eloquent testimony that the share certificates belonged to the respondents. The appellant made a wholesale admission, in paragraph 3 of its statement of defence, that "the claimant has fully liquidated the overdraft facility granted to it". It stems from the clear concession that the parties are *consensus ad idem* on the discharge of the overdraft facilities. Exhibit C, tendered by the appellant, solidifies the fact that the respondent settled the indebtedness. Having discharged that financial/pecuniary obligation of indebtedness, the respondents had an immediate right of possession to the share certificates pledged as collaterals for the overdraft loans. In the same vein, the same exhibits 8 and 81 revealed that the appellant was in possession of the share certificates. Exhibit 84, authored by the appellant, showed that it handed three, but could not release the other six share certificates to the respondents. In exhibits 82, 82, 85 and 86, the respondents demanded, in clear terms, for the return of the share certificates. Exhibits 86 and C indicate that the appellant retained custody of the share certificates despite the repeated demands by the respondent for their release.

Let me stress, pronto, that the respondents' evidence was mainly documentary. In the eyes of the law, documentary evidence is incorruptible, invincible and permanent and commands more probative evidential value than oral testimony which oozes out of the vocal cord of man and is susceptible to distortion by its creator. Thus, the respondents proffered, in the sanctuary of the lower court, pieces of pungent oral and documentary evidence of detinue against the appellant. In point of fact, all the conditions-precedent for the employment of detinue against the appellant *vis-a-vis* the six share certificates were met by the respondents.

In an avowed bid to castrate the respondent's claim in detinue, the appellant erected the defence of inapposite relief of general damages. A person who has a right of action in detinue has three optional remedies, which trace their paternity to Diplock, LJ:, in *General Finance and Facilities Ltd. v. Cooks Cars (Romford) Ltd.* (1963) 1 WLR 664 at 650-651, open to him: (a) claim for value of the chattel

and damages for its detention; (b) claim for the return of the chattel and damages for its detention or (c) claim for the return of the chattel, or its value as assessed, and damages for its detention. This hallowed principle of law, claims in detinue, is, firmly, propagated in our *corpus juris,* see *Widman & Walters (Nig.) Ltd. v. Mojibolu Oluwa* (1968) 1 All NLR 383; *Ordia v. Piedmont* (1995) 2 SCNJ 175; *Iheanacho v. Uzochukwu* (1997) 1 SCNJ 117; *Oshievire Ltd. v. Tripoli* (1997) 4 SCNJ 246; *NACENN (Nig.) Ltd. v. B.A.P. Ltd* (2011) 11 NWLR (Pt. 1257) 193; *Enterprise Bank Ltd. v. Aroso* (2014) 3 NWLR (Pt. 1394) 256; *Adefunke v. Ikpenai* (1958) SCNLR 189; *Odumosu v. ACB Ltd.* (1976) 11 SC 55; *Kosile v. Folarin* (1989) 3 NWLR (Pt. 107) 1; *Agbanelo v. Union Bank* (2000) 45 SCNJ 353. Suffice to say that claim for damages is recurrent in the three options open to a party that alleges against a tortfeasor of the tortious act of detention of chattel.

In the first place, the invocation of the remedies, which the law has donated to a victim of detinue, is a domestic right which is submissive to waiver by an injured party, see *F & F Farms (Nig.) Ltd. v. NNPC* (2009) 12 NWLR (Pt. 1155) 387; *Nnonye v. Anyichie* (2005) 2 NWLR (Pt. 910) 633. In the Latin days of the law, waiver of personal right was encapsulated in the maxim: *Quilibet patest renunciare juri pro* se *introducto* - an individual may renounce a law made for his special benefit. The respondents exercised this personal right by picking the election of claiming for damages only. It does not lie in the mouth of the appellant to question how the respondents chose to exercise their own right.

In the interest of consolidation, in *Ordia v. Piedmont (Nig.) Ltd.* (1995) 2 SCNJ 175 at 184/ (1994) 2 NWLR (Pt. 379) 516 at 528. Belgore, JSC (later CJN), incisively, declared:

> **In an action like this, where chattel is withheld by the defendant from the plaintiff, the action in detinue is for either the return of the chattel plus damages for its retention; or the value of the chattel plus damages for its retention. Thus, the defendant even cannot deprive the plaintiff of his right to damages for retention of the chattel simply because he was not earning anything from its use.... In a case in detinue, however, the court will award what is reasonable as damages for retention of chattel by the defendant. The measure of damages in detinue, therefore, has always been the value of the chattel (if unreturned or lost) and damages for its retention of the chattel simply because he was not earning anything from its use... In a case in detinue, however, the court will award what is reasonable as damages for retention of chattel by the defendant. The measure of damages in detinue, therefore, has always been the value of the chattel (if unreturned or lost) and damages for its detention. Each case is determined by its facts and special circumstance as it is still an uncharted field...**

This magisterial pronouncement, in this *ex-cathedra* authority, *inter alia,* puts to rest any lingering doubt as to the claim of damages against a wrongdoer in the tort of detinue. Thus, it drowns and demolishes the defence of inappropriate remedy being brandished and paraded by the appellant to emasculate the lower court's finding on detinue. The defeasible defence is lame and flies in the face of the law. In the aggregate, the lower court's finding, that the tort of detinue was established against the appellant, was not injurious to the law to warrant any interference of this court. Contrariwise, I endorse it *in toto.*

My noble Lords, in the spirit of *ex abundanti cautela,* the judgment of the lower court, which is in the heat of decimation, is encased between pages 93-102 of the record. I have subjected it to a microscopic examination. The lower court, to my mind, carried out a meticulous and thorough analysis of the evidence, *viva voce* and documentary, proffered by the warring parties after assigning them to their respective pans in the imaginary scale of justice. It attached, deserving probative weight to the respective evidence offered by the parties. It found that the respondents' pan in the imaginary scale of justice hosted more admissible, credible and conclusive evidence. A piece of evidence is credible when it is worthy of belief, see *Agbi v. Ogbeh* (2006) 11 NWLR (Pt. 990) 1; *Dim v. Enemuo* (2009) 10 NWLR (Pt. 1149) 353; *Eta v. Dazie* (2013) 9 NWLR (Pt. 1359) 248; *A.J. Inv. Ltd. v. Afribank (Nig.) Plc.* (2013) 9 NWLR (Pt. 1359) 380; *Emeka v. Chuba-Ikeazu* (2017) 15 NWLR (Pt. 1589) 345.In the same vein, a piece of evidence is conclusive if it leads to a definite result, see *Nruamah v. Ebuzoeme* (2013) 13 NWLR (Pt. 1372) 474. The lower court found, rightly in my view, that the balance of evidence of the respondents, based on their qualitative nature, preponderated over those of the appellant's. The net effect is that the respondents proved their case against the appellant. Proof, in law, is a process by which the existence of facts is established to the satisfaction of the court, see section 121 of the Evidence Act, 2011; *Olufosoye v. Fakorede* (1993) 1 NWLR (Pt. 272) 747; *Awuse v. Odili* (2005) 16 NWLR (Pt. 952) 416; *Salau v. State* (2019) 16 NWLR (Pt. 1699) 399 (Pt. 1372) 474; *APC v. Karfi* (2018) 6 NWLR (Pt. 1616) 479; *Ojobo v. Moro* (2019) 17 NWLR (Pt. 1700) 166.

For the sake of completeness, the judgment of the lower court, which is comprehension-friendly, is not antithetical to the pleadings and evidence presented before it by the feuding parties. At the same time, the lower court did not import alien/foreign matters into the judgment. It utilised the evidence the parties presented before it as catalogued above. The finding does not, in the least, reek of any charge of perversity levelled against it by the appellant. In effect, the decision of the lower court is not marooned in the murky ocean of perversion to magnet the intervention of this court.

Flowing from the above juridical survey, done in due consonance with the law, the lower court's ultimate and solemn finding is an impeccable one. It did, in the least, fracture the law to render its faultless finding guilty of the accusation

of perfunctory evaluation of evidence hurled against it by the appellant. In fact, the allegation is a phantom as well as uncharitable and unsustainable. On this premise, I, with due respect, dishonour the learned appellant's counsel's salivating invitation to sacrifice the finding, on the proof of the claim, on the underserved altar of improper evidential evaluation. In the end, I have no option but to resolve issue two against the appellant and in favour of the respondents.

It remains to thrash out issue three. The marrow of the issue, which falls within a slim scope, is obedient to clarity. It bemoans the lower court's award of ₦1 million damages against the appellant for its detention of the respondents' share certificates.

Damages have been defined as: "that pecuniary compensation which law awards to a person for the injury he has sustained by reason of the act or default of another whether that act or default is a breach of contract or tort", see *Iyere v. B.F.F.M Ltd* (2008) 18 NWLR (Pt. 1119) 300 at 345, Per Muhammad, JSC; *Agbanelo v. Union Bank* (2000) 4 SCNJ 353; *Ukudie v. SPDCN* (1975) 8-11 SC 155 at 162; *Neka B.B.B. Mfg. Co. Ltd. v. A.C.B. Ltd* (2004) 2 NWLR (Pt. 858) 521. General damages are those damages that the law presumes as flowing from the wrong complained of by the victim. They need not be specifically pleaded and strictly proved, see *U.B.N. Plc v. Ajabule* (2011) 18 NWLR (Pt. 1278) 152; *Neke B.B.B. Mfg. Co. Ltd. v. A.C.B. Ltd. (supra)*; *Ajigbotosho v. R.C.C. Ltd.* (2019) 3 NWLR (Pt. 1659) 289; *UBN Plc v. Nwankwo* (2019) 3 NWLR (Pt. 1660) 474; *Ibrahim v. Obaje* (2019) 3 NWLR (Pt. 1160) 389; *Onyiorah v. Onyiorah* (2019) 15 NWLR (Pt. 1695) 227. It is at the discretion of the court to award general damages, see *Cameroon Airlines v. Otutuize* (supra); *Ahmed v. CBN* (2013) 2 NWLR (Pt. 1339); *Unity Bank Plc v. Ahmed* (2020) 1 NWLR (Pt. 1705) 364. The appellant, for reasons best known to it, did not query the propriety or otherwise of the lower court's exercise of its discretion. I will, therefore, restrain myself from making excursion into the firmament of discretionary power of a court.

The appellant implored this court to interfere with the award of ₦1 million general damages as being an affront to the law. An appellate court does not usually interfere with award of damages unless: (a) the trial court acted under a mistake of law; or (b) where the trial court acted in disregard of some principles of law; or (c) where the trial court acted under misapprehension of facts; or (d) where it has taken into account irrelevant matters or failed to take into account relevant matters; or (e) where injustice would result if the appellate court does not interfere; or (f) where the amount awarded is ridiculously low or high that it must have been a wholly erroneous estimate of the damages, see *Cameroon Airlines v. Otutuizu* (2011) 4 NWLR (Pt. 1238) 512; *British Airways v. Atoyebi* (2014) 13 NWLR (Pt. 1424) 253; *Agu v. General Oil Ltd.* (2015) 17 NWLR (Pt. 1488) 327.

I have just found that the lower court paid due allegiance to the law when it awarded the damages in the case in that it is a grantable relief in the tort of det-

inue. As shown earlier, the lower court did not desecrate the law nor disregard its principles in the award. It awarded nominal damages as recommended and decreed by law, see *Odumosu v. ACB Ltd* (supra). It was not mistaken as to the facts. It never invited extraneous matters to play a role, in its assessment of the damages. The corollary is that no injustice will arise if an appellate court fails to intervene in the awards. On the *quantum* of the damages, the appellant, in its infinite wisdom, made no case for or against mitigation of damages before the lower court or even in this court. It, therefore, did not avail the court, to its detriment with the necessary facts and evidence that would have compelled this court to slash the damages. In any event, the seemingly mountainous sum of ₦1 million vaporises in the presence of the existential galloping inflation and exponential depreciation of the Nigerian Naira currency In a nutshell, the lower court was/is not guilty of any of the circumstances chronicled above as to warrant and propel this court to tamper with the award in general damages.

This brief legal dissection, anchored on interference in award of damages, with due deference, deflates the learned appellant's seemingly sterling argument on the issue. The lower court acted in due obeisance to the dictate of the letter and spirit of the law in the award of the ₦1 million damages to the respondents. In effect. I have no backing of the law to interfere with the award that has not revealed any enmity with the law. I will, therefore, not hesitate to resolve the issue three against the appellant and in favour of the respondents.

On the whole, having resolved the three issues against the appellant, the destiny of the appeal is obvious. It is devoid of any grain of merit and liable to the reserved penalty of dismissal. Consequently, I dismiss the appeal. I affirm the judgment of the lower court delivered on 31st May, 2016. The parties shall bear the respective costs they expended in the prosecution and defence of the doomed appeal.

UMAR, JCA: I read in advance the judgment just delivered by my learned brother, OBANDE FESTUS OGBUINYA, JCA, and I completely agree with his erudition in arriving at the conclusion thereat.

In the well-articulated judgment, my brother has exhaustively dealt with all the issues raised by the counsel, so much so that whatever contribution I make will amount to mere repetition.

I adopt my Lord judgment as mine. I, too, dismiss the appeal. I abide by consequential order as to the cost.

BAYERO, JCA: I have read in advance the draft of the lead judgment just rendered by my learned brother OBANDE FESTUS OGBUINYA JCA. I agree with the reasoning and the conclusion that the appeal lacks merit. It is accordingly dismissed by me.

I abide by the consequential orders therein.

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History:

HIGH COURT
High Court of Lagos State
***Coram Judice:* F. Bankole-Oki, J.**
Suit No. LD/2116/2009
Tuesday 31st May, 2016

COURT OF APPEAL (Lagos Division)
Joseph Shagbaor Ikyegh, JCA ***(Presided)***
Abubakar Sadiq Umar, JCA ***(Read the leading Judgment)***

Abdullahi Mahmud Bayero, JCA

COUNSEL:
Richard Okwudili. Esq., for the appellant
C.E. Anaenugwu Esq., for the respondents

MAERSKLINE NIG. LTD. v. S. E. EZE & CO. LIMITED

COURT OF APPEAL
(LAGOS DIVISION)

CA/L/83/2016
MONDAY 20TH SEPTEMBER, 2021

(OGBUINYA; OHO; BAYERO, JJ.CA)

COMMERCIAL LITIGATION – Jurisdiction – Where a court is disrobed of the jurisdiction to entertain a matter, the proceeding germinating from it, becomes a nullity.

COMMERCIAL LITIGATION – Locus standi – who can sue on a bill of lading – only a consignee or endorsee of a bill of lading has the legal capacity/locus standi to sue on it.

CONTRACT – Privity of contract – a contract cannot confer/bestow rights, or impose obligations arising under it, on any person except parties to it.

COURT – Jurisdiction to adjudicate over academic issues – a court is divested of the necessary jurisdiction to adjudicate over academic disputes.

MARITIME – Bill of lading – Meaning – Concept – A bill of lading, in the province of carriage of goods by sea/contract of affreightment, connotes a written evidence of contract between a person engaged in the business of transporting/forwarding goods by sea and a carrier (shipper) or its agents embodying an' undertaking by the shipper for the carriage and delivery of the freight or cargo to the order or assigns of a specified person at a specified place.

MARITIME – Bill of lading – who is a notify party – A notify party or addressee is a party who is to be notified of the arrival of the goods and is often an agent for the receiver of the goods who arranges for their clearance.

Facts:

This is an appeal from the decision of the Federal High Court, Lagos Division (trial court), which was delivered by Saliu Saidu, J, on 15th December, 2015.

The respondent (as Plaintiff in the trial court), ordered for the importation of 700 bags of dried fish heads/bone with the appellant (as Defendant in the trial court) as the carrier of the cargo on board the vessel Maersk Flensbury in a container No. 1407064 and bill of loading No. SAFM 75-192441, on behalf of First Bank (whose name was later struck out from the suit), who was the consignee in the

bill of lading.

The respondent alleged that 183 bags, out of the 700 bags of dried fish heads/bone, got damaged whilst under the custody of the appellant, and when the appellant was informed, it appointed a loss adjuster to meet with the respondent's insurer to take record of the incident. The respondent on this note, claimed that the damage was out of negligence of the appellant to deliver the cargo in good state, and therefore with the ousted First Bank of Nigeria Plc, instituted an action via a writ of summon and statement of claim, beseeching the trial court for the sum of ₦5,490,000.00, being the sum payable for the insured damaged goods belonging to the Plaintiff, interest at the rate of 30% per annum, ₦3,000,000.00 as general damages, as well as cost for litigation.

The appellant joined issue with the respondent and denied liability by filing a statement of defence wherein it raised some legal defences.

Following the discordant claims, the trial court had a full-scale determination of the suit, and in a considered judgment, granted the claim in part.

The appellant was dissatisfied with the judgment, and appealed to the Court of Appeal.

Held ***(Unanimously allowing the appeal):***

[1] ***Commercial Litigation – Jurisdiction – Where a court is disrobed of the jurisdiction to entertain a matter, the proceeding germinating from it, becomes a nullity.***

Where a court is disrobed of the jurisdiction to entertain a matter, the proceeding germinating from it, no matter the quantum of diligence, dexterity, artistry, sophistry, transparency and objectivity injected into it, will be trapped in the intractable vortex of nullity, see *Elugbe v. Omokhafe* (2004) 18 NWLR (Pt. 905) 319; *Lokpobiri v. Ogola* (2016) 3 NWLR (Pt. 1499) 328; *Garba v. Mohammed (supra)*; *Isah v. INEC (supra)*.
(P. 125 lines 12 - 17)

[2] ***Commercial Litigation – Locus standi – who can sue on a bill of lading – only a consignee or endorsee of a bill of lading has the legal capacity/locus standi to sue on it.***

There is no gainsaying the fact that the provision of section 375(1) of the Merchant Shipping Act, chronicled above, has fallen for interpretation before the Supreme Court in a galaxy of authorities. The apex court has since construed it to mean that only a consignee or endorsee of a bill of lading has the legal capacity/locus standi to sue on it, *id est*, the law

recognises only two classes of people who can sue on a bill of lading - the consignee and or the endorsee, see *Adesanya v. Leigh Hoegh of Co. A/S* (1968)/AII NLR 333/(1968) SCNLR 426; *Broadline Ent. Ltd. v. Monterey Maritime Corp.* (1995) 9 NWLR (Pt.417) 1; *Pacers Multi-Dynamic v. M. V. "Dancing Sister"* (2000) 3 NWLR (Pt.648) 241; *Brawal Shipping Ltd. v. F. I. Onwadike Co.* Ltd. (2000) 11 NWLR (Pt. 678) 387/(2000) 2 SCNQR (Pt. 2) 1379; *B.M. Ltd. v. Woermann-Line* (2009) 13 NWLR (Pt. 1157) 149; *P.M. Ltd. v. The "M.V. Dancing Sister"* (2012) 4 NWLR (Pt. 1289) 169. Recently, in *P.M Ltd. v. The "M.V. Dancing Sister" (supra)*, at 190 and 191, Rhodes-Vivour, JSC, insightfully and incisively, declared:

The above explains section 375(1) supra [Merchant Shipping Act] and the dilemma of the appellant in this appeal. ... The appellant claims to be the consignee and owner of the goods shipped from Brazil on board the Dancing Sister (1st respondent). The appellant appears on the three bills of lading as the notify party and not the consignee. The right of action on the bill of lading is restricted to parties to the bills of lading. Ownership of the goods is irrelevant in a suit on the contract in the bills of lading. Since the appellant is a notify party on the three bills of lading, he is not a party to the contract in the bills of lading and so he had no locus standi to sue upon it. There can only be a justiciable action in contract if there is a dispute between the parties to the contract. Since the appellant is not a party to the bills of lading there can be no dispute to resolve. (P. 121 lines 23 - 45; P. 122 lines 1 - 5)

[3] ***Contract – Privity of contract – a contract cannot confer/bestow rights, or impose obligations arising under it, on any person except parties to it.***

The ancient doctrine of privity of contract has been defined as "that connection or relationship which exists between two or more contracting parties", see *Rebold Ind. Ltd. v. Magreola* (2015) 8 NWLR (Pt. 1461) 201 at 231, per Fabiyi, JSC. The doctrine, which is part of our corpus juris, postulates, generally, that a contract cannot confer/bestow rights, or impose obligations arising under it, on any person except parties to it. Put simply, a stranger to a contract cannot gain or be bound by it even if made for his benefit, see *T. E. Oshevire Ltd v. Tripoli Motors* (1997) 5 NWLR (Pt. 503) 1/(1997) 4 SCNJ 246; *Owodunmi v. Registered Trustees, CCC Worldwide* (2001) 10 NWLR (Pt. 675) 315; *Makwe v. Nwukor* (2001) FWLR (Pt. 63)/(2001) 14 NWLR (Pt. 733) 356; *Union Beverages Ltd v. Pepsi Cola Int. Ltd* (1994) 3 NWLR (Pt. 330) 1; *UBA v. Jargaba* (2007) NWLR (Pt. 1045); *Nwuba v. Ogbuehi* (2007) NWLR (Pt. 1072); *Osoh v. Unity Bank Plc* (2013) 9 NWLR (Pt. 1358) 1; *Idufueko v. Pfizer Products Ltd.* (2014) 12 NWLR (Pt. 1420) 96; *Rebold Ind. Ltd. v. Magreola (supra)*;

Reichie v. N.B.C.I (2016) 8 NWLR(Pt.1514) 274.
(P. 126 lines 6 - 20)

[4] ***Court – Jurisdiction to adjudicate over academic issues – a court is divested of the necessary jurisdiction to adjudicate over academic disputes.***

It is settled law, beyond any peradventure of doubt, that a court is divested of the necessary jurisdiction to adjudicate over academic disputes. This is so even if their determination will enrich the jurisprudential content of the law. Such academic questions are divorced from live issues which engage the adjudicative attention of the courts, see *A.G., Anambra State v. A.G., Fed.* (2005) 9 NWLR (Pt. 931) 572; *Ugba v. Suswan* (2014) 14 NWLR (Pt. 1427) 264; *Salik v. Idris* (2014) 15 NWLR (Pt. 1429) 36; *FRN v. Borishade* (2015) 5 NWLR (Pt. 1451) 155; *Danladi v. T.S.H.A.* (2015) 2 NWLR (Pt. 1442) 103; *FRN v. Dairo* (2015) 6 NWLR (Pt. 1452) 141; *Daniel v. INEC* (2015) 9 NWLR (Pt. 1463) 113; *Odedo v. Oguebego* (2015) 13 NWLR (Pt. 1476) 229; *Dickson v. Sylva* (2017) 10 NWLR (Pt. 1573) 299; *Olowu v. Building Stock Ltd.* (2018) 1 NWLR (Pt. 1601) 343; *Anyanwu v. PDP* (2020) 3 NWLR (Pt. 1710) 134.
(P. 127 lines 12 - 23)

[5] ***Maritime – Bill of lading – Meaning – Concept – A bill of lading, in the province of carriage of goods by sea/contract of affreightment, connotes a written evidence of contract between a person engaged in the business of transporting/forwarding goods by sea and a carrier (shipper) or its agents embodying an' undertaking by the shipper for the carriage and delivery of the freight or cargo to the order or assigns of a specified person at a specified place.***

A bill of lading, in the province of carriage of goods by sea/contract of affreightment, connotes a written evidence of contract between a person engaged in the business of transporting/forwarding goods by sea and a carrier (shipper) or its agents embodying an' undertaking by the shipper for the carriage and delivery of the freight or cargo to the order or assigns of a specified person at a specified place. It is a contract between a ship owner/carrier, a shipper/consignee and a consignee/endorsee. It is categorised into two classes namely: combined transport bill of lading which involves usage of different ships or other means of transportation from origin to destination. Through bill of lading where the carrier takes on full liability under the contract of carriage for the entire journey and overall modes of transport. A bill of lading performs three principal functions in the shipment of goods, videlicet: (a) It is evidence of the terms of contract of affreightment. (b) It is evidence of receipt for the goods to which it relates, *id est*, evidence of shipment of goods. (c) It is evidence

that the holder of it has property in the goods - it serves as document of title, see *B.M Ltd. v. Woermann-Line* (2009) 13 NWLR (Pt.1157) 149; *B.M Ltd. v. The "M.V. Dancing Sister"* (2012) 4 NWLR (Pt. 1289) 169; *Delmas v. Sunny Ositez Int'l Ltd* (2019) 9 NWLR (Pt 1677) 305. Indubitably, it has been described as "a key which in the hands of rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may change to be", see *Barclays Bank Ltd. v. Customs and Excise Commissioners* (1963) Lloyd's Rep. 81 at 88, per Diplock L. J.
(P. 120 line 45; P. 121 lines 1 - 21)

[6] ***Maritime – Bill of lading – who is a notify party – A notify party or addressee is a party who is to be notified of the arrival of the goods and is often an agent for the receiver of the goods who arranges for their clearance.***

It is decipherable from the bill of lading that the respondent is listed as a notify party. A notify party or addressee is a party who is to be notified of the arrival of the goods and is often an agent for the receiver of the goods who arranges for their clearance. A notify party is not a party to the contract enshrined in a bill of lading, see *Pacers Multi-Dynamic v. M.V. "Dancing Sister"* (2000) 3 NWLR (Pt. 648) 241.
(P. 123 lines 3 - 7)

OGBUINYA, JCA (Delivering the leading Judgment): This appeal interrogates the correctness of the decision of the Federal High Court, Lagos Division (hereinafter addressed as "the lower court") *coram judice*: Saliu Saidu, J., in Suit No. FHC/L/CS/1466/2011, delivered on 15th December, 2015. Before the lower court, the appellant and the respondent were the defendant and the plaintiff respectively.

The facts of the case, which transmuted into the appeal, are amenable to brevity and simplicity. The appellant is a registered shipping company under the Laws of Nigeria. The respondent is a limited liability company engaged in the business of importation of goods. On or about 14th December, 2010, the respondent ordered for the importation of 700 bags of dried fish heads/bone with the appellant as the carrier of the cargo on board the vessel Maersk Flensbury in a container No. 1407064 and bill of lading No. SAFM 75-192441. The First Bank of Nigeria Plc, whose name was later struck out from the suit, was the consignee in the bill of lading. The 700 bags of dried fish heads/bone were insured with NEM Insurance. The respondent alleged that the183 bags, out of the 700 bags of dried fish heads/bone, got damaged whilst under the custody of the appellant. When the appellant was informed, it appointed a loss adjuster to meet with the respondent's insurer to take record of the incident. The respondent claimed that the damage was out of negligence of the appellant to deliver the cargo in good state. Sequel to that, the respondent, with the ousted First Bank of Nigeria Plc, beseeched the lower court and tabled against the appellant the following reliefs:

a) Five Million Four Hundred and Ninety Thousand Naira only (₦5,490,000.00) being the sum payable for the insured damaged goods belonging to the Plaintiff.

b) Interest on the above sum at the rate of 30% per annum, from the date of issuance of the Writ of Summons, until Judgment; and thereafter at the prevailing Central Bank of Nigeria interest rate, until the entire judgment sum is liquidated.

c) Three Million Naira as general damages.

d) Costs of this action.

In reaction, the appellant joined issue with the respondent and denied liability by filing a statement of defence wherein it raised some legal defences.

Following the discordant claims, the lower court had a full-scale determination of the suit. In proof of the case, the respondent fielded one witness, PW1. In disproof of it, the appellant called a witness, DW1. Tons of documentary evidence were tendered in evidence. At the closure of evidence, the parties, through their counsel, addressed the lower court in the manner required by law. In a considered judgment, delivered on 15th December, 2015, found at pages 172-181 of the record, the lower court granted the claim in part.

The appellant was dissatisfied with the judgment. Hence, on 23rd December, 2015, the appellant lodged a 3-ground notice of appeal which is reflected at pages 182-185 of the record. Subsequently, the appellant, with the leave of this court, filed an amended notice of appeal on 12th January, 2018 but deemed properly filed on 15th January, 2018, which hosts five grounds, wherein it prayed this court for:

a. An order setting aside the decision of the Federal High Court, Lagos Judicial Division, Coram Honourable Justice Saidu delivered on the 21st day of December 2015 In Suit No: FHC/L/CS/1466/2011 Between S. E. Eze & Co. Limited v. Maersk Line Nigeria Limited.

b. An order dismissing the Respondent's suit against the Appellant.

Thereafter, the parties, through their counsel, filed and exchanged their respective briefs of argument in line with the procedure regulating the hearing of civil appeals in this court. The appeal was heard on 24th June, 2021.

During its hearing, learned counsel for the appellant, Chidinma Mbakwe, Esq.,

adopted the appellant's brief of argument, filed on 12th January, 2018 but deemed properly filed on 15th January, 2018 and the appellant's reply brief, tiled on 6th March, 2018 but deemed properly filed on 24th October, 2018, as representing his arguments for the appeal. He urged the court to allow it. Similarly, learned respondent's counsel, Jean Chiazor Anishere, SAN, adopted the respondent's amended brief of argument, filed on 19th January, 2018, as forming his reactions against the appeal. He urged the court to dismiss it.

In the appellant's brief of argument, learned counsel distilled three issues for determination to wit:

1. **Whether the trial Court was right when the Court held that by virtue of Section 375(1) of the Merchant Shipping Act, CAP 224, Laws of Federation, 1990, the Respondent had the locus standi to maintain an action under the, bill of lading no: SAFM75219244J.**

2. **Whether or not there is a privity of contract between the Appellant and Respondent?**

3. **Whether or not the Respondent is entitled to the award of special damages?**

In the respondent's amended brief of argument, learned senior counsel crafted three issues for determination namely:

1. **Whether the learned trial judge was right in deciding the case in favour of the Respondent, based on the law and the totality of facts adduced before the Court.**

2. **Whether the Appellant is liable to the claims of the Respondent as the earner and/or owners of the vessel that carried the Plaintiff's cargo.**

3. **Whether the Respondent proved his claim to be entitled to the award of damages.**

A close view of the two sets of issues shows that they are identical in substance. In fact, the respondent's issues can be conveniently, subsumed under the appellant's. Given this sameness, I will decide the appeal on the issues nominated by the appellant: the undisputed owner of the appeal.

Arguments on the issues:

Issue one.

Learned appellant's counsel submitted that a court would determine locus standi of a party by scrutinising the statement of claim which should disclose a party's interest in the subject matter. He relied on *Bolaji v. Bamgbose* (1986) 4 NWLR (Pt. 34) 632; *Momoh v. Olotu* (1970) 1 All NWLR 117. He asserted that suits on carriage of good by sea are contested on bills of lading and only a person whose name appears therein as consignee/endorsee, not notify party, that would have sufficient interest to sue. He cited section 375 of the Merchant Shipping Act, 1990; *Adesanya v. Leigh Hoegh* (1968) 1 All NLR 330; *Broadline Enterprises Ltd. v. Monterey Maritime Corporation* (1995) LPELR-807 (SC); *Seatrade (owners of MV Joint Frost) v. Fiogret Ltd* 3 NSC (1987)-1990) 453 at 463; *Pacers Multi-Dynamics Ltd. v. M. v. "Dancing Sister"* (2000) 3 NWLR (sic-no part) 241; *Basinco Motors Ltd. v. Woermann-Line* (2009) 13 NWLR (Pt. 1157) 149. He explained that the respondent was a notify party, not the endorsee/consignee which was First Bank of Nigeria Plc. He referred to exhibit OKZ2 and evidence of PW1. He pointed out that the lower court was bound to follow the Supreme Court decisions, cited to it, on the, basis of stare decisis. He relied on *Nigerian Agip Oil Col. Ltd. v. Nkweke* (2016) LPELR-26060 (SC); *Ngwo v. Monye* (1970) LPELR-1991 (SC); *Chedi v. A.G., Fed* (2007) LPELR-8958 (CA). He maintained that the respondent had no locus standi which made the lower court to lack jurisdiction to hear the case and its judgment a nullity and liable to be set aside. He relied *Okwu v. Umeh* (2015) LPELR-26042 (SC); *Opobiyi v. Muniru* (2011) LPELR-7840 (SC).

On behalf of the respondent, learned counsel contended that mere endorsement on a bill of lading is not conclusive evidence of who has title to the property or may sue on it. He reasoned that what is paramount is that evidence must be adduced to show title or ownership in the property the subject matter of bill of lading. He relied on *MV Caroline Maersk v. Nokoy Investment Ltd.* (2000) NWLR (Pt. 666) 587. He asserted that exhibits OKZ2-OKZ8 showed that the respondent had sufficient interest in the subject matter of the claim. He explained that First bank of Nigeria Plc, which was an endorsee on the bill of lading, had no interest on the claim as it acted solely as a financier to the respondent in the shipment of the goods. He noted that exhibit OKZ3, certificate of insurance, described the respondent as the owner of the goods insured. He insisted that the description of the respondent as a notify party did not detract it from being the owner of the goods with the right to sue under the tort of negligence and breach of contract by the appellant. He postulated that title to property suffices as focus standi does not arise by mere endorsement on the bill of lading. He maintained that evidence of title is paramount on who to sue. He cited *Exquisite Ind. Ltd. v. Omars of MV Bacoliners 1-3* (Pt. 998) 5 NWLR (Pt. 549) 335; *Pacers Multi-Dynamic Ltd. v. MV "Dancing Sister"* (1999-2008) Vol. 8 NSC 208. He concluded that the appellant could not benefit from its wrong on the assumption that respondent had no focus standi to institute the action.

On points of law, learned appellant's counsel posited that the bill of lading, exhibit OKZ2, was not endorsed to the respondent to confer title on it to sue. He cited

Brawal Shipping Ltd. v. F.I. Onwadike Co. Ltd. (supra). He stated that the certificate of insurance (exhibit OKZ3) which was not incorporated by reference to the contract of carriage the bill of lading (exhibit OKZ2), was insurance contract between the insurer and insured. He observed that even if the claim was founded on law of tort, the liability of the carrier would be limited by the terms of bailment in the bill of lading. He relied on *Owners of Cargo on KH Enterprise v. Owners of Pioneer Container* (1994) 1 Lloyd's Rep: 593; *Jian Sheng Co. v. Great Tempo S.A.* (1998); 225 N.R 140 (FCA). He insisted that the respondent was not the endorsee in the bill of lading and had no locus standi to sue on it. He referred to the reverse side exhibit OKZ2; *Broadline Enterprises Ltd. v. Monterey Maritime Corporation* (1995) LPELR-807 (SC).

Issue two.

Learned appellant's counsel stated the meaning and nature of privity of contract. He relied on *Bosinco Motors Ltd v. Woermann Line (supra)*; *Ikpeazu v. ACB Ltd.* (1965) NMLR 374; *K.S.O. Allied Products Ltd. v. Kofo Trading Co. Ltd.* (1996) 3 NWLR (Pt. 436) 244; *Alfortin Ltd. v. A.V* (1996) NWLR (Pt. 475) 634; *Nweke v. Nweke* (2014) LPELR-23563 (CA). He explained the meaning and nature of bill of lading as noted in *Kaycee (Nig.) Ltd. v Prompt Shipping Corporation* (1986) 1 NWLR (Pt. 15) 180. He asserted that a person who is not a party to a contract of carriage of goods by sea cannot sue on a bill of lading. He cited *Brawal Shipping v. F.I. Nwadike Co. Ltd* (2000) 11 NWLR (Pt. 678) 387; *Sea Trade (owner of MV Joint Frost) v. Fiogret Ltd. (supra)*. He opined that the respondent was not a party to the bill of lading because it was neither a consignee nor endorsee on it and could not sue or be sued on the contract. He referred to *Basinco Motors Ltd. v. Woermann Line (supra)*; *Negbenebor v. Negbenebor* (1971) 1 All NWLR 210; *Ikpeazu v. ACB Ltd. (supra)*; *K.S.O. Allied Products Ltd. v. Fofo Trading Co. Ltd. (supra)*; *Alfortrin Ltd. v. AV (supra)*; *UBN Plc v. Soares* (2012) LPELR-8018(CA).

Learned counsel further contended that the appellant, even though it appointed a loss adjuster, was not a necessary party to the contract so as to be liable thereon. He cited *C.R.S.W.B. v. N.C.E Ltd.* (2007) WRN (Vol. 18) 132; *African Reinsurance Corp. v. Fantaye* (1986) 1 NWLR (Pt. 14); *UBA Plc v. Jargaba* (2007) 11 NWLR (Pt. 1045) 247/(2007) 5 SC 1. He highlighted the procedure for evaluation of evidence as noted in *NNPP v. Otefe* (2003) LPELR-7281 (CA). He described the finding on the privity of contract as perverse. He cited *Ogbeiwi v. Egharevba* (2009) LPELR-4685 (CA). He reasoned that there was no evidence to show that Safmarine containers MV and the appellant were the same entity. He opined that the, respondent did not debunk the appellant's averment on privity of contract and so admitted it. He referred to *Frazimex Nigeria Ltd. v. Doatee Concepts Nigeria Ltd.* (2010) LPELR-4173 (CA). He added that the appellant's witness was not cross-examined on the fact and the same deemed admitted.

He relied on *Gaji v. Paye* (2003) LPELR-1300 (SC). He persisted that the lower

court's finding on privity of contract was based on speculation and should be struck out. He cited *Ejezie v. Anuwu* (2008) LPELR-1063 (SC); *Ikenta Best (Nig.) Ltd. v. A.G., Rivers State* (2008) LPELR-1476 (SC). He concluded that the finding occasioned a miscarriage of justice and should be set aside. He referred to *Odega v. Olloh* (2015) LPELR-24568 (CA).

For the respondent, learned counsel submitted that the respondent contracted one of the appellant's subsidiaries, Safmarine Container Lines N.V., which carried the cargo on board the appellant's "Maersk Flensburg" with a container No. MSK 1407064, so that it could not claim ignorance of it to avoid liability. He relied on exhibits OKZ2-OKZ8. He stated that the appellant did not deny ownership of the vessel and it sent a loss adjuster to evaluate the damage. He opined that facts not challenged are deemed admitted and a court can act on them. He relied on section 123 of the Evidence Act, 2011; *Maisaje v. Hassan* (2004) 11 NWLR (Pt. 883) 181; *Ezeanah v. Attah* (2004) 7 NWLR (Pt. 873) 648. He asserted that the appellant did not deny the damage caused to the cargoes and it owed the carrier a duty of care to ensure they were shipped in good state. He stated that it failed in its duty when it shipped the cargoes in a leaking /bad container which caused the damage. He described the appellant as the actual carrier, under the carriage of goods by sea, with all the responsibilities for loss and damage caused by occurrence which takes place while the goods are in its charge. He cited Articles 1, 10 (2) and 11 (1) and (2) of the United Nations Convention on Carriage of Goods by Sea (Ratification and Enforcement) Act, 2005. He noted that exhibits OKZ2 and OKZ4 showed the vessel that carried the goods and exhibit OKZ6 showed that cargo was stored in the appellant's container. He concluded that the appellant admitted the damage by its conduct of appointing a loss adjuster.

On points of law, learned appellant's counsel posited that the appellant was not a party to the contract of carriage as a subsidiary company was different from its parent company. He relied on *Bulet Int'l (Nig.) Ltd. v. Olaniyi* (2017) 17 NWLR (Pt. 1594) 260. He claimed that there was no evidence which showed that the appellant was, the owner of the vessel and the container. He referred to *Boniface Ayika & Co. (Nig.) Ltd. v. Uzor* (2006) LPELR-790 (SC); *The MV S Araz v. Scheap* (1996) 5 NWLR (Pt. 447) 204. He urged the court to discountenance the issue of actual carrier and its liability because it was not raised before the lower court. He asserted, in the alternative, that parties are bound by the terms of their contract. He relied on *Larmie v. D.P.M.S. Ltd.* (2005) 12 SC (Pt. 1) 93; *Sona Brew Plc. v. Peters* (2005) 1 NWLR (Pt. 908) 478. He pointed out the reverse side of the bill of lading (exhibit OKZ2) mentioned Safmarine Container Lines N.V. as the carrier. He took the view that the respondent cannot rely on the provisions of the United Nations Convention on Carriage of Goods by Sea (Ratification and Enforcement) Act, 2015 to avoid the terms and conditions in contract of carriage of goods by sea. He reasoned that by the respondent's description of the appellant as the actual carrier, it conceded that it was not the carrier. He opined that the carrier, Safmarine Container Lines NV, would remain responsible for the entire carriage.

He relied on Articles 10 and 11 of the United Nations Convention on Carriage of Goods by Sea (Ratification, and Enforcement) Act, 2015. He added that there was no mention of the appellant in the contract of carriage-exhibit OKZ2. He maintained 'that the respondent misinterpreted the provisions of the Act. He concluded that there was no evidence that the goods were damaged whilst in the custody of the carrier - Safmarine Containers Line NV and that they were shipped in a leaking/ bad container that led to ingress of water that damaged them.

Issue three.

Learned appellant's counsel enumerated the circumstances when interest may be awarded in a case. He relied on *Agip (Nig.) Plc. v. Ossai* (2016) LPELR-40976 (CA). He added that evidence must show the rate and date of interest. He cited *Dange Shuni L.G.C. v. Okonkwo* (2008) All FWLR (Pt. 415) 1757. He persisted that the respondent did not plead or prove entitlement to interest as required by law and should be set aside.

It was argued that the case was based on subrogated claim where an insurer/ assured would not be entitled to recover the amount paid to the insured as indemnity. He relied on Temple man on Marine Insurance, 64th Edition, page 452. He opined that there was evidence on the amount paid to the insured as indemnity and the finding on it should be set aside. He conceded that general damage could be awarded in addition to special damages where evidence showed its proof. He cited *Ogbonna v. Ogbonna* (2014) LPELR-22308 (CA). He, however, added that the respondent did not lead evidence on the value of the goods so that there was no basis to measure the damages. He referred to *Obasuyi v. Business Ventures Ltd.* (2000) 5 NWLR (Pt. 658). He insisted that the lower court awarded the special damages without evidence of proof.

On the part of the respondent, learned counsel submitted that the respondent established the elements of negligence against the appellant and it was entitled to damages. He relied on *Brawal Shipping Nig. Ltd. v. Ometraco Int'l Ltd.* (2011) 16 WRN 84. He reasoned that the respondent proved the value of the 700 bags of dried fish heads/bone and that it insured 2,100 bags thereof valued at ₦17.7M. He relied on exhibit OKZ6. He opined that the value was neither denied nor challenged by the appellant. He referred to exhibits OKZ2 and OKZ4. He observed that the standard of proof in civil suit is by preponderance of evidence. He claimed that the respondent's case was not contradicted on the value of goods, payments made and loss/damage suffered so that it was entitled to the damages granted. He cited *Amadi v. Osakwe* (2006) 3 WRN. He took the view that the respondent pleaded and strictly proved special damages and general damages flew therefrom. He referred to *Obasuyi v. Business Ventures Ltd. (supra)*.

On points of law, learned appellant's counsel posited that there was no relationship between the parties to show failure of duty of care. He relied on *I.M.N.L. v.*

Nwachukwu (2004) LPELR-1526 (SC). He added that there was no evidence of carelessness on the part of the appellant. He insisted that special damage was not proved because the actual cost of the goods was not proved. He referred to exhibits OKZ4 and OKZ3.

Resolution of the issues

In total loyalty to the injunction of the law, I will settle issue one first. The hub of the issue is plain. It centres on the jurisdiction of the lower court to hear the suit which mothered this appeal. The law compels the courts to accord premier attention to issue of jurisdiction, which is *numero uno* in adjudication, when raised in any proceedings, see *Okwu v. Umeh* (2016) NWLR (Pt. 1501) 120; *Brittania-U (Nig.) Ltd. v. Seplat Pet. Co. Dev. Ltd.* (2016) 4 NWLR (Pt. 1503) 541; *Oni v. Cadbury Nig. Plc.* (2016) 9 NWLR (Pt. 1516) 80; *Diamond Bank Ltd. v. Ugochukwu* (2016) 9 NWLR (Pt. 1517) 193; *PDP v. Umeh* (2017) 12 NWLR (Pt. 1579); *APC v. Ndual* (2018) 2 NWLR (Pt. 1602) 1; *Adama v. Maigari* (2019) 3 NWLR (Pt. 1658) 26; *APC v. Lere* (2020) 1 NWLR (Pt. 1705) 254. I will obey this legal commandment so as not to insult the law.

The issue evinces a jurisdictional question in that it quarrels with the respondent's locus standi to institute the action. It is trite law that the absence or presence of locus standi in a party will divest or infuse jurisdiction into a court to discountenance or entertain a matter before it, see *Emezi v. Osuagwu* (2005) 12 NWLR (pt. 939) 349/(2005) 30 WRN 1; *A.G., Anambra State v. A.G. Fed* (2007)11 NWLR (Pt. 1047) 4; *Admin/Exec., Estate Abacha v. Eke-Spiff* (2009) 17 NWLR (Pt. 1171) 614; *Ajayi v. Adebiyi* (2012) 11 NWLR (Pt. 1310 1370; *Uwazuruonye v. Gov., Imo State* (2013) 8 NWLR (Pt. 1355) 28; *Adebayo v. PDP* (2013) 17 NWLR (Pt. 1382) 1; *Okwu v. Umeh* (2016) 4 NWLR (Pt. 1501) 120; *Nyesom v. Peterside* (2016) 7 NWLR (Pt. 1512) 452; *Rebold Ind. Ltd. v. Magreola* (2015) 8 NWLR (Pt. 1461) 210; *Centre for Oil Pollution Watch v. NNPC* (2019) 5 NWLR (Pt. 1666) 518; *Nworka v. Ononeze-Medu* (2019) 7 NWLR (Pt. 1672) 422 (supra); *A.G., C.R.S. v. FRN* (2019) 10 NWLR (Pt. 1681) 401.

From an etymological perspective, the cliche, locus standi, traces its ancestry to Latin Language which-means: "place of standing". In its expounded legal form, locus standi denotes the legal right or capacity of a person to institute an action in a court of law when his right is trampled upon by somebody or authority, see *INEC v. Ogbadibo L.G.* (2016) 3 NWLR (Pt. 1498) 167; *Centre for Oil Pollution Watch v. NNPC (supra)*, *Nworka v. Ononeze-Madu (supra)*; *A.G., C.R.S. v. FRN (supra)*. Locus standi was evolved to protect the court from being, converted into a jamboree by professional litigants who have no interest in matter, see *Taiwo v. Adegboro* (2011) 11 NWLR (Pt. 1259) 562; *Al-Hassan v. Ishaku* (2016) 10 NWLR (Pt. 1520) 230. For a party to establish locus standi, he must show that the matter is justiciable, - capable of being disposed judiciously in a court of law - and the existence of dispute between parties, see *Taiwo v. Adegboro (supra)*;

Ajayi v. Adebiyi (supra). Again, that he has sufficient interest in the subject-matter of the action and that his civil rights and obligations are in the danger of being infringed on, see *Jitte v. Okpulor* (2016) 2 NWLR (Pt. 1497) 542; *Nyesom v. Peterside (supra)*; *AI-Hassan v. Ishaku (supra)*; *Centre for Oil Pollution Watch v. NNPC (supra)*; *Nworka v. Ononeze-Madu (supra)*; *A.G., C.R.S. v. FRN (supra)*.

Nota bene, it is a statement of claim, or affidavit in originating summons, that is examined by a court in determining the locus standi of a party, see *Nyesom v. Peterside (supra)*; *Taiwo v. Adegboro (supra)*; *Odeneye v. Efunuga (supra)*; *Uwazuruonye v. Gov., Imo State* (2013) 8 NWLR (Pt. 1355) 28; *Bakare v. Ajose-Adeogun* (2014) 6 NWLR (Pt. 1403) 320; *INEC v. Ogbadibo L.G. (supra)*; *Okwu v. Umeh (supra)*; *Centre for Oil Pollution Watch v. NNPC (supra)*; *Nworka v. Ononeze-Madu (supra)*; *A.G., C.R.S. v. FRN (supra)*. However, chances of success of an action is irrelevant in considering locus standi) see *Taiwo v. Adegboro (supra)*; *Ajayi v. Adebiyi (supra)*; *Okwu v. Umeh (supra)*; *Centre for Oil Pollution Watch v. NNPC (supra)*.

Now, the gravamen of the appellant's chief grievance, indeed its trump card on the issue which is the heartbeat of the appeal, chastises the lower court's finding that the appellant possessed the locus standi to maintain the action, which transfigured into the appeal, on the footing of a bill of lading within the ambit of maritime/admiralty law. The appellant's agitation orbits around the lower court's interpretation of the provision of section 375(1) of the Merchant shipping Act, Cap. 224, Laws of the Federation of Nigeria, LFN, 1990. Since, the provision is the cynosure and lifeline of the decisive issue, it is imperative to pluck it out, from its domicile in the statute book, *ipsissima verba* as follows:

> **375(1): Every consignee of goods named in a bill of lading, and every endorsee of a bill to whom the property shall pass upon or by reason of such consignment or endorsement shall have transferred to and vested in him all rights of suit, and shall be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.**

Interestingly, the provision does not harbour any ambiguity. On this score, the law mandates the court to accord it its ordinary grammatical meanings without any interpolation, see *Bakare v. NRC* (2007) 17 NWLR (Pt. 1064) 606; *PDP v. Okorocha* (2012) 15 NWLR (Pt. 1323) 205; *Kawawu v. PDP* (2017) 3 NWLR(Pt. 1553) 420; *Setracto (Nig) Ltd. v. Kpayi* (2017) 5 NWLR (Pt. 1558) 280; *Adeokin Records v. MCSCN* (2018) NWLR (Pt. 1643); *Ecobank v Honeywell Flour* (2019) NWLR (Pt. 1655) 55.

In so far as the fate of the issue circles around a bill of lading, it is germane to foremost display, its imports within the firmament of maritime law. A bill of lading,

in the province of carriage of goods by sea/contract of affreightment, connotes a written evidence of contract between a person engaged in the business of transporting/forwarding goods by sea and a carrier (shipper) or its agents embodying an' undertaking by the shipper for the carriage and delivery of the freight or cargo to the order or assigns of a specified person at a specified place. It is a contract between a ship owner/carrier, a shipper/consignee and a consignee/endorsee. It is categorised into two classes namely: combined transport bill of lading which involves usage of different ships or other means of transportation from origin to destination. Through bill of lading where the carrier takes on full liability under the contract of carriage for the entire journey and overall modes of transport. A bill of lading performs three principal functions in the shipment of goods, videlicet: (a) It is evidence of the terms of contract of affreightment. (b) It is evidence of receipt for the goods to which it relates, *id est*, evidence of shipment of goods. (c) It is evidence that the holder of it has property in the goods - it serves as document of title, see *B.M Ltd. v. Woermann-Line* (2009) 13 NWLR (Pt.1157) 149; *B.M Ltd. v. The "M.V. Dancing Sister"* (2012) 4 NWLR (Pt. 1289) 169; *Delmas v. Sunny Ositez Int'l Ltd* (2019) 9 NWLR (Pt 1677) 305. Indubitably, it has been described as "a key which in the hands of rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may change to be", see *Barclays Bank Ltd. v. Customs and Excise Commissioners* (1963) Lloyd's Rep. 81 at 88, per Diplock L. J.

There is no gainsaying the fact that the provision of section 375(1) of the Merchant Shipping Act, chronicled above, has fallen for interpretation before the Supreme Court in a galaxy of authorities. The apex court has since construed it to mean that only a consignee or endorsee of a bill of lading has the legal capacity/locus standi to sue on it, *id est*, the law recognises only two classes of people who can sue on a bill of lading - the consignee and or the endorsee, see *Adesanya v. Leigh Hoegh of Co. A/S* (1968)/ AII NLR 333/(1968) SCNLR 426; *Broadline Ent. Ltd. v. Monterey Maritime Corp.* (1995) 9 NWLR (Pt.417) 1; *Pacers Multi-Dynamic v. M.V. "Dancing Sister"* (2000) 3 NWLR (Pt.648) 241; *Brawal Shipping Ltd. v. F. I. Onwadike Co.* Ltd. (2000) 11 NWLR (Pt. 678) 387/(2000) 2 SCNQR (Pt. 2) 1379; *B.M. Ltd. v. Woermann-Line* (2009) 13 NWLR (Pt. 1157) 149; *P.M. Ltd. v. The "M.V. Dancing Sister"* (2012) 4 NWLR (Pt. 1289) 169. Recently, in *P.M Ltd. v. The "M.V. Dancing Sister" (supra)*, at 190 and 191, Rhodes-Vivour, JSC, insightfully and incisively, declared:

> **The above explains section 375(1) supra [Merchant Shipping Act] and the dilemma of the appellant in this appeal. ... The appellant claims to be the consignee and owner of the goods shipped from Brazil on board the Dancing Sister (1st respondent). The appellant appears on the three bills of lading as the notify party and not the consignee. The right of action on the bill of lading is restricted to parties to the bills of lading. Ownership of the goods is irrelevant in a suit on the contract in the bills of lading. Since the appellant**

is a notify party on the three bills of lading, he is not a party to the contract in the bills of lading and so he had no locus standi to sue upon it. There can only be a justiciable action in contract if there is a dispute between the parties to the contract. Since the appellant is not a party to the bills of lading there can be no dispute to resolve.

At page 169 thereof, His Lordship, the eminent Law Lord, concluded:

My Lords, only consignee, endorsee can sue on a bill of lading. The de jure consignee has property in the goods when the vessel is at sea. He has the right of action in negligence: The appellant being a notify party is not a party to the contract in the bills of lading and so cannot sue on it in contract. The appellant has no cause of action on the bills of lading and being the owner of the goods makes no difference.

This current and inelastic position of the law, on legal capacity to sue on a bill of lading, as espoused in these *ex cathedra* authorities, which this court is bound to kowtow to willy-willy, will define the destiny of the issue and, by extension, the respondent's action.

I have, in due fidelity to the desire of the law, consulted the record: the spinal cord of every appeal. My port of visit is the residence of the respondent's 12-paragraph statement of claim which monopolises pages 8-11 of the record. In order to pacify the law, I have given a holistic and global examination to it with the finery of a tooth comb. Admirably, it is comprehension-friendly. It is discernible from the statement of claim, the barometer with which to measure the presence or absence of *locus standi*, that the respondent weaved/staked his claim on a bill of lading No. SAFM 752192441. In the course of plenary trial in the lower Court, the said bill of lading metamorphosed into exhibit OKZ2. It colonises page 14 of the record the bible of the appeal. I have given a clinical study to the bill of lading which is obedient to clarity. Incidentally, I am unable to find/detect, even with the prying bird's eye view of an appellate court, where the respondent was/is nominated as a consignee in the bill of lading. Nor is it endorsed to it to make it an endorsee thereof. In the eyes of the law, "to endorse" is to write at the back of the bill of lading. There are two species of endorsement: Endorsement in blank and endorsement in full. The former is effected where the shipper or consignee writes his name on the back of the bill of lading. The latter occurs where the consignee/shipper writes "deliver to A or order", see *Brawal Shipping Ltd v. F.I. Onwadike Co. Ltd (supra)*. The bill of lading, which the respondent brandished and paraded as the donor of locus standi to it, is bereft of any endorsement. Per contra, the First Bank of Nigeria, which was the respondent's co-plaintiff, whose name was expelled from the proceeding, was mentioned as the consignee. It is curious that the name of the First Bank of Nigeria Plc, which the sacrosanct provision of section 375(1) of the Merchant Shipping Act, has equipped/cloaked

with *locus standi* was ostracised from the suit by the lower court.

It is decipherable from the bill of lading that the respondent is listed as a notify party. A notify party or addressee is a party who is to be notified of the arrival of the goods and is often an agent for the receiver of the goods who arranges for their clearance. A notify party is not a party to the contract enshrined in a bill of lading, see *P.M Ltd. v. The "M.V. Dancing Sister" (supra)*. Thus, in the mind of the law, the respondent, which was listed as a notify party in the bill of lading, is a stranger/alien to the contract affreightment entrenched in it. The prescription of section 375(1) of the Merchant Shipping Act has, in unmistakable terms, donated/allocated locus standi to a consignee or an endorsee in bill of landing. The implication of the respondent's elegant submission is to factor in notify party to the provision of section 375(1) of the Merchant Shipping Act which is not cognisable under it.

It is an elementary law that the primary duty/function of the court/*Judex is jus dicere, not jus dare, id est*, to declare what the law is and not to formulate one, see Ugwu v, Ararume (2007) 12 NWLR (Pt. 1048) 367; *Kraus Thompson Org. Ltd. v. N.I.P.S.S.* (2004) 17 NWLR (Pt. 901) 44); *Dickson v. Sylva* (2017) 8 NWLR (Pt. 1567) 167; *Coca-Cola (Nig.) Ltd. v. Akinsanya* (2017) 17 NWLR (Pt. 1593) 74. It will be doing serious violence to the rudimentary/traditional role of the court to factor the missing notify party into the provision as canvassed by the appellant. The law does not grant this court the licence to indulge in such untoward and injudicious exercise which will smell of judicial legislation - a judgment wearing the garb or colouration or flavour of a statute. That will be tantamount to an unjustifiable usurpation, trespass and invasion of the exclusive constitutional territory of the legislature. Such is not only antithetical to the *raison d'etre* for adjudication, but an amputation of the constitutional doctrine of separation of powers. I must decline such enticing supplication that has the potential to dethrone the existential doctrine of separation of powers which is, firmly, propagated in the Constitution - the *fons et origo* of our laws.

It stems from the expansive legal anatomy on bill of lading, done in consonance with the law, that the respondent, which was/is not a consignee or endorsee, but a notify party, in the bill of lading was not clothed with the garment of locus standi to institute any action on the footing of it. The legal dissection, to all intents and purposes, with due reverence, exposes the poverty of the seemingly dazzling argument of the respondent on ownership of the cargo in question. The lower court, with due respect, fractured the law when it crowned the respondent with the undeserved toga of locus standing the premises of the sacred provision of section 375(1) of the Merchant Shipping Act. It will smack of judicial sacrilege to allow the finding to stand in the face of its hostility to the law. It does not deserve such approbation.

As already noted, at the dawn of this judgment, locus standi comes within the purview of jurisdiction of court. Jurisdiction, a mantra in adjudication, connotes

the authority/power of a court to determine a dispute submitted to it by contending parties in any proceeding, see *Ajamole v. Yaduat* (No. 1) (1991) 5 SCNJ 172; *Mobil Pro. Co. Unltd. v. LASEPA* (2002) 18 NWLR (Pt. 798) 1; *Ndaeyo v. Ogunnaya* (1977) 11 MSLR 300; *Ebhodagbe v. Okoye* (2004) 18 NWLR (Pt. 905) 472; *Garba v. Mohammed* (2016) 16 NWLR (Pt. 1537) 144; *A.G., Kwara State v. Adeyemo* (2017) 1 NWLR (Pt. 1546) 21; *Isah v. INEC* (2016) 18 NWLR (Pt. 1544) 175; *Angadi v. PDP* (2018) 15 NWLR (Pt. 1641) 1; *Nduul v. Wayo* (2018) 16 NWLR (Pt. 1646) 548.

A court of law is invested with jurisdiction to hear a matter when:

> "1. it is properly constituted as regards numbers and qualification's of members of the bench, and no member is disqualified for one reason or another; and
>
> 2. the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction; and
>
> 3. the case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction"

See *Modukolu v. Nkemdilim* (2006) 2 LC 2081961) NSCC (Vol. 2) 374 at 379, per Bairamian F. J., *Tukur v. Taraba State* (1997) 6 SCNJ 81; *Daro v. UBN* (2007) 16 NWLR (Pt. 1029) 164; *Okereke v. Yar'Adua* (2008) 12 NWLR (Pt. 1100); *Saraki v. FRN* (2016) 3 NWLR (Pt. 1500) 531; *Oni v. Cadbury Nig. Plc* (2016) 9 NWLR (Pt. 1516) 80; *Diamond Bank Ltd. v. Ugochukwu* (2016) 9 NWLR (Pt. 1517) 193; *Okpe v. Fan Milk Plc*. (2017) 2 NWLR (Pt. 1549) 282; *Bello v. Damisa* (2017) 2 NWLR (Pt. 1550) 455; *Osi v. Accord Party* (2017) 3 NWLR (Pt. 1553) 387; *Nworka v. Ononeze-Madu* (2019) 7 NWLR (Pt. 1672) 422; *Adeleke v. Oyetola* (2020) 6 NWLR (Pt. 1721) 440. The three ingredients must co-exist in order to invest jurisdiction in a court.

I have married the respondent's defective suit with the inflexible ingredients of jurisdiction catalogued above. The rationale behind the juxtaposition is not far-fetched. It is to discover whether the suit flouted or obeyed these ingredients of jurisdiction. The fact that the respondent, which instituted the suit, was/is not a statutory party as ingrained in section 375(1) of the Merchant Shipping Act constitutes a serious feature in the case which drained the lower of the jurisdiction to entertain it. By the same token, it is an ample demonstration that the action, which gave birth to appeal, was not initiated by due process of law and upon the fulfillment of a condition precedent for the lower court's exercise of jurisdiction over it. In the sight of the law, a condition precedent is: "the one that delays the vesting of a right until the happening of an event", see *Atalegbe v. Awuni* (1997)

9 NWLR (Pt. 525) 537 at 562, per Uwais, CJN; *Niger Care Dev. Co. Ltd. v. ASWB* (2008) 9 NWLR (Pt. 1093) 493; *A.G., Kwara State v. Adeyemo* (2017) 1 NWLR (Pt. 1546) 210; *Jumbo United Co. Ltd. v. Leadway Ass. Co. Ltd.* (2016) 15 NWLR (Pt. 1536) 439. The only way the respondent would have properly ignited the jurisdiction of this court was contingent upon its satisfaction of the twin conditions-precedent. Their compliance is sine qua non for the activation of the court's jurisdiction. Alas, it did not act in due fidelity to the letter and spirit of the law. In sum, the respondent's suit, which parented the appeal, defiled the second and third inviolable ingredients of jurisdiction. The caustic effect of these infractions are dire. It taints the suit with competence.

Where a court is disrobed of the jurisdiction to entertain a matter, the proceeding germinating from it, no matter the quantum of diligence, dexterity, artistry, sophistry, transparency and objectivity injected into it, will be trapped in the intractable vortex of nullity, see *Elugbe v. Omokhafe* (2004) 18 NWLR (Pt. 905) 319; *Lokpobiri v. Ogola* (2016) 3 NWLR (Pt. 1499) 328; *Garba v. Mohammed (supra)*; *Isah v. INEC (supra)*.

In the light of this expansive *tour d'horizon* on the locus standi under section 375(1) of the Merchant Shipping Act; done in due obeisance to the law, the lower court's decision was/is enmeshed in the web of nullity. In the view of the law, nullity denotes: "Nothing; no' proceeding; an act or proceeding in a case which the opposite party may treat as though it had not taken place; or which has absolutely no legal force or effect", see *Lasisi v. State* (2013) 12 NWLR (Pt. 1367) 133 at 146, per Ngwuta JSC; *Ezenwaji v. U.N.N. (supra)*; *Mamman v. Hajo* (2016) 8 NWLR (Pt. 1575) 411. The consequence of a nullity is far-reaching. If a decision or proceeding is soiled by nullity, it is void and taken as it was never given or made, see *Okoye v. Nigeria Const. & Furniture Co. Ltd.* (1991) 6 NWLR (Pt. 199) 501; *Bello v. INEC* (2010) 8 NWLR (Pt. 1196) 342. Moreover, such a decision or proceeding, in the view of the law, bestows no enforceable right on its beneficiary party, who possesses it, nor does it impose any obligations on its victim party, see *Ajibola v. Ishola* (2006) 13 NWLR (Pt. 998) 628; *Oyeneyin v. Akinkugbe* (2010) 4 NWLR (Pt. 1184) 265. The bounden duty of a court is to set aside a null order/decision *ex debito justitiae* in that it does not exist in law, see *Mamman v. Hajo (supra)*; *N.A.C.B. Ltd. v. Ozoemelam* (2016) 9 NWLR (Pt. 1517) 376; *Oyeyemi v. Owoeye* (2017) 12 NWLR (Pt. 1580) 364. In effect, the lower court's decision, delivered on 15th December, 2015, and all other proceedings anterior and posterior to it, were/are marooned in the murky ocean of nullity. On this score, the law commands me to mow them down with the unbiased judicial sword of this court. In essence, I dishonour the respondent's learned senior counsel's salivating invitation to endorse the lower court's injudicious exercise that was contemptuous of the law. Such will amount to transgression of the law. In the end, I have no choice than to resolve the issue one in favour of the appellant and against the respondent.

Having dispensed with the issue one, proceed to settle issue two. The marrow of the issue is crystal clear. It castigates the lower court's finding that there is privity of contract between the appellant and the respondent. In view of the finding on issue one, the issue is canalised within a narrow compass.

As a necessary prelude, the ancient doctrine of privity of contract has been defined as "that connection or relationship which exists between two or more contracting parties", see *Rebold Ind. Ltd. v. Magreola* (2015) 8 NWLR (Pt. 1461) 201 at 231, per Fabiyi, JSC. The doctrine, which is part of our corpus juris, postulates, generally, that a contract cannot confer/bestow rights, or impose obligations arising under it, on any person except parties to it. Put simply, a stranger to a contract cannot gain or be bound by it even if made for his benefit, see *T. E. Oshevire Ltd v. Tripoli Motors* (1997) 5 NWLR (Pt. 503) 1/(1997) 4 SCNJ 246; *Owodunmi v. Registered Trustees, CCC Worldwide* (2001) 10 NWLR (Pt. 675) 315; *Makwe v. Nwukor* (2001) FWLR (Pt. 63)/(2001) 14 NWLR (Pt. 733) 356; *Union Beverages Ltd v. Pepsi Cola Int. Ltd* (1994) 3 NWLR (Pt. 330) 1; *UBA v. Jargaba* (2007) NWLR (Pt. 1045); *Nwuba v. Ogbuehi* (2007) NWLR (Pt. 1072); *Osoh v. Unity Bank Plc* (2013) 9 NWLR (Pt. 1358) 1; *Idufueko v. Pfizer Products Ltd.* (2014) 12 NWLR (Pt. 1420) 96; *Rebold Ind. Ltd. v. Magreola (supra)*; *Reichie v. N.B.C.I* (2016) 8 NWLR(Pt.1514) 274.

It admits of no argument that the doctrine of privity of contract is elastic as it admits certain exceptions. However, those exceptions are not applicable to the position of a notify party in a bill of lading on any relationship based on a bill of lading, see *B.M. Ltd. v. Woermann-Line (supra)*. Put simply, a notify party is not accommodated in the exceptions to privity of contract.

I had, whilst considering issue one, found that the respondent did not possess locus standi to sue on the bill of lading because it was a notify party that is not a party within the lean confine of section 375(1) of the Merchant Shipping Act. The respondent has starved this court of any extenuating circumstances that will propel me to disturb that solemn finding reached after due consultation with the law. It is deducible from the finding that the respondent was not privy to the contract in the bill of lading. A bill of lading houses contractual terms between contracting parties which are binding only on them, see *Nika Fishing Co. Ltd v. Lavina Corp* (2008) 16 NWLR (Pt.1114) 509. It flows that the status of the - respondent, notify party, in the bill of lading deprives it of any privity of contract between it and the appellant. In essence, the lower court's' finding, with due deference, is, highly, offensive to the law such that it magnets the intervention of this court. As a result, I will not hesitate to resolve the issue two in favour of the appellant and against the respondent.

It remains to treat out issue three. The kernel of the issue is disobedient to equivocation. It probes into the correctness of the lower court's award of special damages to the respondent. The aftermath of issues one and two, which ousted

the lower court's jurisdiction over the matter on ground of want of locus standi of the respondent, renders the consideration of this issue a footnote and otiose as it snowballs into the constricted four walls of an academic issue. In *Plateau State v. A.G., Fed*. (2006) 3 NWLR (Pt. 967) 346 at 419, Tobi, JSC, incisively, explained the term, thus:

> **A suit is academic where it is merely theoretical, makes empty sound, and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situation of human nature and humanity.**

It is settled law, beyond any peradventure of doubt, that a court is divested of the necessary jurisdiction to adjudicate over academic disputes. This is so even if their determination will enrich the jurisprudential content of the law. Such academic questions are divorced from live issues which engage the adjudicative attention of the courts, see *A.G., Anambra State v. A.G., Fed.* (2005) 9 NWLR (Pt. 931) 572; *Ugba v. Suswan* (2014) 14 NWLR (Pt. 1427) 264; *Salik v. Idris* (2014) 15 NWLR (Pt. 1429) 36; *FRN v. Borishade* (2015) 5 NWLR (Pt. 1451) 155; *Danladi v. T.S.H.A.* (2015) 2 NWLR (Pt. 1442) 103; *FRN v. Dairo* (2015) 6 NWLR (Pt. 1452) 141; *Daniel v. INEC* (2015) 9 NWLR (Pt. 1463) 113; *Odedo v. Oguebego* (2015) 13 NWLR (Pt. 1476) 229; *Dickson v. Sylva* (2017) 10 NWLR (Pt. 1573) 299; *Olowu v. Building Stock Ltd.* (2018) 1 NWLR (Pt. 1601) 343; *Anyanwu v. PDP* (2020) 3 NWLR (Pt. 1710) 134.

Flowing from this immutable position of the law, the appellant's issue three, to all intents and purposes, is rendered idle. Its resolution in favour of the appellant will not erode the strength of its case in the appeal. Nor will its resolution in favour of the respondent advance, an inch, its chances of success in the appeal. Put bluntly, its consideration by this court, even if found in favour of the appellant or the respondent will be of no judicial utilitarian value to either of them premised on the result of issues one and two. It is settled law that courts are not equipped with the requisite jurisdiction to adjudicate over academic issues. In total allegiance to the law, strike out the issue three for being an incompetent academic issue.

My noble Lords, in the spirit of' completeness, where the jurisdiction of a court to hear a matter is divested by law, the order it makes is plain. It is one of striking it out, see *Okolo v. UBN Ltd.* (2004) 3 NWLR (Pt. 859) 87; *Gombe v. P.W. (Nig.) Ltd.* (1995) 6 NWLR (Pt. 402); *CGG v. Ogu* (2005) 8 NWLR (Pt. 927) 366; *Uwazuruike v. A.G., Fed.* (2007) 8 NWLR (Pt. 1035) 1; *WAEC v. Adeyanju* (2008) NWLR (Pt. 1092) 270; *Dairo v. UBN Plc* (2007) 16 NWLR (Pt. 1071) 347; *Ikechukwu v. FRN (supra)*; *Inakoju v. Adeleke* (2007) 4 NWLR (Pt. 1052) 423; *Onyero v. Nwadike* (2011) 18 NWLR (Pt. 1279) 954; *Odom v. PDP* (2015) 6 NWLR (Pt. 1456) 527. In the same vein, the order a court makes, in the absence of locus standi, is one of striking out the suit, not dismissal, see. *Magbagbeola v. Akintola* (2018) 11 NWLR (Pt. 1629) 177.

On the whole, having resolved the live issues one and two in favour of the appellant, the fortune of this appeal is obvious. It is imbued with merit. Consequently, I allow the appeal. Accordingly, Suit No: FHC/L/CS/1466/2011, filed by the respondent against the appellant, is struck out for being incompetent. The parties shall bear the respective costs they expended in the prosecution and defence of the fruitful appeal.

OHO, JCA: I read the draft of the judgment just delivered by my learned Brother, OBANDE FESTUS OGBUINYA, JCA and I am in agreement with the reasoning and conclusions reached in allowing the Appeal as meritorious. However, I have a few comments of my own in addition to this brilliantly analyzed and, well reasoned leading judgment.

The Appellant had challenged the locus standi of the 1st Respondent in instituting this Appeal in the first place.

ACTION - LOCUS STANDI - Relationship between the issue of locus standi and jurisdiction of court to entertain a matter; meaning of *locus standi*. The settled position is that in order for the Court of trial to have jurisdiction, the Claimant must have locus standi to commence or institute the action. Where it is shown that a Claimant does not possess of the locus standi to bring an action, the Court will decline jurisdiction to hear the case and consequently strike out the action. A Court of law has no jurisdiction to manufacture locus standi on a party, and arrogate to itself jurisdiction.

The terms *locus standi* denotes the legal capacity to institute and action in a Court of law. There are numerous decided cases on this subject. It is a status which the Claimant must have before being heard in Court. It is therefore a condition precedent to determination on the merits. In order to achieve the status of *locus standi*, the claim of the Claimant must reveal the followings;

a. A legal or *justiciable* right

b. Show sufficient or special interest adversely affected...

c. *A justiciable* cause of action.

See *Momoh v. Olotu* (1970) 1 All NLR 117; *Bolaji v. Bamgbose* (1986) 4 NWLR (Pt. 37) 632; *Adesanya v. The President* (1981) 5 SC 112; *Adefulu v. Oyesile* (1989) 5 NWLR (Pt. 122) 377; *Thomas v. Olufosoye* (1986) 1 NWLR (Pt. 18) 669; *Owodunni v. Registered Trustees of CCC* (2000) 10 NWLR (Pt. 675) 315.

Generally, a challenge to the locus standi of a Claimant is obliquely a challenge to the jurisdiction of the Court to hear the matter. Where the question of locus standi therefore comes into the issue of cause of action, a Claimant who has no privity

of contract with the defendant will fail to establish a cause of action, for breach of the contract as he will simply not have a locus standi to sue the defendant on the contract. See the case of *Momoh v. Olotu* (1970) 1 All NLR 117.

The Appellant in the instant Appeal had taken exceptions to the lower Court's interpretation of the provision of Section 375(1) of the Merchant Shipping Act, Cap. 224, Laws of the. Federation of Nigeria, LFN, 1990, which for the avoidance of doubt is reproduced here, thus:

> **375(1): "Every consignee of goods named in a bill of lading, and every endorsee of a bill to whom the property shall pass upon or by reason of such consignment or endorsement shall have transferred to and vested in him all rights of suit, and shall be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself."**

The question that perhaps, be addressed here is: what in fact is a Bill of Lading' since the said Section 375(1) of the Merchant Shipping Act, Cap. 224, LFN, 1990 tends to define the limits of the juridical extent to which a Bill of Lading can be stretched in the application to the facts of the instant case. A bill of lading, simply put is any document in writing signed on behalf of the owner of the ship in which goods are embarked, acknowledging the receipt of the goods and undertaking to deliver them at the end of the voyage, subject to such conditions as may be mentioned therein. See the learned Author: WILLIAM R. ANSON; Principles of the Law of Contract, p.380 (Arthur L. Carbin Ed.).

On the vexed question of the application of Section 375(1) of the Merchant Shipping Act to the question of the locus standi vis-a-vis the instant case, it is important to note that the said section has received a number of interpretations of the apex Court in several cases where the Court has construed it to mean that only a consignee or endorsee of a bill of lading has the legal capacity/ *locus standi* to sue on it. In other words, that only two classes of people are recognized to sue on a bill of lading, namely, the consignee and/or the endorsee. See the case of *Basinco Motors Ltd v. Woermann Line & Anor* (2009) LPELR-756 se, where the apex Court per ADEKEYE, JSC, had this to say on the subject:

> **"It is however now settled by a plethora of cases that by virtue of Section 375 (1) of the Merchant Shipping Act 1990 only a consignee of the goods named in a bill of lading or an endorsee whom the property in the goods have passed and by virtue of those facts will be able to sue on a bill of lading contract. A notify party or addressee cannot therefore possibly be a party to the contract evidenced in the bill of lading. Furthermore, a plaintiff who was not an endorsee of the bill of lading but merely holder of the original copy as in this**

case, does not have a right to sue on the contract categorically. A notify party or addressee has no right of audience on the bill of lading W013 either in contract or tort of negligence. Even in an action for bailment it is not possible to make a party whose name appears only in regard to notification of the arrival of the consignment assume the role of' a bailor or bailee. The appellant may be a party to another contract on the order of the goods but surely not on the consignment based on the bill of lading W013 which was between Tetramer GMBH of Hamburg Germany and Woermann line the 1st Respondent."

Against the backdrop of the foregoing, I have carefully examined the printed records of this Appeal and it is rather glaring that the Respondent, who instituted the suit, was/is not a statutory party as defined by Section 375(1) of the Merchant. Shipping Act and this amounts to serious defect on the qualification of the Respondent in instituting this case in the first place. What this translates is that the action which gave rise to this appeal was not initiated by due process of law and upon the fulfillment of a condition precedent for the lower Court's exercise of jurisdiction over it. In simple everyday legal parlance, what the situation simply translates is that the Respondent did not possess locus standi to sue on the bill of lading because it was not a party within the lean confine of Section 375(1) of the Merchant Shipping Act.

Consequently, this appeal succeeds to the hilt and it is accordingly allowed. I subscribe to the consequential orders made in the leading judgment.

BAYERO, JCA: I read in draft the Judgment just rendered by my learned brother Obande F. Ogbuinya, JCA. For the more detailed reasons in the lead Judgment, I also allow the Appeal for being meritorious. I abide by all the consequential orders.

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History:

HIGH COURT
Federal High Court (Lagos Division)
Coram Judice: SALIU SAIDU, J
SUIT NO: FHC/L/CS/1466/2011
Tuesday 15th December, 2015

COURT OF APPEAL (Lagos Division)
Obande Festus Ogbuinya, JCA ***(Presided & Read the lead Judgment)***
Fredrick O. Oho, JCA
Abdullahi Mahmud Bayero, JCA

COUNSEL:
Chidinma Mbakwe, Esq., for the appellant
Jean Chiazor Anishere, SAN, with him, Ruth Abanum, Esq., for the respondent

KEEN LINE INVESTMENT LIMITED; CHISCO TRANSPORT (NIG.) LIMITED v. PATERSON ZOCHONIS INDUSTRIES PLC; DOMINO STORES LIMITED; THE REGISTRAR OF LANDS, LAGOS STATE

COURT OF APPEAL
(LAGOS DIVISION)

CA/L/1085/2018
WEDNESDAY 19TH MAY, 2021

(IKYEGH; UMAR; BAYERO, JJ.CA)

APPEAL – Setting aside the judgement of a trial court on improper evaluation of evidence – What appellant must show – an appellant who relies on improper evaluation of evidence to set aside the judgment of a trial court, has the onus to identify and specify the evidence improperly evaluated or not evaluated.

COMMERCIAL LITIGATION – Jurisdiction – Distinction between procedural and substantive jurisdiction – procedural jurisdiction is secondary to substantive jurisdiction; the distinction being that while procedural jurisdiction can be waived, substantive jurisdiction cannot be waived.

COMMERCIAL LITIGATION – Reliefs – grant of declarative reliefs – Declarative reliefs are granted on convincing evidence tendered by the party claiming the declaratory reliefs.

CONTRACT – Contract for Sale – Must be in writing – no contract for any disposition of land, being a disposition that is required by any enactment to be made by deed or instrument or in writing shall be enforceable by action unless the contract is in writing and is signed by the party to be charged therewith or by some other person lawfully authorised by him.

CONTRACT – Contract of Sale – Need to be in writing – Exceptions – Part performance – when it applies to an agreement – the doctrine of part performance applies only where there is a completed agreement in existence.

CONTRACT – Contract of Sale – Registration of title – Effects of – Registration of title is for security. It guarantees title to the property registered but is not one of the methods to establish contract of purchase of landed property.

CONTRACT – Contract of Sale – when it becomes invalid – Fraud – Defined.

CONTRACT – Elements of a valid contract – Offer and Acceptance.

Facts:

The appellant instituted an action via a writ of summon and statement of claim, as claimant, against the respondents, as defendants, in the High court of Lagos State (trial court), claiming an order for a declaration that pursuant to the contract between the 2nd appellant and the 1st respondent for option to purchase and the first right of refusal on the sale of the 1st respondent's property, the 1st respondent is bound to sell the said property to the 2nd appellant and not to the 2nd respondent at the price of ₦40 million it was offered to the 2nd appellant or at the price of ₦45 million it was allegedly offered to the 2nd respondent; a declaration that neither the 1st respondent nor the 2nd respondent is entitled to apply for the registration with the 3rd respondent in the name of the 2nd respondent of the title to the said property; an order setting aside the purported sale of the said property to the 2nd respondent by the 1st respondent inter alia on the ground of fraud; an order of specific performance of the aforesaid contract; an order of perpetual injunction protecting the 2nd appellant's rights over the aforesaid property in tandem with the declaratory reliefs and the order for specific performance.

Pleadings were exchanged between parties, and the trial court after evaluating the evidence and considering the written addresses for and against the action, saw no merit in the suit and dismissed the action in its entirety.

Dissatisfied with the decision of the trial court, the appellants filed an original notice of appeal and another notice of appeal, all within time, challenging the trial court's decision.

Held ***(Unanimously dismissing the appeal):***

[1] ***Appeal – Setting aside the judgement of a trial court on improper evaluation of evidence – What appellant must show – an appellant who relies on improper evaluation of evidence to set aside the judgment of a trial court, has the onus to identify and specify the evidence improperly evaluated or not evaluated.***

The said findings which were not specifically shown to be perverse or against the trend of evidence and did not occasion a miscarriage of justice are hereby affirmed vide *Ozuzu v. Emewu* (2019) 13 NWLR (Pt. 1688) 143 to the effect that, an appellant who relies on improper evaluation of evidence to set aside the judgment of a trial court, has the onus to identify and specify the evidence improperly evaluated or not evaluated; that the appellant has to convincingly show that if the error complained of had been corrected, the conclusion reached would have been different and in favour of the party complaining of the wrong evaluation.
(P. 159 lines 36 - 44)

[2] ***Commercial Litigation – Jurisdiction – Distinction between procedural and substantive jurisdiction – procedural jurisdiction is secondary to substantive jurisdiction; the distinction being that while procedural jurisdiction can be waived, substantive jurisdiction cannot be waived.***

The matter is clearly and eloquently put by the Supreme Court in the case of *Heritage Bank Ltd. v. Bentworth Finance (Nig.) Ltd.* (2018) 9 NWLR (Pt. 1625) 420 per the lead judgment prepared by the great jurist, His Lordship, Eko, J.S.C., where His Lordship held inter alia that procedural jurisdiction is secondary to substantive jurisdiction; the distinction being that while procedural jurisdiction can be waived, substantive jurisdiction cannot be waived, as a defect in procedure is not the same as a defect in competence or jurisdiction and that the former is waivable, being a private right, therefore objection to it cannot be countenanced at the appellate Court, for the first time, as in this case.
(P. 154 lines 21 - 29)

[3] ***Commercial Litigation – Reliefs – grant of declarative reliefs – Declarative reliefs are granted on convincing evidence tendered by the party claiming the declaratory reliefs.***

It is settled that declaratory reliefs are not granted on admissions or default in filing statement of defence but on convincing evidence tendered by the party claiming the declaratory reliefs. So, the onus and a heavy one for that matter rested squarely on the appellants to establish the declaratory reliefs crucial to the action to the satisfaction of the Court for it to exercise its discretionary powers to issue the declaratory reliefs in favour of the appellants vide *Awomuti v. Salami and Ors.* (1978) 11 N.S.C.C. 180 at 186, *Udo v. Cross River State Newspaper and Anor* (2002) FWLR (Pt. 104) 665 at 701, *Bello v. Eweka* (1981) N.S.C.C. 48, *Ezeokonkwo & Ors. v. Nwafor Okeke* (2002) S.S.C. (Pt. 1) 44 at 61, *Adama v. Kogi State House of Assembly* (2019) 16 NWLR (Pt. 1699) 501, *Ilori v. Ishola* (2018) 15 NWLR (Pt. 1641) 77. **(P. 155 lines 19 - 29)**

[4] ***Contract – Contract for Sale – Must be in writing – No contract for any disposition of land, being a disposition that is required by any enactment to be made by deed or instrument or in writing shall be enforceable by action unless the contract is in writing and is signed by the party to be charged therewith or by some other person lawfully authorised by him.***

Be it appreciated, however, that for other agreed terms to be part of the sale transaction such terms should be evidenced in writing. A memorandum is incomplete and does not fulfill the statutory requirement when

other terms, save terms implied by law, agreed to by the parties are not evidenced in writing. Sensing and appreciating the inadequacy of the conditional state of Exhibit D, the appellants argued that it had back-up oral agreement giving the priority to the appellants to purchase the property. I agree with the 1st - 2nd respondents by section 5(1)(b), (2) and (3) of the Law reform (Contracts) Law, CAP L73 Laws of Lagos State which copied section 4 of the statute of Frauds 1677, no contract for any disposition of land, being a disposition that is required by any enactment to be made by deed or instrument or in writing shall be enforceable by action unless the contract or some memorandum or note in respect thereof is in writing and is signed by the party to be charged therewith or by some other person lawfully authorised by him vide *Okoleji v. Okupe* 15 NLR 28, *Suleiman v. Johnson* 13 WACA 213, *Ayinla v. Sijuwola* (1984) 5 S.C. 77. The oral understanding, if any, even if proved, was not shown to be within these exceptions, and would not have made it enforceable, in my modest opinion. **(P. 158 lines 13 - 30)**

[5] ***Contract – Contract of Sale – Need to be in writing – Exceptions – Part performance – when it applies to an agreement – the doctrine of part performance applies only where there is a completed agreement in existence.***

One of the exceptions is part performance. In the present case the improvement made on the property was for the enjoyment of the property in tenancy. It was not shown that it was made for the purpose of or pursuant to the bid to purchase the property by the appellants. Also, the doctrine of part performance applies only where there is a completed agreement in existence vide *Shelle v. Rossek* (1938) 14 NLR 80. In addition, the acts of part performance must be carried out with the knowledge and consent of the vendor or his agent and known to have been done in pursuance of the contract of sale vide *Shelle v. Rossek (supra).*
(P. 158 lines 32 - 37)

[6] ***Contract – Contract of Sale – Registration of title – Effects of – Registration of title is for security. It guarantees title to the property registered but is not one of the methods to establish contract of purchase of landed property.***

Registration of title is for security. It guarantees title to the property registered but is not one of the methods to establish contract of purchase of landed property. Registration merely creates a right, title or interest in land in favour of the grantee. Registration does not cure defect in title or ownership. Registration also helps a purchaser to discover from inspection of the register whether the vendor has power to sell and whether the property is encumbered vide *Onagoruwa v. Aderemi* (2001) 13 NWLR

(Pt. 721) 38. It has to be noted that the title guaranteed the first registered owner is not absolute. The moment title of the first registered owner is in issue in proceedings relating to the property against an adverse claimant, the register cannot serve as evidence of title vide the case of *Animashaun v. Mumuni* (1941) 16 NLR 59 where it was held that registration of title affords no protection to the first registered owner, not even against an unsuccessful objector to the registration, even apparently if that objector had appealed unsuccessfully to an appellate Court, so the validity of the transaction leading to the registration must be established in the same way as if the title had not been registered.
(P. 159 lines 16 - 30)

[7] ***Contract – Contract of Sale – when it becomes invalid – Fraud – Defined.***

Fraud implies a willful act on the part of anyone, whereby another is sought to be deprived by legal or equitable means, of what he is entitled to, and includes acts, omissions and concealments by which an undue and unconscientous/unconscionable advantage is taken of another and must be specifically pleaded with particularly and must be proved beyond reasonable doubt vide *Otukpo v. John* (2012) 7 NWLR (Pt. 1299) 357, *Agi v. PDP* (2017) 17 NWLR (Pt. 1595) 386, *Ikpeazu v. Otti* (2016) 8 NWLR (Pt. 1513) 38, *Adimora v. Ajufo* (1988) 3 NWLR (Pt. 80) 1, *A.C.N. v. I.N.E.C.* (2013) 13 NWLR (Pt. 1370) 161, *Trade Bank Plc and Ors. v. Pharmatek Industries Projects Ltd.* (2020) 8 NWLR (Pt. 1725) 124 at 159 - 160. Proof of fraud would invalidate the title of the first registered owner vide *Labobadi v. Lagos Metal Industries Ltd.* (1973) 1 S.C. 1, *Bada v. Pereira* (1974) 11 S.C. 5, *Lasisi v. Tubi* (1974) All NLR (Pt. 11) 438.
(P. 159 lines 1 - 12)

[8] ***Contract – Elements of a valid contract – Offer and Acceptance.***

In a contract, an offer is a proposal which originates or emanates from the offeror to the offeree to enter into an agreement to do or not to do a particular thing. Since the essence of offer is reciprocal acceptance, the offeror anticipates the expected acceptance and this he makes clearly in the offer. An acceptance is the reciprocal act or action of the offeree to an offer in which he indicates his agreement to the terms of the offer as conveyed to him by the offeror. In other words, acceptance is the act of compliance on the part of the offeree with the terms of the offer. It is the element of acceptance that underscores the bilateral nature of a contract. For an acceptance to be operative it must be plain, unequivocal, unconditional and without variance of any sort between it and the offer. The offeree must unreservedly assent to the exact terms proposed by the offeror. A counter - offer or a qualified acceptance of an offer cannot

give rise to a binding agreement between parties. See *Orient Bank (Nig.) Plc v. Bilante International Ltd* (1997) 8 NWLR (Pt. 515) 37 AT 76; *UBN Ltd v. Sax (Nig.) Ltd* (1994) 8 NWLR (Pt. 361) 150.
(P. 159 lines 1 - 12)

IKYEGH, JCA (Delivering the Leading Judgment): The appeal is from a decision of the High Court of Justice of Lagos State (the court below) whereby it dismissed the appellants' action with respect to disputed rights over the landed property located at No. 336 Murtala Mohammed Way, Yaba, Lagos.

In summary, the appellants sued the respondents at the court below claiming an order for a declaration that pursuant to the contract between the 2nd appellant and the 1st respondent for option to purchase and the first right of refusal on the sale of the 1st respondent's property situate at No. 336 Murtala Muhammed Way, Yaba, Lagos, the 1st respondent is bound to sell the said property to the 2nd appellant and not to the 2nd respondent at the price of ₦40 million it was offered to the 2nd appellant or at the price of ₦45 million it was allegedly offered to the 2nd respondent; a declaration that neither the 1st respondent nor the 2nd respondent is entitled to apply for the registration with the 3rd respondent in the name of the 2nd respondent of the title to the said property; an order setting aside the purported sale of the said property to the 2nd respondent by the 1st respondent inter alia on the ground of fraud; an order of specific performance of the aforesaid contract; an order of perpetual injunction protecting the 2nd appellant's rights over the aforesaid property in tandem with the declaratory reliefs and the order for specific performance.

The action was "fought" on pleadings and evidence upon which the court below, after evaluating the evidence and considering the written addresses for and against the action, saw no merit in it and dismissed the action in its entirety.

Dissatisfied with the decision of the court below, the appellants filed an original notice of appeal and another notice of appeal, all within time, challenging the said decision. The appellants filed a brief of argument on 12.12.18 but deemed as properly filed on 04.03.21. The appellants urged, in page 3 of the brief that, the notice of appeal filed on 23.05.18 contained in pages 1736 - 1746 of the record of appeal (the record) be struck out leaving the notice of appeal filed on 16.08.18 contained in pages 1821 - 1837 of the record and it is so ordered.

The surviving original notice of appeal filed on 16.08.18 was subsequently amended by order of the Court. It contains eleven (11) grounds of appeal. The appellants contended in the brief that the court below denied them fair hearing leading to a miscarriage of justice by not considering all the issues placed before it, thereby rendering the entire proceedings null and void upon which the appellants urged that the decision of the court below be set aside citing in support section 36(1) of the Constitution of the Federal Republic of Nigeria 1999 (1999 Constitution),

as amended together with the cases of *Ovunwo v. Woko* (2011) 17 NWLR (Pt. 1277) 522 at 556, *Olufeagba v. Abdul-Raheem* (2009) 18 NWLR (Pt.1173) 384 at 446 - 447, *First Bank of Nigeria Plc v. T.S.A. Industries Ltd.* (2010) 15 NWLR (Pt.1216) 247 at 303, *Otapo and Ors. v. Sunmonu* (1987) 2 NWLR (Pt. 58) 587 at 605, *Kraus Thompson Organ. Ltd. v. University of Calabar* (2004) 9 NWLR (Pt. 879) 631 at 657, *NIPOL Ltd. v. Bioku Investment & Proco. Ltd.* (1992) 3 NWLR (pt.232) 727 at 747, *Tanko v. U.B.A. Plc* (2010) 17 NWLR (Pt.1221) 80 at 93 - 94, *Katto v. C.B.N.* (1991) 9 NWLR (Pt. 214) 126 at 149, *Unongo v. AperAku* (1983) 11 SC 129 at 153, *Nwokoro v. Osunma* (1990) 3 NWLR (Pt.136) 22 at 32 - 33.

The appellants contended that the 1st - 2nd respondents joint statements of defence contained in pages 524 - 533 of the record were signed in the name of the law firm of Yemi Gbonegun & Co. which is unknown to Law and are, on that account, incompetent and struck at the jurisdiction of the court below to entertain the said pieces of pleadings and the evidence built thereon for being incurably bad and automatically null and void upon which the appellants urged that the pieces of pleadings in question and the evidence led in support thereof should be struck out citing in support the cases of *Okafor & Ors. v. Nweke & Ors.* (2007) 10 NWLR (Pt.1043) 521, *SLB Consortium Ltd. v. N.N.P.C.* (2011) 9 NWLR (Pt.1252) 317, *Bello v. Adamu* (2012) 3 NWLR (Pt.1287) 286 at 298 - 299, *Mohammed v. M.E. Co. Ltd.* (2010) 2 NWLR (Pt. 1179) 473 at 486, *Madukolu v. Nkemdilim* (1962) 1 All NLR 587, *Ashco Nig. Ltd. v. Ward.* and Green (2010) 3 NWLR (Pt.1181) 302 at 326, *Oketade v. Adewunmi* (2010) 8 NWLR (Pt. 1195) 63, *Mobil-Oil (Nig.) Plc v. Yusuf* (2012) 9 NWLR (Pt. 1304) 47 at 56 *N.N.B. Plc v. Denclag Ltd.* (2005) 4 NWLR (Pt. 916) 549, *Skenconsult (Nig.) Ltd. v. Ukey* (1981) NSCC 1 at 18, *UAC v. MacFoy* (1961) All ER 1169 read with Order 1 rule 2(3) and 6 rule 1 (3) of the High Court (Civil Procedure) Rules 2012 (the rules of the court below), sections 2 and 24 of the Legal Practitioners Act 1990.

The appellants contended that granted it is determined on the preceding issue that the statements of defence does not exist in law and therefore of no effect, and that the evidence tendered in support thereof would go to no issue, being on pleadings deemed abandoned with the logical legal consequence that, the appellants' case at the court below stood unchallenged and/or amounted to an admission which required minimal proof which the appellants discharged entitling the appellants to judgment on the uncontested case citing in support Order 6 rule 1 (3), 15 rule 2, and 17 rule 1 of the rules of the court below, section 122 of the Evidence Act, 2011 (Evidence Act) read with the cases of *Amaechi v. I.N.E.C.* (No.3) (2007) 18 NWLR (Pt. 1065) 105 at 106, *Okagbue v. Romaine* (1992) 5 S.C. 133 at 154 - 155, *Idesoh v. Ordia* (1997) 2 SCNJ 175 at 183, *Odebunmi v. Abdullahi* (1997) 2 SCNJ 112 at 126, *Lawson v. Afaro Cont. Co. Ltd.* (2002) 2 NWLR (Pt.752) 585 at 624 - 625, *Narindex Trust Ltd. v. N.I.C.M.B. Ltd.* (2001) FWLR (Pt. 49) 1546 at 1548, *Owosho v. Dada* (1984) 7 S.C. 149 at 163, *Adesei v. Adebayo* (2012) 1 S.C. (Pt. IV) 95 at 123, *Agbanelo v. U.B.N. Ltd.* (2000) 7 NWLR (Pt. 666) 534 at 549, *Wassah v. Kara* (2015) 4 NWLR (Pt.1449) 374 at

395 - 396, *Commercial Bank (C.L.) Nig. Ltd. v. Ishola* (2015) 4 NWLR (Pt.1449) 291 at 302 - 303; likewise, it was also argued that the 3rd respondent failed to give evidence in the case, therefore the address of its counsel, no matter how brilliant, should not take the place of evidence vide *Vassileva v. P.M.S. Industries Ltd.* (2000) FWLR (Pt.199) 392, *Moses v. Onu* (2013) LPELR - 20348, *Ngere v. Okuruket* (2014) 5 S.C. (Pt.11), *Nwachukwu (?) v. Ottih* (1961) All NLR 507 at 511, *Ebe v. Ottih* (1961) All NLR 507 at 511, *Ebe v. Nnamani* (1997) 7 NWLR (Pt.513) 479 at 501.

The appellants contended that by their amended writ of summons and the 2nd amended statement of claim particularly reliefs 3 and 5 thereof contained in pages 459 - 462 and 463 - 468 of the record, respectively, geared towards stopping the respondents from perfecting and registering the disputed property in the name of the 2nd respondent, the respondents were wrong and in contempt/abuse of the process of the court below to perfect and register the property in the name of the 2nd respondent in Exhibit 'RR' contained in pages 1707 - 1715, while the action and the appeal in CA/L/726/2008 was pending upon which the appellants urged that Exhibit RR be set aside citing in support the cases of *Adusei v. Adebayo* (2012) 1 S.C. (Pt. IV) 95 at 115 - 116, *Seismograph Services Nig. Ltd. v. Efuaye* (1976) 9 - 10 S.C. 135 at 146, *Management Enterprises Ltd. v. Otusanya* (1987) 2 NWLR (Pt. 55) 179 at 191, *Shell Pet. Dev. Co. (Nig.) Ltd. v. Amaro* (2000) 10 NWLR (Pt. 675) 248 at 279, *Governor of Lagos State v. Ojukwu* (1986) 1 NWLR (Pt.18) 621 at 632, *A.G., Anambra State v. Okafor* (1992) 2 NWLR (Pt. 224) 396, *Odogwu v. Odogwu* (1992) 2 NWLR (pt.225) 539, *Okorodudu v. Okoromadu* (1977) 3 SC 21, *Vaswani Trading Co. v. Savalakh& Co.* (1972) 12 S.C. 77 at 84 - 85, *Papersack Nig. Ltd. v. Odutola* (2011) 10 NWLR (Pt.1255) 244, *Julius Berger Nig. Plc v. Toki Rainbow Community Bank Ltd.* (2007) 1 NWLR (Pt. 1016) 540 at 550, *The Shell Petroleum Development Company of Nigeria Ltd. v. Amadi & Ors.* (2011) 14 NWLR (Pt. 1266) 157 at 186, *CBN v. UTC (Nig.) Ltd.* (1996) 4 NWLR (Pt.445) 694 at 702, considered with sections 6(6)(b) and 36(1) of the 1999 Constitution, sections 22 and 26 of the Land Use Act, 1978 and section 15 of the Court of Appeal Act, as amended.

The appellants contended that in the light of the fact that the court below held in its judgment that Knight Frank Estate Agency was the sale agent of the 1st respondent on both the lease, Exhibit 'BB' and purchase of the property, and the Knight Frank Estate Agency who prevailed on the appellants to take a lease in the first instance instead of the purchase of the property pending clearance from the 1st respondent before effecting the sale of the property to the appellants on option to purchase and first right of refusal having orally agreed with the 2nd appellant that it would have both the right of first refusal and the first option to buy the property on or before the expiration of the lease from the 1st respondent if the lease of the property was taken by the appellants, the court below should have held that based on these facts, the oral agreement was binding on the 1st respondent. and estopped the 1st respondent to resile from it having held out

Knight Frank Estate Agency as its authorized agent in the transaction vide section 151 of the Evidence Act read with the cases of *Combe v. Combe* (1951) 1 All ER 767 at 770, *Buhari v. I.N.E.C.* (2009) All FWLR (Pt. 459) 419, *Hilary Farms Ltd. v. M/V Mahtra* (2007) All FWLR (Pt. 190) 1417, *A.G., Rivers State* (2011) 8 NWLR (Pt. 1248) 31 at 83, *Aray v. Airline Management Support Ltd.* (2003) 7 NWLR (Pt. 820) 577.

The appellants referred to paragraphs 15, 16, 22, 23, 24, 25, 26 and 27 of the statement of defence contained in pages 528 - 530 of the record and Exhibit 'PP', contained in pages 1696-1700 of the record, the Deed of Assignment, to contend that both were contradicted by the Deed of Assignment, Exhibit 'RR', dated 9.11.10 contained in pages 1707-1715 of the record without containing the sum of money of ₦45 million which the 1st - 2nd respondents pleaded and led evidence that it was paid by the 2nd respondent to the 1st respondent, therefore the appellants urged that the court below could not have rightly concluded that the 2nd respondent paid ₦45 million when Exhibit RR contains ₦12 million, more so, the only reason why the said registration was not predicated on Exhibit 'PP' was because it was never in existence for the 1st - 2nd respondents to rely upon; that : whereas the 2nd respondent asserted that the ₦45 million was paid via four cheques, the court below held that it was paid by two cheques without production in evidence of the bank statement of account to establish that the ₦45 million was actually paid when the 2nd respondent undertook to produce its bank statements of account in evidence; and that there could not have been a valid sale between the 1st and 2nd respondents when the appellants had the option of first refusal which was not activated by the 1st respondent; more so, the purported sale as contained in Exhibit 'RR' was done in 2010 after the cause of action arose in 2004, therefore the 1st - 2nd respondents could not have relied on Exhibit RR prepared and engrossed after the suit was commenced at the court below; and that the 2nd respondent could not have been a purchaser for value, when the appellants paid the 1st respondent ₦45 million through Exhibit 'W' on the option of first refusal which militated against the 2nd respondent's interest, so urged the appellants.

The appellants started with the proposition that the party who asserts must prove but that in respect of particular facts the burden rests on the party against whom judgment will be given if no evidence was produced in respect of those facts vide *Adedeji v. Oloso* (2007) 5 NWLR (Pt.1 026) 133 at 165, *Oyovbiare v. Omamurhomu* (1999) 10 NWLR (Pt. 621) 23 at 34 - 35, *Wuemeni v. Ochie* (2004) 15 NWLR (Pt. 895) 196 and section 131, 132, 133(2) and (3) and 136 of the Evidence Act.

The appellants then contended that the 1st respondent was the disclosed principal of Knight Frank Estate Agency and was properly shed in place of its agent, Knight Frank Estate Agency; that the appellants' claim against the respondents was jointly and severally, while paragraph 3 of the 2nd amended statement of claim which was evasively traversed by paragraph 3 of the 1st – 2nd respondents' statement of defence pleaded that the 1st and 2nd appellants are sister companies

which fact was also established by paragraph 5 of CW1's witness written statement on oath coupled with the oral and documentary evidence established the appellants' case that the 1st respondent was in breach of the contract of sale of the property by not honouring the undertaking made orally by its agent to sell the property to the appellants on the option of first refusal to purchase the property and in disregard of the fact that when the appellants had offered more on the property than the ₦12.5 million paid by the 1st - 2nd respondents; consequently, the appellants urged that the court below was wrong to dismiss their case when it was proved on the balance of probabilities vide *Osigwe v. PSPLS Mgt. Consortium Ltd.* (2009) 3 NWLR (Pt. 1128) 378, *Chime v. Chime* (2001) 3 NWLR (Pt. 701) 527, *Ude v. Nwara* (1993) 2 NWLR (Pt. 278) 638, *Skenconsult (Nig.) Ltd. v. Ukey* (1981) NSCC 1, *MacFoy v. UAC (supra)*, *IfeanyiChukwu (Osondu) Ltd. v. Soleh Boneh Ltd.* (2000) 5 NWLR (Pt. 656) 322, *Reptico S.A. Geneva v. Afribank (Nig.) Plc* (2013) 14 NWLR (Pt.1373) 172, *Lewis & Peat (N.I.R.) Ltd. v. Akhimien* (1976) 1 All N.L.R. 460, *George & Ors. v. Dominion Flour Mills Ltd.* (1963) 1 All NLR 71, Ekpan.

The appellants contended that their evidence that the property was in dilapidated state at the time of the lease agreement between the appellants and the 1st respondent through its authorized agent, Knight Frank Estate Agency was supported by the evidence of DW1 during cross-examination contained in pages 1559 - 1560 of the record as well as the contradictory stance of the 1st - 2nd respondents who approbated that the property leased out was fallow, bushy, unused and dilapidated only to reprobate that no development, mending, patching and/or beautifying had been done on the property by the appellants upon which the appellants urged that their assertion 'that the property was in dilapidated condition and that they improved it to make it fit for habitation had been established vide *Adeosun v. Governor of Ekiti State* (2012) 4 NWLR (Pt. 1291) 581, *Onisaodu v. Elewuju* (2006) 13 NWLR (Pt. 998) 517, *A.G., Rivers State v. A.G., Akwalbom* (2011) 8 NWLR (Pt. 1248) 31, *CBN v. Aribo* (2018) 4 NWLR (Pt. 1608) 130 read with sections 20 and 24 of the Evidence Act.

The appellants contended that fraud was pleaded in paragraph 8 of the amended reply contained in pages 469 - 472 of the record and evidence given on it in paragraph 43 of the witness written statement on oath contained in pages 475 - 482 of the record which was not cross examined upon and amounted to tacit acceptance of the truth thereof vide Order 15 rule 3(1) of the rules of the court below read with the cases of *Emirate Airline v. Agonadi (2)* (2014) 9 NWLR (Pt. 1413) 506 at 534, *Oforlete v. State* (2000) 12 NWLR (Pt. 681) 415 at 436, *Egwumi v. State* (2013) 13 NWLR (Pt. 1372) 525 at 552; and that the 1st - 2nd respondents' refusal to produce the statement of account to prove that the 2nd respondent made payment of ₦45 million to the 1st respondent showing if the evidence had been produced it would have worked against the 1st - 2nd respondents vide *Citizens International Bank v. SCOA (Nig.) Ltd.* (2006) 18 NWLR (Pt. 1011) 332 at 350, *Re Adewunmi* (1988) 3 NWLR (Pt. 83) 483, *Agbonifo v. Aiwereoba* (1988) 1 NWLR

(Pt. 70) 325 and section 167(d) of the Evidence Act.

The appellants contended that DW1 and DW2 were dishonest witnesses in that they gave evidence in their paragraphs 28 and 17 respectively of their witness written statements on oath that the two cheques, Exhibit 'II' and 'JJ' received by the 1st respondent on 14.07.04 was cleared on the same 14.07.04; while the DW1 gave evidence that the 1st respondent was not aware that Exhibit k (contained in pages 1635-1644) of the record was given to the appellants by Knight Frank, the witness was quick to assert that there was no oral agreement between the 2nd appellant and Knight Frank; that the DW1 also denied that the 2nd appellant paid the rent and agency fee for the lease, Exhibit 'BB' when Exhibit 'G' and for same; that DW1 and DW2 claimed that 2nd respondent paid N45 million to the 1^{5t} respondent for the property yet Exhibit 'RR' showed that it was ₦12 million that was paid; that the DW1 and DW2 claimed that the appellants could not pay the purchase price of ₦40 million yet the ₦22.5 million the 2nd appellant offered in Exhibits 'B' and 'O' contained in pages 1626 and 1627 of the record was more than what the 2nd respondent offered; also that the DW1 admitted that Knight Frank was the 1st respondent's agent for the lease and purchase of the property but·still denied Exhibits 'T' and 'U' contained in pages 1653 - 1655 of the record exchanged between Knight Frank and the 2nd appellant; and that besides, the DW2 claimed the closed cheques, Exhibits 'EE', 'FF', 'II' and 'JJ' issued by the 2nd respondent to the 1st respondent cleared and the statement of accounts backing up the said closed cheques will be produced in evidence but none was produced.

The appellants further contended that the DW1 claimed that the 1st respondent received 2nd appellant's letter dated 20.07.04, Exhibit 'W' without the accompanying cheque when the 2nd appellant's Union Bank of Nigeria Plc cheque in the sum of ₦45 million was attached to Exhibit 'W; and mentioned in page 2 paragraph 3 of Exhibit 'W' contained in pages 1657 - 1658 of the record, the DW1 and DW2 claimed that Exhibit 'PP' was executed on 15.07.04 when Exhibit 'PP' did not state so; and that rather Exhibit 'RR' revealed the payment of consideration of ₦12 million by the 2nd respondent and the execution of Exhibit 'RR' made on 09.11.10 long after the offers and payments made by the appellants through Exhibits 'R', 'S' and 'W' and that Exhibit 'RR' showed that Exhibit 'PP' was not executed on 15.07.04. So the appellants having established fraud, it vitiated Exhibit 'PP' which should be expunged; more so, the 1st - 2nd respondents did not establish the payment of ₦40 million they undertook to establish, thus not discharging the burden of proof placed on them to establish facts that were especially within their knowledge, that pleading not supported by evidence is deemed abandoned and that illegality once brought to the attention of the court overrides, all questions of pleading vide sections 128(1) and 140 of the Evidence Act and the cases of *Ugo v. Obiekwe* (1989) 1 NWLR (Pt. 99) 566 at 572, *Akpan v. R.T.Q.I. Church* (2001) 15 NWLR (Pt. 736) 328 at 349, *Okaqbue v. Romaine* (1982) 5 S.C. 133 at 156; and that the 1st - 2nd respondents cannot approbate and reprobate on proof of fraud by maintaining that even if it was true it did not affect the validity of

the sale by the 1st respondent to the 2nd respondent vide *Enekwe v. International Merchant Bank of Nigeria Limited* (2006) 19 NWLR (Pt.1013) 146 at 181, *UBA Plc v. Samba Pet. Co. Ltd.* (2002) 16 NWLR (Pt. 739) 361 at 406 - 407.

The appellants contended that it is preposterous for the 1st - 2nd respondents to maintain that the contract between them was on 09.07.04 by Exhibit 'HH' contained in page 1691 of the record when the closed cheques were received on 14.07.04 and also in the light that the 1st respondent had stated that it was waiting for advice from its bankers on the clearance of the closed cheques and there was no evidence brought from the statement of accounts to demonstrate that the cheques were cleared, thus not establishing that the 2nd respondent furnished consideration higher than the ₦45 million paid by the 2nd appellant.

The appellants reiterated in argument that the 1st – 2nd respondents who held out Knight Frank as the 1st respondent's agent in both the lease agreement and the oral agreement for sale of the property and bound by its actions on the footing that he who acts through another, act by himself or the Latin maxim *"qui facit per allium facit perse, a samfacereindepur"* vide *Fairline Pharmaceutical Industries Ltd. v. Trust Adjusters Nig. Ltd.* (2012) LPELR - 20860 (CA); and that by the undenied Exhibits 'A', 'B', 'C' and 'D' which amounted to proof without more, the appellants were able to prove the transaction, so the 1st - 2nd respondents did not discharge the burden to call Knight Frank to give evidence to the contrary if such evidence exists vide *Egbe v. Duru* (1998) 9 NWLR (Pt. 565) 288 at 297, *Eseigbe v. Agholor* (1990) 7 NWLR (Pt. 161) 234, *Igbojimadu v. Ibeabuchi* (1998) 1 NWLR (Pt. 533) 179, *Ojukwu v. Onwudike* (1984) 2 S.C. 15 at 88.

Consequently, the appellants urged that, based on the preceding arguments, the court below failed to evaluate the evidence which should be evaluated, by the Court and that the court below persisted in error which made its judgment perverse and therefore against the weight of evidence and that the appellants have shown (supra) that the Court must intervene by allowing the appeal and setting aside the decision of the court below and granting the prayers in the appellants' amended writ of summons and the 2nd amended statement of claim vide *Adegoke v. Adibi* (1992) 5 NWLR (Pt. 242) 410, *Ihewueze v. Ekeanya* (1989) 1 NWLR (Pt. 96) 239*, Yusuf v. Mobolaji* (1999) 12 NWLR (Pt. 631) 374 at 387, *Balogun v. Akanji* (1988) 1 NWLR (Pt. 70) 301 at 319, *Woluchem v. Gudi* (1981) 5 SC 291 at 326, *Onwoamanam v. Fatuade* (1986) 2 NWLR 199, *Haricon Ltd. v. Wasurum* (1987) 3 NWLR (Pt. 66) 646 at 653 and section 15 of the Court of Appeal Act.

The 1st – 2nd respondents argued in the brief filed on 16.05.19 but deemed as properly filed on 04.03.21 that the court below gave the parties equal opportunity to present their respective cases by considering all the issues presented before it on the validity of the sale contract between the 1st - 2nd respondents, the registration of the contract instrument by the 3rd respondent, and the appellants' alleged right of first refusal or first option to purchase the property and upon refusal of

the relief to set aside the registration/perfection of the contract document, the issue of specific performance became academic and hypothetical, which is not the function of the court to determine; more so, the 3rd respondent was a nominal party whose liability the court below need not go into and the appellants did not establish a miscarriage of justice in that they did not show that the decision of the court below in the case was prejudicial or inconsistent with their substantial right vide *SCEN v. Nwosu* (2008) All FWLR (Pt. 413) 1399, *A.G., Benue State v. Umar* (2008) 1 NWLR (Pt. 1068) 311, *Messrs Lewis and Peat (N.R.T.) Ltd. v. Akhimien* (1976) LPELR - 1864) (SC), *Adeogun v. Fashogbon* (2008) LPELR - 131 (SC), *Kanu v. A.G., Imo State* (2013) LPELR - 20646 (CA), *Mr. Ikenna John Ogbuli v. Madam Abomeli Blackie* (2018) LPELR - 44203 (CA), *Ito v. Ekpe* (2000) LPELR - 1561 (SC) AND *Mojeed Suara Yusuf v. Madam Idiatu Adegoke* (2007) LPELR - 3534 (SC), *Pam v. Mohammed* (2008) LPELR - 2895 (SC).

The 1st - 2nd respondents relied on the cases of *Heritage Bank Ltd v. Bentworth Finance (Nigeria) Ltd.* Appeal No.SC.175/2005: (unreported) delivered on 23rd February 2018, *Union Homes Savings & Loans Plc v. Olumide* (2018) LPELR - 45572, *Olumide & Ors. v. Ajayi* (1997) LPELR - 6244 (CA), to contend that the statement of defence being a piece of pleadings like a statement of claim, is not an originating process therefore the failure to challenge its defectiveness at the trial of the action tantamount to acquiescence and waiver of the defect and that it is late to complain of it on appeal.

The 1st - 2nd respondents referred to page 468 of the record of appeal (the record) containing the reliefs sought to contend that since the appellants did not seek for any relief to set aside the registration of the property the court below could not have granted the relief as a Court is not a charitable organization and that the appellants' interlocutory application to set aside the sale, perfection and registration of the property was dismissed by the court below vide pages 1066 to 1067, 1607 to 1613 of the record citing in support the cases of *Nabore Properties Ltd. v. Peace-cover Nigeria Ltd.* (2014) LPELR – 22586; *Shena Security Company Ltd. v. Afropak (Nigeria) Ltd.* (2008) LPELR - 3052 (SC), *Government of Gongola State v. Tukur* (1989) 4 NWLR (Pt. 117) 592, *Vab Petroleum Inc v. Momah* (2013) LPELR - 19770 (SC), *Atunka & Anor. v. Aboki & Anor.* (2016) LPELR - 41199 (CA), *Dingyadi v. INEC* (2011) LPELR - 950 (SC), *Mohammed v. Husseini* (1998) 14 NWLR (Pt. 584) 108.

The 1st – 2nd respondents argued in the alternative, that the act of registration of the property, being a ministerial act, based on exercise of discretion by the 3rd respondent, the court below could not interfere to set it aside vide *Shitta-Bey v. Federal Public Service Commission* (1981) 1 S.C. (REPRINT) 26, *Amasike v. Registrar-Gen., C.A.C.* (2006) 3 NWLR (Pt. 968) p.462, *A.G. Anambra State v. Okafor* (1992) 2 NWLR (Pt. 224) p.396 S.C., *Jolasun v. Bamgboye* (2010) 18 NWLR (Pt. 1225) 285 S.C.

The 1st - 2nd respondents argued that the res of the action is title over landed property and the contract agreement between the 1st and the 2nd respondents was executed before the commencement of the suit at the court below so the registration of the property during litigation which had no bearing on the action and same did not constitute self-help and an abuse of the process of the court vide *Gbejuade v. Gbejuade* (2017) LPELR - 41977 (CA), *Igbokwe v. Kehinde* (2008) 2 NWLR (Pt. 1072) 441 at p.452, paras F-H, *Nigerian Breweries Plc v. Dumeje* (2015) LPELR - 25583 (CA), *Abdullah v. Gov. of Lagos State* (1989) 1 NWLR (Pt. 97), *Shuaibu v. Muazu* (2007) 7 NWLR (Pt. 1033) p.271, *Ajewole v. Adetimo* (1996) 2 NWLR (Pt. 431) 391, *Akinpelu v. Adegbore* (2008) 10 NWLR (Pt.1096) 531 S.C., *R-Benkay Nigeria Ltd. v. Cadbury Nigeria Ltd.* (2012) LPELR - 7820 (SC).

The 1st - 2nd respondents argued that there was no valid contract as the 2nd appellant rejected the offer of ₦40 million and made its own offer of ₦25.5 million as consideration for the property which the 1st respondent refused, therefore the court below was right to hold that the 1st respondent outrightly rejected the offer of ₦25.5 million thereby breaking the chain of any contractual relationship which would have existed between the parties with regards to the sale of the property vide *Abba v. Shell Petroleum Development Company of Nigeria Limited* (2013) LPELR - 20338, *Chabasaya v. Anwasi* (2010) LPELR - 839.

The 1st – 2nd respondents argued that the four set of receipts, Exhibits KK - PP, contained in pages 1693 - 1701 of the record constituted proof of receipt of consideration for the sale and existence of a valid contract which made the 2nd respondent a bona fide purchaser for value, therefore even if the deed of assignment between the 1st respondent and the 2nd respondent is unreliable the purchase receipts issues by the 1st respondent to the 2nd respondent is' sufficient proof of contract between the 1st and 2nd respondents vide sections 5(1)(b), 5(2) and (3) of the Law Reform (Contracts) Law, CAP L63, Laws of Lagos State, 2003, *Amana Suits Hotels Ltd. v. P.D.P.* (2007) 6 NWLR (Pt.1031) 453 at 477 - 478 paras. FA (CA), *Moses v. Onu* (2013) LPELR - 20348 (CA), *Ladunni v. Adesoye* (2015) LPELR - 25579, *Best Nigeria Ltd. v. Blackwood Hodge Nigeria Ltd.* (2011) LPELR - 776 (SC).

The 1st - 2nd respondents pointed out that Exhibit RR tendered by the appellants through respondents' witness related to the existence of a contract between the 1st and 2nd respondents and perfection of the said document and that the very basis for the case was for the court below to pronounce the sale contract between the 1st and 2nd respondents as invalid given the appellants perceived right of first refusal and first option to purchase the property which the court resolved against the appellants in its judgment which was based on admitted facts needing no further proof vide *Agbanelo v. U.B.N. Ltd.* (2000) 7 NWLR (Pt. 666) 534 at 549.

The 1st - 2nd respondents argued that the allegation of fraud was not supported by

any iota of evidence and that fraud being a criminal allegation had to be proved beyond reasonable doubt; more so, documentary evidence such as the cheques and the letter of cover, Exhibit DD showed the first set of cheques were dispatched on 02.06.2004 while Exhibit HH showed another set of cheques were dispatched on 09.07.2004 should speak for themselves; that failure of consideration, if any, gives rise to an action for breach of contract and does not affect the validity of the contract; that the contract came into existence on 09.07.2004 by virtue of the 2nd respondent's letter accepting the 1st respondent's counter offer and agreeing to pay the balance of ₦33 million, therefore the consideration that' the last set of cheques were received till 14.07.2004 or value for them taken before 15.07.2004 was immaterial vide *Arowosaye v. Ogedengbe & Anor.* (2008) LPELR - 3701 (CA), *Fhomo v. Zenith Bank* (2016) LPELR - 42233 (CA), *Oyebanji v. Fowowe* (2008) All FWLR (Pt. 410) 780 at pp.796 - 797 paras. H-B (CA).

The 1st – 2nd respondents relied on section 5(1)(b), (2) and (3) of the Law Reform (Contracts) Law CAP L63, Laws of Lagos State, 2003, to contend that since there was no evidence of part performance of the contract, save acts done in furtherance of and incidental to the occupation of property as a tenant, the oral agreement was unenforceable to dispose of the property to the appellants vide *Mba-Ede v. Okufo* (1990) 2 NWLR 135, *Senfowokan v. Idowu & Anor.* (1975) 4 S.C. (Reprint) 136, *Awaye Motors Co. Ltd. v. Adewunmi* (1993) 5 NWLR (Pt. 292) 236, *Obajimi v. Adediji* (2008) 3 NWLR (Pt.1073) 1, *Standard Bank Nigeria v. Ikomi* (1992) LPELR - 3112, *Ekpanya v. Akpan* (1989) 2 NWLR (Pt. 101) pg.86 at 97 para. H, *Dike v. Adube* (2016) LPELR - 41035, *Orlu v. Gogo-Abite* (2010) 8 NWLR (Pt. 1196) 307.

The 1st - 2nd respondents argued that the court cannot look beyond the lease agreement to determine the terms of the contract between the parties, therefore the non inclusion or absence of the oral agreement to sell the property to the appellants in the lease agreement Exhibit BB contained in page 1675 of the record was fatal vide *S.P.D.C. (Nig.) Ltd. v. Emehuru* (2007) All FWLR (Pt. 381) 1694 at 1710 para. C (CA), *Ashaka v. Nwachukwu* (2013) LPELR - 20272 (CA).

The 1st - 2nd respondents argued that Exhibit D was conditional as it carried the phrase "As proposed by you, if before the period the issue of purchase is concluded good enough", while Exhibit M limited the authority of Knight Frank to secure a buyer for the property and did not conferring extraneous rights on third parties in respect of the property; likewise Exhibit T contained in pages 1653 - 1654 where it is stated that any prospective purchaser that first prices the property will have it showing that Knight Frank did not concede the right of first refusal or first option to purchase the property to the 2nd appellant; and that the 1st respondent having ratified the act of sale of the property by its agent, Knight Frank, to the 2nd respondent, even if the agent exceeded its authority to sell the property to the 2nd respondent, the act of ratification cured it vide *Oyegun v. Igbinedion* (1992) 2 NWLR (Pt. 226) 747, *Ogunseye & Ors. v. Registered Trustees of World Mission*

Agency Incorporated (2017) LPELR - 42767 (CA).

The 1st - 2nd respondents argued that the 1st appellant is distinct from the 2nd appellant therefore the latter cannot take the benefit of a contract between former in the sense that the oral undertaking to sell the property on the basis of first refusal (if any) given to the 1st appellant is not transferable to the 2nd appellant vide *New Res Int'l v. Oranusi* (2011) 2 NWLR (Pt. 1230) p.102, *Ojoh v. Kamalu* (2005) 18 NWLR (Pt. 958) pg.523 at 565 paras. F-G, *Bulet Int'l (Nig.) Ltd. & Anor. v. Olaniyi & Anor* (2017) LPELR - 42475 (SC).

It was further argued that, even if the 2nd appellant is the disclosed principal of the 1st appellant, evidence abound that the 1st respondent's agent gave them the opportunity to buy the property but they did not meet the price ceiling, therefore the court below was right to hold that the correspondence showed the parties entered into negotiations for sale of the property but could not reach a consensus and that the right of first refusal or the right of first option to purchase the property is not a right in perpetuity, therefore the window was left open for the 1st respondent to make and, in fact, accept offer from the 2nd respondent to sell the property in question.

The 1st - 2nd respondents argued that the suit was not undefended in that the fact that the processes were signed by a law firm did not make the suit undefended; more so, declaratory reliefs are not granted on admission or in default of pleadings vide *Adedoyin & Ors. v. Amoo* (2018) LPELR - 44978 (CA).

The 1st - 2nd respondents argued that the totality of the appellants' claim hinged on the right of first refusal or first option to purchase the property and fraud as between the 1st respondent and the 2nd respondent which were not established showing the action was bound to fail on the weight of evidence vide *Osolu v. Osolu* (2003) FWLR (Pt. 172) 177; consequently, the court below was right in dismissing the action upon which the 1st - 2nd respondents urged that the appeal be dismissed.

The reply brief filed on 18.03.2021 pointed out that issue one of the 1st - 2nd respondents' brief did not arise from grounds 1 and 2 of the notice of appeal and should be struck out on ground of incompetence vide *Osinupebi v. Saibu & Ors.* (1982) 7 S.C. 104 at 110 and 11, *Okpala v. Ibeme* (1989) 2 NWLR (Pt. 102) 208 at 221, *Dahiru v. Kamale* (2005) 9 NWLR (Pt. 929) 8, *Latunde v. Lajinfin* (1989) 3 NWLR (Pt.108) 177, *Akinbinu v. Oseni* (1992) 1 NWLR (Pt. 215) 97 at 118/119 (SC), *Jonah Onyebuchi v. Federal Republic of Nigeria* (1987) 1 NWLR (Pt. 51) 506 at 521 - 522 (SC), *Iheanacho v. Ejiogu* (1995) 4 NWLR (Pt. 389) 324 at 334 - 335 (CA), *Lewis and Peat (N.R.T.) Ltd v. Akhimien* (1976) LPELR - 1864 (SC), *Eta v. Dazie* (2013) 9 NWLR (Pt. 1359) 248 248 at 262 (SC), *Yongbush v. Bulus* (1997) 2 NWLR (Pt. 489) 621 at 630 - 631, *Tanko v. U.B.A. Plc* (2010) 17 NWLR (Pt. 1221) 80 at 93 – 94 H-A, 97E-F (SC), *MTN (Nig.) Comrn. Ltd. v. Corporate*

Comm. Investment Ltd. (2019) 9 NWLR (Pt. 1678) 427 at 447 - 448E-H (SC), *UBN Plc v. Bear Marine Service Ltd. & Anor.* (2018) LPELR - 43692 (CA).

The reply brief added that the court below did not make any finding on the proliferation of issues nor of raising academic issues, nor on the narrowing down of issues for determination. So the 1st - 2nd respondents who did not cross appeal are not permitted to argue the said issues vide *Eta v. Dazie* (2013) 9 NWLR (Pt. 1359) 248, *Yongbush v. Bulus* (1997) 2 NWLR (Pt. 489) 621 at 630 - 631; and that only the Supreme Court can afford not to determine all issues presented before it because it is a final court vide *Tanko v. U.B.A. Plc* (2010) 17 NWLR (Pt.1221) 80 at 93 - 94, *MTN (Nig.) Comm. Ltd. v. Corporate Comm. Investment Ltd.* (2019) 9 NWLR (Pt. 1678) 427 at 447 - 448, *UBN Plc v. Bear Marine Services Ltd and Anor.* (2018) LPELR - 43692.

The appellants also contended in the reply brief that the issue of estoppel, though not bound to be specifically pleaded, was raised in paragraphs 3 and 4 of the amended reply to the statement of defence contained in pages 469 - 472 at 469 - 470 vide Order 15 of the High Court of Lagos State, (Civil Procedure) Rules: *Ito v. Ekpe* (2000) LPELR - 1561 (SC) and *Mojeed Suara Yusuf v. Madam Idiatu Adegoke* (2007) LPELR - 3534 (SC), *Nkwocha v. MTN Nigeria Communication Ltd.* (2008) 11 NWLR (Pt. 1099) 439 at 459 - 462 (CA), *Pam v. Muhammed* (2008) 16 NWLR (Pt. 1112) 1 at 49 - 51 (SC); that the 1st - 2nd respondents had conceded that the court below did not determine all the issues placed before it and cannot be heard to argue absence of miscarriage of justice at the same time when the court below did not articulate the issue in its judgment.

The appellants contended that in Heritage Bank's case, the issue concerned a statement of claim which was raised for the first time on appeal at the Supreme Court and the case was saved by a writ of summons, unlike the present case where the issue is on a statement of defence which has no preceding process to support the defence, so it is distinguishable from the present case; and that in any case pleadings signed by law firm are incompetent and strike at the jurisdiction of the Court which the Court can raise suo motu and decide, as it cannot waive, as held by the Supreme Court and the Court of Appeal cases where Heritage Bank was distinguished vide *Okafor v. Nweke* (2007) 10 NWLR (Pt. 1043) 521 at 532, *Sunmonu v. Dada* (2019) LPELR - 48270, *Mr. Archibong Nkana v. Abimbola* (2018) LPELR - 42757, *Hamzat v. Sanni* (2015) 5 NWLR (Pt. 1453) 486 at 498 - 499 (SC), *S.L.B. Consortium Ltd. v. N.N.P.C. Plc* (2011) 9 NWLR (Pt. 1252) 317 at 332, *F.B.N. Plc v. Maiwada* (2013) 5 NWLR (Pt. 134,8) 444 at 483 FG, 534 (SC), *Onochie v. Odogwu* (2006) 6 NWLR (Pt. 975) 65 SC at 89 C-E, Order 1 Rule 2(3) of the HCLSCPR, 2004 and 2012, *Ibadan North East Local Govt. v. Alhaji A.O. Makinde* (2018) LPELR - 44984 (CA) pp.18 - 26, paras. A-D., *Okotie-Eboh v. Okotie Eboh* (1986) 1 S.C. 479 at 487, *Kephas Gata Kpezanyashi v. Maiangwa Yamusa Jezhi* (2018) LPELR - 44402 (CA) pp.15 - 33 paras. CC, *Unilorin v. Adesina* (2014) 10 NWLR (Pt. 1414) 159 at 169E (SC),

NNPC v. Orhiowasele (2013) 13 NWLR (Pt. 1371) 211 at 224 E (SC), *Ehinle v. Ikondu Local Government* (2021) 1 NWLR (Pt. 1757) 279 at 311 E-G (SC), *Effiom v. C.R.S.I.E.C.* (2010) 14 NWLR (Pt. 1213) at 133 G-B, *Olumide v. Ajayi* (1997) 8 NWLR (Pt. 517) 433 at 443 – 444 H-B (CA).

The appellants urged in the reply brief that issue 3 of the 1st - 2nd respondents' brief should be struck out as it did not arise from ground 5 of the appellants' notice of appeal.

The reply brief then addressed the appeal on the merit to the effect that the ruling on the motion on notice dated 4.07.17 contained in pages 1066 - 1165 of the record did not determine the issue on the setting aside the perfection and registration of the disputed property, so, it constitute res judicata; and that regardless of the fact that the court below had stated that a grant of the prayers in the motion paper would determine the suit which the appellants had appealed against, the court below did not decide the issue as to constitute *res judicata* and render it functus officio vide . *Akinrimisi v. Maersk (Nig.) Ltd.* (2013) 10 NWLR (Pt. 1361) 73 at 86, *Egbue v. Araka* (1982) 2 NSCC 278 at 284, *Mobil Producing (Nig.) Unltd. v. Monokpo* (2003) 18 NWLR (Pt. 852) 346 at 398 - 399.

The appellant argued that prayers 3 and 5 of the amended statement of claim contained in pages 459 - 462 of the record dealt with perfection and registration of the property supported with Exhibit RR.

The appellants added that the action was based on the contention that the 2nd appellant was entitled to be sold the property and hence the prayer for specific performance vide reliefs 1 and 2 of the second amended statement of claim, not on title to the property; that the 1st - 2nd respondent must be consistent with their case at all stages of the proceedings on the issue of registration of Exhibit PP, not Exhibit RR vide *MTN (Nig.) Comm. Ltd. v. Corporate Communications Inv. Ltd. (supra)*, *Ezegbu v. First African Trust Bank Ltd. and Anor.* (1992) 1 NWLR (Pt. 220) 699.

The appellants complained in the reply brief that it was unfortunate that the court below did not invoke its disciplinary jurisdiction to deal with the issue of registration of the property during the pendency of the action vide *Okoya v. Santili* (1991) 7 NWLR (Pt. 206) 753 at 766. Relying on section 10 of the Registration of title Law and the cases of *Shitta-Bay v. Federal Public Service Commission (supra)*, *Amasike v. Registrar-General C.A.C. (supra)*, *Govenror of Lagos State v. Ojukwu (supra)*, *Vaswani v. Savalakh (supra)*, *A.G., Anambra State v. Okafor (supra)*, *Jolasun v. Bamgboye (supra)*; the appellants contended that public bodies like the 3rd respondent have a legal obligation to maintain the rule of law to prevent anarchy and the Court can issue an order of mandatory injunction to reverse whatever act done by a public body in respect of a pending action especially with respect to the 3rd respondent whose duties are subject to a person filing an

objection to registration of title; and that the Court does not condone act of resort to self-help, so Exhibit RR not Exhibit PP, upon which the 1st - 2nd respondents based their case having been registered during the pendency of the action the court below should have set the registration aside as injunction is not a remedy for a completed act vide *Gbejuade v. Gbejuade (supra)*, *Registered Trustees Apostolic Church v. Olowoleni* (1990) 4 NWLR (Pt. 158) 514 at 537, *Cesare Missini & Ors. v. Balogun* (1986) 1 All NLR 318, *Ajewole v. Adetimo (supra)*, *John Hold Nigeria and Cameroons v. Holt African Workers Union of Nigeria and Cameroon* (1963) 1 All NLR 388 at 390, *Sulu-Gambori v. Bukola* (2004) 1 NWLR (Pt. 853) 122 at 199.

The appellants argued that reference to Exhibit RR in the pleadings made the document part of the pleadings vide *Marine Management Associates Inc. v. National Maritime Authority* (2012) 18 NWLR (Pt. 1333) 506 and that fraud is an exception to section 5 of the Law Reform Contract Law vide *Ede v. Okufo* (1990) 2 NWLR (Pt. 135) 787.

The appellants then veered off from paragraphs 1.34 to 1.43 contained in pages 10 to 14 of the reply brief to discuss issues earlier covered by their brief of argument and came back to contend that quite apart from the fact that there was no pleading on ratification and counsel's address cannot replace evidence, the 1st - 2nd respondents who admitted authority of Knight Frank for the sale of the property on behalf of the 1st respondent, cannot turn round to urge the issue of ratification of sale, when the 1st respondent was aware of the action of Knight Frank on the Latin Maxim of *qui facit per allium*, *facit perse*, *a sam facere indepur* vide *Ajibade v. Pedro* (1992) 5 NWLR (Pt. 241) 257 at 269, *Pascutto v. Adecentro (Nig.) Ltd.* (1997) 11 NWLR (Pt. 529) 467, *Moses v. Onu & Anor.* (2013) LPELR - 20348, *Fairline Pharmaceutical Industries Ltd. v. Trust Adjusters Nig. Ltd.* (2012) LPELR - 20860.

The appellants contended that having pleaded and proved that the 1st respondent was aware that the 2nd appellant was the 1st appellant's undisclosed principal which was unchallenged, the 1st – 2nd respondents cannot be allowed to approbate and reprobate on the admission of assurance of contractual rights of the appellants by the 1st - 2nd respondents who should not be allowed to benefit from their own wrong vide *Owosho v. Dada* (1984) 7 SC 149 at 164, *UBA Plc v. Samba Pet. Co. Ltd.* (2002) 16 NWLR (Pt. 793) 361 at 406 - 407, *Enekwe v. International Merchant Bank of Nigeria Ltd.* (2006) 19 NWLR (Pt. 1013) 146 at 181; upon which the appellants urged that the appeal should be allowed and the judgment of the court below set aside.

Indeed, the statement of defence was served in the name of a law firm. It should have been signed by an identifiable legal practitioner who should have stated his name, address and designation for his name to be traceable on the role of legal practitioners kept at the Supreme Court. This is to avoid imposters or quacks

(so to say) and/or non-qualified persons from infiltrating the legal profession by signing processes of Court.

In respect of originating process like writ of summons or any other process that generates or gives birth to an action, it is incurably bad ab initio and the defect cannot be waived and can be raised at any stage of the proceedings even for the first time at the Apex Court, as it is an issue of substantive jurisdiction that cannot be waived, unless not objected to at all or the issue is not taken suo motu by the Court. However, it is not so with processes that do not originate an action.

The class of such processes is pleadings, for example. In the event a piece of pleadings such as a statement of claim or a statement of defence and any other process filed in the course of proceedings in furtherance of or against an originating process is signed in the name of a law firm, as in this case, where the statement of defence was signed in the name of a law firm, objection to it must be taken at the earliest opportunity at the trial Court or Court of first instance, it being a question of procedural jurisdiction. If not taken at the court of first instance as happened here, the defect would be deemed to have been waived and acquiesced by the party sponsoring the objection.

The matter is clearly and eloquently put by the Supreme Court in the case of *Heritage Bank Ltd. v. Bentworth Finance (Nig.) Ltd.* (2018) 9 NWLR (Pt. 1625) 420 per the lead judgment prepared by the great jurist, His Lordship, Eko, J.S.C., where His Lordship held inter alia that procedural jurisdiction is secondary to substantive jurisdiction; the distinction being that while procedural jurisdiction can be waived, substantive jurisdiction cannot be waived, as a defect in procedure is not the same as a defect in competence or jurisdiction and that the former is waivable, being a private right, therefore objection to it cannot be countenanced at the appellate Court, for the first time, as in this case.

The Supreme Court (Coram: Muhammad, A.G. C.J.N.), Rhodes Vivour, Sanusi, Eko and Galumje, JJ.SC) reinforced its decision in *Heritage Bank Ltd. v. Bentworth Finance Nigeria Ltd.* (supra) in the subsequent fairly recent case of *BPE v. Dangote Cement Plc* (2020) 5 NWLR (Pt. 1717) 322 per the lead judgment prepared by His Lordship, Eko, J.S.C., where His Lordship held that the attitude of the courts to defective pleadings, statement of claim or statement of defence, which are not originating processes, is that such defective processes are regarded as mere irregularity and thus waivable.

In other words, the courts treat a defect in a pleading as a mere irregularity that can be waived because a defective pleading, whether statement of claim or statement of defence, is merely voidable at the instance of the adverse party who should object to it at the earliest opportunity at the trial Court or Court of first instance to have it voided and/or struck out, else the defect will be deemed to have been acquiesced in by the party entitled to raise objection to the defective

process vide *UBA v. Nwora* (1978) 11-12 SC 1; *Ariori v. Elemo* (1983) 1 SCNLR 345 at 347, *A.G., Bendel State v. A.G., Federation* (1982) 3 NCLR 1; (1983) 1 SCNLR 293) (P. 347, paras. E-F), *Nasiru v. Civil Service Commission Kano State* (2010) 6 NWLR (Pt. 1190) 250; *Nwokoro v. Onuma* (1999) 12 NWLR (Pt. 631) 342; *C.C.B. Ltd. v. Mbakwe* (2002) 7 NWLR (Pt. 765) 158 pp. 347-348, paras. H-B, *Ndayako v. Dantoro* (2004) 13 NWLR (Pt. 889) 187.

In the light of the above, I find no muscle or substance in the argument of the appellant on this issue and hereby reject it.

The appellants' argument that the action was undefended and therefore required minimal proof which was accomplished in the instant case upon which the court below should have entered judgment in favour of the appellants was based on the premise that the statement of defence was defective and thus the evidence tendered on it went to no issue. The preceding discussion vindicated the statement of defence. The argument predicated on it, accordingly, has no force.

Besides, the action was principally based on declaratory reliefs as the substantive reliefs in the case. The other reliefs are ancillary in nature. It is settled that declaratory reliefs are not granted on admissions or default in filing statement of defence but on convincing evidence tendered by the party claiming the declaratory reliefs. So, the onus and a heavy one for that matter rested squarely on the appellants to establish the declaratory reliefs crucial to the action to the satisfaction of the Court for it to exercise its discretionary powers to issue the declaratory reliefs in favour of the appellants vide *Awomuti v. Salami and Ors.* (1978) 11 N.S.C.C. 180 at 186, *Udo v. Cross River State Newspaper and Anor* (2002) FWLR (Pt. 104) 665 at 701, *Bello v. Eweka* (1981) N.S.C.C. 48, *Ezeokonkwo & Ors. v. Nwafor Okeke* (2002) S.S.C. (Pt. 1) 44 at 61, *Adama v. Kogi State House of Assembly* (2019) 16 NWLR (Pt. 1699) 501, *Ilori v. Ishola* (2018) 15 NWLR (Pt. 1641) 77, and the cases (supra) cited by the 1st - 2nd respondents. Accordingly, I feel no gravity in the argument and hereby refuse to countenance it.

The 'judgment of the court below is contained in pages 1716 - 1734 of the record. The evaluation of evidence and the findings of fact together with the holding are contained in pages 1729 - 1734 of the record. It is enjoined that judgment should be read together, not by convenient· instalments or piecemeal or in bits vide the cases of *Adegbuyi v. A.P.C.* (2014) All FWLR (Pt. 761) 1486 at 1504, *Adebayo v. A.G., Federation* (2008) All FWLR (Pt. 412) 1195, *Mbani v. Bosi* (2006) 11 NWLR (Pt. 991) 400 at 417, *Akaighe v. Idama* (1964) All NLR (Reprint) 317 at 322.

So read, the judgment disclosed that the court below harnessed, identified, considered and resolved the crux or backbone/mainstay of the principal/main questions in the case as presented in the pleadings and evidence of the rival parties in such a way that the ancillary questions/issues were subsumed in the main issues considered and resolved by the court below. The consideration and

resolution of the issues that are relevant and material to the case met the dictates of justice. Even then, the failure to consider and pronounce on all issues submitted to the Court is not necessarily evidence of miscarriage of justice when what ought to be done was fully done by the Court as in this case, so the issue of denial of fair hearing cannot be sustained, in my modest opinion vide *Ziregbe v. Eyekpimi* (2020) 9 NWLR (Pt. 1729) 327.

Pleadings have to be read holistically as a harmonious whole vide *Adama v. F.S.H.A.* (2019) 16 NWLR (Pt. 1699) 501. Relief 3 of the claim, as amended, was for a declaration that neither the 1st respondent nor the 2nd respondent as defendants at the court below is entitled to apply for the registration with the 3rd respondent, the 3rd defendant at the court below, in the name of the 2nd respondent of the title of the said property. Pursuant to the above relief, the appellants filed a motion for interlocutory injunction to restrain the respondents from the perfection and registration of the property during the pendency of the action.

The ruling of the court below on the motion in respect of perfection and registration of the property during the pendency of the action is contained in pages 1607 to 1612 of the record; whereby the court below held denying the application that since the interlocutory application is in *pari materia*. With the claims in the substantive action, it would decline the application but accord the substantive action accelerated hearing.

It is clear from the ruling in question that, though the issue of the propriety of the perfection and registration of the property during the pendency of the action was raised, the court below did not decide it. The plea of res judicata or estoppel could lie only where the same question was raised and judicially decided on the merit to finality, not when the issue raised was not determined by the Court or adjudicator as in this case vide *Udo & Ors. v. Obot and Ors.* (1989) 1 NWLR (Pt. 95) 59, *Dedeke and Ors. v. Williams and Ors.* (1944) 10 W.A.C.A. 164.

The appellants had in the separate proceeding raised the issue of the perfection and registration or the purported perfection and registration of the property during the pendency of the action as constituting contempt of Court. The procedure followed by the appellants appeared appropriate in the sense that taking prejudicial steps in respect of the res during the pendency of an action is remedied by invoking the disciplinary powers of the Court in form of contempt proceeding for the punishment of the party for the act which is distinct from the substantive action. See *Ecobank (Nig.) Ltd. v. Anchorage Leisures Ltd.* (2018) 18 NWLR (Pt. 1650) 116 at 134, where the Supreme Court following the case of *Onocha v. A.G., Delta State* (2013) LPELR - 20781 held that contempt proceeding is not part of the main civil or criminal proceedings before the Court; it is separate; or put differently, contempt proceeding is distinct and independent of the main suit. See also the case of *Agwu and Ors. v. Julius Berger Nigeria Plc* (2019) 11 NWLR (Pt. 1682) 165 at 186, to the effect that where a defendant is aware of a

pending action but fails to stay action pending determination of the suit the best option for the claimant is to initiate contempt' proceedings against the defendant.

Flowing from the above, it behoved the appellants to pursue the contempt proceedings to its logical conclusion from inception to the last tier' of the adjudicatory system if not satisfied with the decision over it; not to resurrect the complaint in the substantive action up to the appellate level of the proceedings, when proof of the case did not depend on it.

The consequence of taking steps with respect to property in litigation to steal a match on the opponent (so to speak) and thus gain undeserved edge over the adversary is that the party that benefited from the undue advantage during the pendency of the action would be considered to have taken a chance or risk or gamble at the party's own peril or vagaries of the situation; and, that, perchance, the party lost the litigation the steps so taken become an exercise in futility or otiose as the decision on the issue in the case would automatically reverse the steps previously taken.

In the instant case, all that ought to have happened, had the appellants established their case, would have rendered the steps taken to perfect and register the property during the pendency of the action redundant and futile; but the fact that the steps were so taken would not have aided the appellants in proof of their case.

There is sufficient evidence in the record that the agent, Knight Frank, acted at least with ostensible authority of the 1st respondent in respect of the transaction and, on that account, the 1st respondent is bound by the acts of Knight Frank, the agent. The role of the 1st appellant and the 2nd appellant with respect to the facts of the case appeared interwoven and, having sued jointly, both the 1st and 2nd appellants swam or sank together with the case.

The court below held in judgment contained in pages 1730 - 1732 of the record that there were series of correspondence and negotiations between the appellants and the 1st respondent to agree on the purchase price of the property; however, the parties made offer and counter offer without having a meeting point or consensus *ad idem*, as the 1st respondent rejected the appellants' offer of ₦25.5 million against the ₦40 million the 1st respondent put on the property which broke the chain of contractual relationship that should have existed between the parties with regard to the sale of the property upon which the court below concluded that there was no meeting of minds and thus no binding and enforceable contract between the appellants and the 1st respondent for the sale of the property. The holding is amply supported by the evidence on the record.

The court below held in part of its judgment contained in page 1733 of the record that the oral understanding of the right of first refusal or the right of first option to purchase the property by the appellants was open ended and admitted of a

third party buying the property at the price agreeable and acceptable to the 1st respondent. Exhibit D contained in page 1628 of the record, while discussing the settlement of the issue of the two years tenancy on the property by the 1st appellant, went on to state that as proposed by the 1st appellant, if before the period of the expiry of the tenancy the issue of purchase is concluded, it would be good enough; but if not, the tenancy of the 1st appellant will be renewed at a rent to be agreed between the parties for a further period of two years. Exhibit D standing alone cannot constitute evidence of a binding and enforceable contract because by using the conditional phrase "if" and the other phrase "good enough" in Exhibit D, it rendered Exhibit D inchoate and not binding vide *Atiba Iyalamu Savings and Loans Ltd. v. Suberu* (2018) 13 NWLR (Pt. 1637) 387.

Be it appreciated, however, that for other agreed terms to be part of the sale transaction such terms should be evidenced in writing. A memorandum is incomplete and does not fulfill the statutory requirement when other terms, save terms implied by law, agreed to by the parties are not evidenced in writing.

Sensing and appreciating the inadequacy of the conditional state of Exhibit D, the appellants argued that it had back-up oral agreement giving the priority to the appellants to purchase the property. I agree with the 1st - 2nd respondents by section 5(1)(b), (2) and (3) of the Law reform (Contracts) Law, CAP L73 Laws of Lagos State which copied section 4 of the statute of Frauds 1677, no contract for any disposition of land, being a disposition that is required by any enactment to be made by deed or instrument or in writing shall be enforceable by action unless the contract or some memorandum or note in respect thereof is in writing and is signed by the party to be charged therewith or by some other person lawfully authorised by him vide *Okoleji v. Okupe* 15 NLR 28, *Suleiman v. Johnson* 13 WACA 213, *Ayinla v. Sijuwola* (1984) 5 S.C. 77. The oral understanding, if any, even if proved, was not shown to be within these exceptions, and would not have made it enforceable, in my modest opinion.

One of the exceptions is part performance. In the present case the improvement made on the property was for the enjoyment of the property in tenancy. It was not shown that it was made for the purpose of or pursuant to the bid to purchase the property by the appellants. Also, the doctrine of part performance applies only where there is a completed agreement in existence vide *Shelle v. Rossek* (1938) 14 NLR 80. In addition, the acts of part performance must be carried out with the knowledge and consent of the vendor or his agent and known to have been done in pursuance of the contract of sale vide *Shelle v. Rossek (supra)* which does not appear to be the case here, as there was yet to be in existence a contract to sell the property and the acts done were in pursuance of the tenancy agreement. See the authoritative book - Practical Approach to Law of Real Property in Nigeria authored by Professor I. O. Smith (Revised Edition Published in 2013) pages 190, 192 and 193. There was, therefore, no enforceable contract in this case, in my modest view.

The other exception is fraud. Fraud implies a willful act on the part of anyone, whereby another is sought to be deprived by legal or equitable means, of what he is entitled to, and includes acts, omissions and concealments by which an undue and unconscientous/unconscionable advantage is taken of another and must be specifically pleaded with particularly and must be proved beyond reasonable doubt vide *Otukpo v. John* (2012) 7 NWLR (Pt. 1299) 357, *Agi v. PDP* (2017) 17 NWLR (Pt. 1595) 386, *Ikpeazu v. Otti* (2016) 8 NWLR (Pt. 1513) 38, *Adimora v. Ajufo* (1988) 3 NWLR (Pt. 80) 1, *A.C.N. v. I.N.E.C.* (2013) 13 NWLR (Pt. 1370) 161, *Trade Bank Plc and Ors. v. Pharmatek Industries Projects Ltd.* (2020) 8 NWLR (Pt. 1725) 124 at 159 - 160. Proof of fraud would invalidate the title of the first registered owner vide *Labobadi v. Lagos Metal Industries Ltd.* (1973) 1 S.C. 1, *Bada v. Pereira* (1974) 11 S.C. 5, *Lasisi v. Tubi* (1974) All NLR (Pt. 11) 438. The appellants raised the issue of fraud without sufficient particularity and cogent proof or proof beyond reasonable doubt, so the exception does not also apply here.

Registration of title is for security. It guarantees title to the property registered but is not one of the methods to establish contract of purchase of landed property. Registration merely creates a right, title or interest in land in favour of the grantee. Registration does not cure defect in title or ownership. Registration also helps a purchaser to discover from inspection of the register whether the vendor has power to sell and whether the property is encumbered vide *Onagoruwa v. Aderemi* (2001) 13 NWLR (Pt. 721) 38. It has to be noted that the title guaranteed the first registered owner is not absolute. The moment title of the first registered owner is in issue in proceedings relating to the property against an adverse claimant, the register cannot serve as evidence of title vide the case of *Animashaun v. Mumuni* (1941) 16 NLR 59 where it was held that registration of title affords no protection to the first registered owner, not even against an unsuccessful objector to the registration, even apparently if that objector had appealed unsuccessfully to an appellate Court, so the validity of the transaction leading to the registration must be established in the same way as if the title had not been registered.

The judgment of the court below earlier referred to indicated it dispassionately evaluated the documentary oral evidence on the material/key issues upon which the case rested and arrived at the right/correct decision. The presumption in favour of the correctness and soundness of the evaluation/assessment of the totality of the evidence has not been displaced by the appellants. The said findings which were not specifically shown to be perverse or against the trend of evidence and did not occasion a miscarriage of justice are hereby affirmed vide *Ozuzu v. Emewu* (2019) 13 NWLR (Pt. 1688) 143 to the effect that, an appellant who relies on improper evaluation of evidence to set aside the judgment of a trial court, has the onus to identify and specify the evidence improperly evaluated or not evaluated; that the appellant has to convincingly show that if the error complained of had been corrected, the conclusion reached would have been different and in favour of the party complaining of the wrong evaluation.

Further, once a trial court performs its primary function of unquestionable evaluation of evidence and justifiably appraised the facts, as in this case, it is not the business of an appellate court to interfere, and to substitute its own views for the view of the trial court vide the cases of *Dakur v. Dapal* (1998) 10 NWLR (Pt. 571) 573, *Igago v. State* (1999) 14 NWLR (Pt. 637) 1, *Onuoha v. State* (1998) 5 NWLR (Pt. 548) 118, *Woluchem v. Gudi* (1981) 5 SC 291, *Enang v. Adu* (1981) 11 - 12 5 SC 25, *Abisi v. Ekwealor* (1993) 6 NWLR (Pt. 302) 643, *Okolo v. U.B.N. Ltd.* (1998) 2 NWLR (Pt. 539) 618, *U.B.N. Plc v. Borini Prono Co. Ltd.* (1998) 4 NWLR (Pt. 547) 640.

On the whole, I find no merit in the appeal and hereby dismiss it and affirm the decision of the court below with ₦500,000 costs against the appellants in favour of the 1st - 2nd respondents.

UMAR, JCA: I read in draft the lead judgment of my brother, Joseph Shagbaor Ikyegh, JCA just delivered. I am in agreement with the decision and the conclusion contained therein in the lead judgment.

It is trite that the burden of proof in civil cases is not static and the burden of proof at any given palm lies on the party who would fail if no evidence is given. See the case of *Union Bank v. Ravih Abdul & Co Ltd.* (2018) LPELR-46333 (SC). The Appellants in the instant appeal failed to establish through credible evidence the existence of all the essential elements of a valid contract. In a contract, an offer is a proposal which originates or emanates from the offeror to the offeree to enter into an agreement to do or not to do a particular thing. Since the essence of offer is reciprocal acceptance, the offeror anticipates the expected acceptance and this he makes clearly in the offer. An acceptance is the reciprocal act or action of the offeree to an offer in which he indicates his agreement to the terms of the offer as conveyed to him by the offeror. In other words, acceptance is the act of compliance on the part of the offeree with the terms of the offer. It is the element of acceptance that underscores the bilateral nature of a contract. For an acceptance to be operative it must be plain, unequivocal, unconditional and without variance of any sort between it and the offer. The offeree must unreservedly assent to the exact terms proposed by the offeror. A counter - offer or a qualified acceptance of an offer cannot give rise to a binding agreement between parties. See *Orient Bank (Nig.) Plc v. Bilante International Ltd* (1997) 8 NWLR (Pt. 515) 37 AT 76; *UBN Ltd v. Sax (Nig.) Ltd* (1994) 8 NWLR (Pt. 361) 150.

In the absence or all acceptance on the part of the 1st Respondent in the instant appeal, it would he impracticable to hold that the 1st Respondent was bound by the said contract which the Appellants seek to enforce.

Flowing from the above reason and of course the detailed reasons contained in the lead Judgment of my brother, I too, find no merit in this appeal. Same is equally dismissed. I abide by the consequential order as to cost made in the lead

judgment of my brother just delivered.

BAYERO, JCA: I read in draft the Judgment just rendered by my learned brother Joseph Shagbaor Ikyegh, JCA. For the more detailed reasons in the lead Judgment I also dismiss the Appeal for lacking in merit.

I abide by all the consequential orders.

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Osolu v. Osolu (2003) FWLR (Pt. 172) 177
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Ozuzu v. Emewu (2019) 13 NWLR (Pt. 1688) 143
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Papersack Nig. Ltd. v. Odutola (2011) 10 NWLR (Pt.1255) 244
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R-Benkay Nigeria Ltd. v. Cadbury Nigeria Ltd. (2012) LPELR - 7820 (SC)
Re Adewunmi (1988) 3 NWLR (Pt. 83) 483
Registered Trustees Apostolic Church v. Olowoleni (1990) 4 NWLR (Pt.158) 514
Reptico S.A. Geneva v. Afribank (Nig.) Plc (2013) 14 NWLR (Pt.1373) 172
S.L.B. Consortium Ltd. v. N.N.P.C. Plc (2011) 9 NWLR (Pt. 1252) 317
S.P.D.C. (Nig.) Ltd. v. Emehuru (2007) All FWLR (Pt. 381) 1694
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Ude v. Nwara (1993) 2 NWLR (Pt. 278) 638
Udo & Ors. v. Obot and Ors. (1989) 1 NWLR (Pt. 95) 59
Udo v. Cross River State Newspaper and Anor (2002) FWLR (Pt. 104) 665
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Union Homes Savings & Loans Plc v. Olumide (2018) LPELR – 45572
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Wassah v. Kara (2015) 4 NWLR (Pt.1449) 374
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Ziregbe v. Eyekpimi (2020) 9 NWLR (Pt. 1729) 327

Cases cited in the Judgment
Combe v. Combe (1951) 1 All ER 767
UAC v. MacFoy (1961) All ER 1169

Statutes cited in the Judgment
Sections 2 of the Legal Practitioners Act 1990
Section 4 of the statute of Frauds 1677
Section 5(1)(b), (2) and (3) of the Law Reform (Contracts) Law CAP L63, Laws of Lagos State, 2003
Sections 6(6)(b) and 36(1) of the 1999 Constitution
Section 15 of the Court of Appeal Act
Sections 20 and 24 of the Evidence Act
Sections 22 and 26 of the Land Use Act, 1978
Section 36(1) of the Constitution of the Federal Republic of Nigeria 1999 (1999 Constitution)
Section 122 of the Evidence Act, 2011 (Evidence Act)
Section 131, 132, 133(2) and (3) and 136 of the Evidence Act

Sections 128(1) and 140 of the Evidence Act
Section 167(d) of the Evidence Act

Rules of Court referred to in the Judgment
Order 1 rule 1 (3), 2(3), 6 rule 1 (3), 15 rule 2, and 17 rule 1 of the High Court (Civil Procedure) Rules 2012

Book referred to in the Judgment
Practical Approach to Law of Real Property in Nigeria authored by Professor I. O. Smith (Revised Edition Published in 2013)

History:

HIGH COURT
High Court of Lagos State (Lagos Division)

COURT OF APPEAL (Lagos Division)
Joseph Shagbaor Ikyegh, JCA ***(Presided & Read the lead Judgment)***
Abubakar Sadiq Umar, JCA
Abdullahi Mahmud Bayero, JCA

COUNSEL:
Sir. Adolphu Nwachukwu Esq., with Mr. E. Bassey for the appellants
Mr. Harrison Ogalagu with Ifeoma Ezeribe Esq., for the 1st – 2nd respondents
The 3rd Respondent unrepresented

THE EXPORT-IMPORT BANK OF THE UNITED STATES OF AMERICA v. NIGERIAN DEPOSIT INSURANCE CORPORATION (Qua Provisional Liquidator of Gulf Bank Plc)

COURT OF APPEAL
(LAGOS DIVISION)

CA/L/372/2011
TUESDAY 16TH MARCH, 2021

(IKYEGH; AJA-OTISI, BAYERO, JJ.CA)

BANKING – Letters of credit – concept of letters of credit – this is an instrument under which the issuer, usually a bank, at a customer's request, agrees to honour a draft or other demand for payment made by a third party or a beneficiary, as long as the draft or demand complies with specified conditions, and regardless of whether any underlying agreement between the customer and the beneficiary is satisfied.

COMMERCIAL LITIGATION – Jurisdiction – nature – Jurisdiction is the authority or power of a Court to adjudicate over any matter. It is the very basis on which a Court adjudicates over a matter.

CONTRACT – Contract of sale – Acceptance under letters of credit – acceptance of documents under a letter of credit does not preclude the buyer from rejecting the goods subsequently, if the goods, on their arrival, do not conform to the contract of sale.

CONTRACT – Simple contract – simple contracts are not among those envisaged in the exclusive jurisdiction conferred on the Federal High Court.

Facts:

This is an appeal on the ruling of the Federal High Court which was delivered by P. Ajoku, J on January 14, 2011.

The Appellant as plaintiff in the trial court, via a writ of summon and statement of claim instituted an action at the Federal High Court against the Respondent as Defendant, for the recovery of payments made to a third party, on behalf of their customer. The appellant's ground for their claim was predicated upon the terms of a Letter of Credit issued by the Defendant.

The Respondent via its statement of defence denied the claims postulated by the appellant, and further filed a Motion on Notice to strike out the appellant's suit for want of jurisdiction, on the ground that the Federal High Court, in accordance

with Section 251 of the 1999 Constitution (as amended), lacks the jurisdiction to adjudicate on matters bothering on simple contracts.

The trial Court heard arguments on the said Motion and thereof declined jurisdiction to entertain the Appellant's Suit. The trial Court further ordered the return of the case file to the Chief Judge of the Federal High Court for transfer to the Lagos State High Court.

Dissatisfied with the decision of the Federal High Court, the Appellant appealed to the court of appeal.

Held ***(Unanimously dismissing the appeal):***

[1] ***Banking – Letters of credit – concept of letters of credit – this is an instrument under which the issuer, usually a bank, at a customer's request, agrees to honour a draft or other demand for payment made by a third party or a beneficiary, as long as the draft or demand complies with specified conditions, and regardless of whether any underlying agreement between the customer and the beneficiary is satisfied.***

Now, a *Letter of Credit* represents an instrument under which the issuer, usually a bank, at a customer's request, agrees to honour a draft or other demand for payment made by a third party, the beneficiary, as long as the draft or demand complies with specified conditions, and regardless of whether any underlying agreement between the customer and the beneficiary is satisfied; Black's Law Dictionary 9th Edition, 2009 at 987; *Imoka* & *Anor v. UBA Plc* (2012) LPELR-19837(CA); *Nwangwu v. FBN* (2008) LPELR-4478(CA).

Article 2 of the Uniform Customs and Practice for Documentary Credits (1993 Revision) ICC No 500, which the Letter of Credit issued by GBN, the Respondent, was subject to (page 112 of the Record of Appeal), defines the expressions 'documentary credits(s)' and 'credits(s)' used therein *to mean any arrangement; however named or described, whereby a bank (the issuing bank, acting at the request and in accordance with the instructions of a customer (the Applicant) or on its behalf (i) is to make a payment to or to the order of a third party (the Beneficiary) or is to accept and pay bills of exchange (Draft(s)) drawn by the Beneficiary, or (ii) authorises another bank to effect such payment; or to accept and pay such bills of exchange (Draft(s), or (iii) authorises another bank to negotiate, against stipulated document's), provided that the terms and conditions of the Credit are complied with.*

Expounding further on the nature of *letters of credit,* the Supreme Court,

per Bello, JSC (as he then was) in *Nasarawa Enterprises Ltd v. Arab Bank (Nig) Ltd* at pages 20-22 cited with approval the case of *United City (Investments) Ltd v. Royal Bank of Canada* (1983) A.C. 168, thus:

> "In the recent case of *United City (Investments) Ltd. v. Royal Bank of Canada* (1983) A.C. 168 at 182-183, Lord Diplock explained that four contracts are involved in a commercial letter of credit. He said –
>
> "It is trite law that there are four autonomous though interconnected contractual relationships involved.
>
> (1) the underlying contract for the sale of goods, to which the only parties are the buyer and the seller;
>
> (2) the contract between the buyer and the issuing bank under which the latter agrees to issue the credit and either itself or through a confirming bank to notify the credit to the seller and to make payments to or to the order of the seller (or to pay, accept or negotiate bills of exchange drawn by the seller) against presentation of stipulated documents; and the buyer agrees to reimburse the issuing bank for payments made under the credit. For such reimbursement the stipulated documents, if they include a document of title such as a bill of lading, constitute a security available to the issuing bank;
>
> (3) if payment is to be made through a confirming bank the contract between the issuing bank and the confirming bank authorising and requiring the latter to make such payments and to remit the stipulated documents to the issuing bank when they are received, the issuing bank in turn agreeing to reimburse the confirming bank for payments made under the credit;
>
> (4) the contract between the confirming bank and the seller under which the confirming bank undertakes to pay to the seller (or to accept or negotiate without recourse to drawer bills of exchange drawn by him) up to the amount of the credit against presentation of the stipulated documents."

At page 183 of the Report, Lord Diplock said:

> "Again, it is trite law that in contract (4), with which alone the instant appeal is directly concerned, the parties to it, the seller and the confirming bank, "deal in documents and not in goods," as Article 8 of the Uniform Customs puts it. If, on their face,

the documents presented to the confirming bank by the seller conform with the requirements of the credit as notified to him by the confirming bank, the bank is under a contractual obligation to the seller to honour the credit, notwithstanding that the bank has knowledge that the seller at the time of presentation of the conforming documents alleged by the buyer to have, and in fact has already, committed a breach of his contract with the buyer for the sale of the goods to which the documents appear on their face to relate, that would have entitled the buyer to treat the contract of sales as rescinded and to reject the goods and refuse to pay the seller the purchase price."
(P. 180 lines 29 - 45; P. 181 lines 1 - 45; P. 182 lines 1 - 13)

[2] ***Commercial Litigation – Jurisdiction – nature – Jurisdiction is the authority or power of a Court to adjudicate over any matter. It is the very basis on which a Court adjudicates over a matter.***

Jurisdiction is the authority or power of a Court to adjudicate over any matter. It is the very basis on which a Court adjudicates over a matter. Jurisdiction is conferred on a Court by the Constitution or by Statute, as may be permitted by the Constitution; *Adetayo v. Ademola* (2010) LPELR-155(SC); *Adah v. N.Y.S.C* (2004) 19 NSCQR 220; *Utih v. Onoyivwe* (1991) 1 SCNJ 25. A complaint querying the jurisdiction or authority of a Court to hear a matter is foundational to the legality of any decision flowing from the proceedings before that Court over such matter. The imperative reason for hearing and resolving a complaint on jurisdiction at the earliest is that where a Court proceeds to hear a matter, without jurisdiction, the proceedings, no matter how well conducted, as well as every order or decision arising therefrom, amount to a nullity; *ex nihilo nihil fit; Melwani v. Five Star Industries Ltd* (2002) 1 S.C. 120, *Oloba v. Akereja* (1988) 3 NWLR (Pt. 84) 508 (1988) 7 SC (Pt.1) at pp. 11-14. The issue of jurisdiction is therefore always raised and determined at the earliest to save costs and time and also avoid a null trial; *Petro Jessica Enterprises Ltd v. Leventis Technical Company Ltd* (1992) LPELR- 2915 (SC); *Nwankwo v. Yar'Adua* (2010) 12 NWLR (Pt. 1209) 518 SC; *Obaba v. Military Governor of Kwara State* (1994) 4 SCNJ 121; *Okoye v. N.C.F.C* (1991) 7 SC (Pt. 111) 33.
(P. 177 lines 40 - 45; P. 178 lines 1 - 12)

[3] ***Contract – Contract of sale – Acceptance under letters of credit – acceptance of documents under a letter of credit does not preclude the buyer from rejecting the goods subsequently, if the goods, on their arrival, do not conform to the contract of sale.***

It is important to note that in the contract between the buyer and the

seller, the acceptance of documents under a letter of credit does not preclude the buyer from rejecting the goods subsequently, if the goods, on their arrival, do not conform to the contract of sale; *Akinsanya v. UBA Ltd (supra),* (1986) LPELR-355(SC). **(P. 185 lines 21 - 25)**

[4] ***Contract – Simple contract – simple contracts are not among those envisaged in the exclusive jurisdiction conferred on the Federal High Court.***

In a plethora of judicial pronouncements, it has been established that disputes founded on simple contracts are not among those envisaged in the exclusive jurisdiction conferred on the Federal High Court under Section 251 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended); *Onuorah v. Kaduna Refining & Petrochemical Co. Ltd (supra)*, (2005) LPELR-2707(SC); *Adelekan v. Ecu-Line NV (supra)* (2006) 12 NWLR (Pt. 993) 33, (2006) LPELR-113(SC); *Roe Ltd v. UNN* (2018) LPELR-43855(SC); *Dec Oil & Gas Limited v. Shell Nigeria Gas Limited* (2019) LPELR-49347(SC). **(P. 185 lines 27 - 35)**

OTISI, JCA (Delivering the leading Judgment): This appeal was lodged against the decision of the Federal High Court, Lagos (the lower Court) in its ruling delivered on January 14, 2011 *Coram* P. Ajoku, J. in Suit No: FHC/L/CS/1295/2005 wherein the lower Court, in an application filed by the Respondent, held that it had no jurisdiction to adjudicate upon the Appellant's claim.

The facts leading to this appeal, on the part of the Appellant, may be summarized in this manner: By a Commercial Invoice and Original Final Invoice No WTI/FCT/NG/10/2003A dated 21/10/2003, the Widespread Trading International Inc (WTII) had a contract with FC and T Projects Ltd (FC & T), a private limited liability Company based in Nigeria whereby WTII agreed to sell and FC & T agreed to buy 25 refurbished 86/90 Forty Foot GMC/RTS Transit Buses (the goods) at a total free-on-board value of $562,500.00. By the Commercial Invoice and Original Final Invoice, the freight charges and ancillary charges for the transportation of the goods to FC & T in Nigeria were $248,750.00 and $170,000.00, respectively. By the said Commercial Invoice and Original Final Invoice, the total cost of the goods together with the shipping cost by WTII from USA to FC & T in Nigeria was $981,250.00.

By another Pro-forma Commercial Invoice and Final Invoice No WTI/FCT/NG/11/2003B dated 12/5/2004, WTII in USA agreed to sell and FC & T in Nigeria agreed to buy 25 refurbished 86/90 Forty Foot GMC/TMC/RTS Transit Buses (the goods) at a total free-on-board at a unit cost of $22,500.00, with the total cost at $517,500.00. WTII and FC & T agreed to employ the means of documentary credit, particularly the opening /issuance of Letter of Credit for the purpose of the sale and purchase of the goods. Pursuant to this agreement, WTII sought

and obtained credit facilities from RZB Finance LLC (RZB), a financial institution based in USA, to finance the export of the goods from the USA, while FC & T sought and obtained from GBN, as issuing Bank, an Irrevocable Transferable Letter of Credit bearing Documentary Credit No GBN/2003/0037 in favour of WTII. By the said Letter of Credit, CBN undertook to pay WTII through RZB, the confirming Bank, upon satisfying the conditions for payment as stipulated therein, and issued Notification of Documentary Credit for the sum of US$1,962,500.00. As a condition precedent to RZB financing the exportation of the goods to Nigeria and WTII agreeing to sell the goods to FC & T, and pursuant to the terms of the sale agreement between FC & T and WTII, both FC & T and WTII agreed that RZB take out an insurance policy with the Appellant, insuring the payment of the sum of UD$1,962,500.00 being the value of the goods and sundry charges as evidenced by the Letters of Credit. The Appellant is an agency of the Government of United States of America (USA) that is engaged in the financial support of exports from the USA and whose services include giving insurance cover to exporters based in the USA against payment defaults by foreign buyers. RZB took out the insurance policy with the Appellant, with the knowledge and agreement of both GBN and FC & T. Premised upon this, WTII agreed to deliver the goods to FC & T and in accordance with the terms of the Letter of Credit.

However, when GBN failed to make payment to RZB, WTII was paid by RZB. Pursuant to the terms of the insurance policy, RZB, upon payment of the insurance claim by the Appellant, assigned all its rights under the Letter of Credit to the Appellant. The Appellant made attempts to recover the payment from GBN, the Respondent. After unsuccessful attempts, the Appellant as plaintiff instituted action before the lower Court by Writ of Summons and Statement of Claim, both dated 9/12/2005, seeking the following reliefs, pages 1 - 13 of the Record of Appeal:

> *"(i) The sum of US$2,943,750.00 (Two Million, Nine Hundred And Forty-Three Thousand. Seven Hundred and Fifty United States Dollars) being principal and accrued interest [as at the 6th day of April 2005] due to the Plaintiff by virtue of the terms of a Letter of Credit issued by the Defendant and bearing Letter of Credit issued by the Defendant and bearing Letter of Credit No. GBN/2003/0037.*
>
> *(ii) Interest on the said sum US$2,943,750.00 at the rate of 7% from the 6th day of April 2005, until the final liquidation of the judgment-debt and costs.*
>
> *(iii) Costs of this action in the sum ₦2,000,000.00 (Two Million Naira) only"*

The Respondent as defendant, in its Statement of Defence, denied the claims of the Appellant, pages 194-229 of the Record of Appeal. The Respondent also

filed a Motion on Notice seeking the following relief, pages 272-273 of the Record of Appeal:

> *AN ORDER of this Honourable Court striking out the Plaintiffs' suit in its entirety:*

The grounds upon which the application was sought were that:

> *1. The Plaintiffs action in its entirety is a claim for payment for supply of goods.*
>
> *2. The Federal High Court has no jurisdiction in respect of a simple contract specifying payment obligations for supply of goods.*
>
> *3. Plaintiffs action does not relate to any matter under Section 251(1) of the 1999 Constitution or any matter under any Act of the National Assembly in respect of which the Federal High Court is vested with jurisdiction.*

The lower Court heard arguments on the said Motion and, on 14/1/2011, declined jurisdiction to entertain the Appellant's Suit. The lower Court further ordered the return of the case file to the Chief Judge of the Federal High Court for transfer to the Lagos State High Court, pages 350-366 of the Record of Appeal.

Dissatisfied with the decision of the Federal High Court, the Appellant filed a Notice of Appeal on 28/1/2011 on one ground of Appeal, pages 367-370 of the Record of Appeal.

The parties filed Briefs of Argument, pursuant to the Rules of this Court. The Amended Appellant's Brief was filed on 31/10/2019 but deemed properly filed and served on 23/1/2020. The Respondent's Brief was filed on 3/2/2020. The Appellant filed a Reply Brief on 20/3/2020 but deemed properly filed and served on 18/1/2021. At the hearing of the appeal on 18/1/2021, the Briefs were respectively adopted by O. Iyayi, Esq. for the Appellant, and, by O. Akinosun, SAN, with Ayodeji Jolaoso, Esq., for the Respondent. Mrs. Iyayi urged the Court to allow the appeal and set aside the ruling of the lower Court, while Senior Counsel, Akinosun, SAN, urged the Court to dismiss the appeal and affirm the ruling of the lower Court.

The Appellant, in its Brief distilled this sole issue for determination of the appeal:

> *Whether taking into account the subject-matter of the Appellants claim before if; the lower Court was right in deciding that the Federal High Court lacks the jurisdiction to adjudicate upon the Appellants claim.*

For the Respondent, the issue for determination was framed thus:

> *The Appellant instituted this action to a recover debt stemming from a contract for the supply of mass transit buses. Sec 251(1) (d) confers exclusive jurisdiction in State High Courts in respect of matters relating to simple contract. Was the lower Court right when it declined jurisdiction to entertain the suit.*

The issues seek the same determination. I shall adopt the issue as framed by the Appellant.

Arguments

For the Appellant, it was argued that jurisdiction of a Court is determined by the claim of the plaintiff as endorsed on its writ of summons and statement of claim, and not the defendant's statement of defence, relying on *Onuorah v. Kaduna Refining & Petrochemical Co. Ltd* (2005) 6 NWLR (Pt 921) 393; *Tukur v. Government of Gongola State* (1989) 4 NWLR (Pt 117) 517. The lower Court recognized that the Appellant's relief was predicated upon a Letter of Credit transaction, and then proceeded to hold that the Appellant's claim was for recovery of debt and that it was a matter of simple contract, which does not fall within the jurisdiction of the Federal High Court. Counsel contended that it was not the case of the Appellant at the lower Court that the Letter of Credit was issued by the Respondent in favour of the Appellant. The Appellant's rights accrued from Insurance Clause in the Letter of Credit transaction whereby the Appellant as insurer acquired the rights of RZB to recover from. the Respondent, the sums due to it under the Letter of Credit transaction upon the failure of the Respondent to make payments to RZB as the issuing Bank in the Letter of Credit transaction. Counsel submitted that the lower Court's reliance on *Akinsanya v. UBA Ltd* (1986) 4 NWLR (Pt 35) 273 and *Onuorah v. Kaduna Refining & Petrochemical Co. Ltd (supra)* was in error as both cases had no bearing to the instant case.

The Appellant's action did not arise from it being a buyer or seller of goods, or from the supply of goods. It arose from a Letter of Credit transaction and therefore not an action in simple contract. By Section 251(1)(d) of the 1999 Constitution, claims relating to rights attached to Letters of Credit fall within the jurisdiction of the lower Court. The Appellant's claim was for the payment of the sum of US$2,943,750.00 pursuant to rights accruing to it by the Letter of Credit No. GBN/2003/0037 issued by the Respondent and not a claim for supply of goods, as found by the lower Court. It fell within the jurisdiction of the lower Court. Reliance was also placed on the decision of this Court in *Central Bank of Nigeria v. Industrial Bank Ltd* (1997) 9 NWLR (Pt. 522) 712. The only exception to the exclusive jurisdiction of the Federal High Court is found in the proviso to Section 251(1)(d) of the Constitution, which confers concurrent jurisdiction on both the State and Federal High Courts where the cause is between a bank and its customer, citing *NDIC v. Okem*

Enterprises Ltd & *Anor* (2004) 10 NWLR (Pt 880) 107 at 198. It was submitted that the Appellant's case was not caught by this proviso.

The case of the Appellant relating to its rights derived from the terms of a letter of credit, fall within the purview of the Federal High Court. Further reliance was placed on the decisions in *Owens Bank Nig Plc v. Michael Ade-Ojo* (2003) 17 NWLR (Pt 848) 174 at 193; *Societe Bancaire (Nigeria) v. Margarida Salvado De Lluch* (2004) 18 NWLR (Pt 905) 341. Appellant's Counsel further cited and relied on *Alsthom SA & Anor v. Saraki* (2005) 3 NWLR (Pt 911) 208 at 224 - 225 in arguing that the trial Court had acted upon a misconception of the law and that was in the interest of justice to set aside the ruling of the lower Court. The Court was urged to allow the appeal.

For the Respondent, it was submitted that jurisdiction is the life wire of every matter as it goes deep to the root of the matter. No matter how well structured' the arguments of the parties are, once a court lacks jurisdiction to hear the suit it amounts to a nullity, citing *Chief Etuedor Utih & Ors. v. Jacob Umurhurhu Onoyivwe & Ors.* (1991) LPELR-3436(SC). The Respondent argued that the lower Court, after considering the Appellant's claim, was right to have declined jurisdiction and transferred the case to the Honourable Chief Judge for onward transmission to the High Court of Lagos State.

The case of *Akinsanya v. UBA (supra)* was relied on to submit that the mere fact that a letter of credit is involved does not bring the claim within the jurisdiction of the Federal High Court. From the facts of the case, the underlying dispute was about payment for the supply of goods. It had nothing to do with issuance of letter of credit, defect in letter of credit or any dispute intrinsic in the nature of the letter of credit. The Appellant's simple request was for payment of a specified sum of money, purportedly due from a contract for supply of the buses, such that the suit would automatically terminate the moment the money claimed on the contract is paid. The claim did not relate to any subject for which the jurisdiction of the Federal High Court was established.

Senior Counsel for the Respondent posited that the cases of *Central Bank of Nigeria v. Industrial Bank Ltd. (supra)* and *Owena Bank Nig. Plc v. Michael Ade Ojo (supra)* relied on by the Appellant did not support their position. The Appellant's claim at the lower Court was for payment under a contract for supply of mass transit buses by WTII to FC & T. The Appellant, under a misapprehension that the contract for supply of mass transit buses was financed by a GBN's Unconfirmed Letter of Credit, instituted the action at the lower Court to recover the payment of the sum of US$2,943,750.00 for the mass transit buses. It was an action for demand of money. As settled by judicial pronouncements, the Federal High Court has no jurisdiction in respect of claims arising out of contracts, citing *International Timber and Ply Wood Products Limited v. Union Bank Plc* (2006) LPELR-1519(SC); *Onuorah v. K.R.P.C LTD (supra); Adelakan v. Ecu-Line NV*

(2006) 12 NWLR (Pt. 993); *Associated Discount House Limited v. Amalgamated Trustees Limited* (2006) 10 NWLR (Pt. 989) at 635.

It was argued that the Appellant, in the Appellant's Brief, had acknowledged the fact that there was a sale agreement which arose from a contract between FC& T and WTII for the purchase of mass transit buses.The Appellant further acknowledged that the issuance of the Letter of Credit emanated from the main claim of a simple contract where it stated that the issuance of the Letters of credit was for the purpose of the sale and purchase of the goods. It was posited that the issuance of a Letter of Credit was not the subject matter for contention. Rather, the subject matter for contention was the unpaid sum which arose from the simple contract between the parties. The Letter of Credit herein was just one of the processes included in the execution of the subject matter, which was the simple contract between the parties. Senior Counsel reasoned that the Letter of Credit cannot stand independently on its own without the mention of the simple contract. It was the position of the Respondent that the Appellant' claim cannot stand when it is severed from the simple contract between the parties.

It was further posited that by the provisions of Section 251 (1)(d) of the Constitution of the Federal Republic of Nigeria, the jurisdiction of the Federal High Court would only be invoked in relation to the issues of a Letter of Credit where it involves the Central Bank of Nigeria. In the instant case, the appropriate court to adjudicate upon the matter is the High Court of Lagos State, taking into consideration that the letter of credit does not involve the Central Bank of Nigeria. Reliance was placed on the decision of this Court in *Agu v. CBN* (2016) LPELR-41091(CA).

Senior Counsel finally submitted that the Appellant had failed to show any just ground for the Court to rely on in upturning the decision of the lower Court. The Court was urged to dismiss the appeal.

In the Reply on points of law, the Appellant submitted that the Respondent cannot formulate a case for the Appellant or state that which it perceives to be the Appellant's case as a basis for the determination of jurisdiction of the Court. The Court was urged to interpret Section 251(1)(d) as a whole and not in isolation. On rules for interpretation of Statutes, reliance was placed on the decision in *Ugwu v. Ararume* (2007) 6 SC (Pt 1) 88. The Court was again urged to allow the appeal.

Resolution

Jurisdiction is the authority or power of a Court to adjudicate over any matter. It is the very basis on which a Court adjudicates over a matter. Jurisdiction is conferred on a Court by the Constitution or by Statute, as may be permitted by the Constitution; *Adetayo v. Ademola* (2010) LPELR-155(SC); *Adah v. N.Y.S.C* (2004) 19 NSCQR 220; *Utih v. Onoyivwe* (1991) 1 SCNJ 25. A complaint querying the jurisdiction or authority of a Court to hear a matter is foundational to

the legality of any decision flowing from the proceedings before that Court over such matter. The imperative reason for hearing and resolving a complaint on jurisdiction at the earliest is that where a Court proceeds to hear a matter, without jurisdiction, the proceedings, no matter how well conducted, as well as every order or decision arising therefrom, amount to a nullity; *ex nihilo nihil fit; Melwani v. Five Star Industries Ltd* (2002) 1 S.C. 120, *Oloba v. Akereja* (1988) 3 NWLR (Pt. 84) 508 (1988) 7 SC (Pt.1) at pp. 11-14. The issue of jurisdiction is therefore always raised and determined at the earliest to save costs and time and also avoid a null trial; *Petro Jessica Enterprises Ltd v. Leventis Technical Company Ltd* (1992) LPELR-2915 (SC); *Nwankwo v. Yar'Adua* (2010) 12 NWLR (Pt. 1209) 518 SC; *Obaba v. Military Governor of Kwara State* (1994) 4 SCNJ 121; *Okoye v. N.C.F.C* (1991) 7 SC (Pt. 111) 33.

The Appellant's Counsel has rightly submitted that jurisdiction is determined by the claim of the plaintiff as evinced in the writ of summons and statement of claim, and not by the defence of the defendant. This is well settled; *Adeyemi & Ors v. Opeyori* (1976) LPELR-171(SC); *Sabale v. Abdulkadir* (1993) LPELR-693(SC); *ITPP Ltd v. UBN Plc (supra)* (2006) LPELR-1519(SC); *Adetayo & Ors v. Ademola* (2010) LPELR-155(SC), (2010) 15 NWLR (Pt 1215) 169; *Zakirai v. Muhammad & Ors* (2017) LPELR-42349(SC). The Court is to examine the enabling law vesting jurisdiction in the Court in the light of the reliefs sought by the plaintiff. Where the reliefs sought fall within the jurisdiction of the Court; the Court must assume jurisdiction. But, where the reliefs fall outside its jurisdiction, the Court must decline jurisdiction. In resolving the controversy in this appeal therefore, the claim of the Appellant as plaintiff before the lower Court must be examined to ascertain whether the claim came within the jurisdiction conferred on the lower Court.

The jurisdiction of the Federal High Court is not unlimited. The subject matter and status of parties' jurisdiction of the Federal High Court is circumscribed primarily by the provisions of Section 251 of the 1999 Constitution, as amended, and by various other legislations that donate jurisdiction to the Federal High Court over specific matters. The subject matter in controversy must fit into one of the enumerated compartments of jurisdiction of the Federal High Court donated by the Constitution or other Statute, before the Federal High Court can have the jurisdictional toga to entertain the suit. See also *Olutola v. Unilorin* (2004) LPELR-2632(SC); *PDP v. Sylva* (2012) LPELR-7814(SC); *Opia v. INEC* (2014) LPELR-22185(SC); *Jev v. Iyortyom (supra); Abdulraheem & Ors v. Oduleye & Ors* (2019) LPELR-48892(SC).

Remarking on the import of the drafting technique employed in the provisions of Section 251 of the 1999 Constitution, as amended, this Court, per Nweze, JCA (as he then was) in *Oladipo v. Nigeria Customs Service Board* (2009) LPELR-8278(CA) at pages 14 -16; succinctly said:

"The point must be noted that the draftsman of that section painstakingly

itemised the subject matters that fall within the exclusive jurisdiction of the Federal High Court. In all, that section vested exclusive jurisdiction on the Federal High Court in eighteen major items, see, per Tobi JSC in *Olutola v. UNILORIN* (2004) 18 NWLR (Pt 905) 416, 462. The implication of this technique is that the said court (Federal High Court) is actually a Court of enumerated jurisdiction, that is, a Court whose jurisdiction is not only delimited by statute but whose jurisdiction is delineated in relation only to the subject matters enumerated therein.

It would, therefore, amount to wreaking havoc on the express letters and intendment of the said Section 251 to construe it as granting the said Court a carte blanche to deal with every conceivable matter [that is, beyond those expressly enumerated above] that relates to a federal agency. This cannot be so.

The effect of the circumscription of the jurisdiction of the Court to those eighteen major items is that whenever the question of the jurisdiction of the Court is canvassed, attention ought to be focused on the subject matter of the suit. If the subject matter of the suit cannot be pitch forked into any of those eighteen major items, then that Court is not the proper forum for the ventilation of the action."

By Writ of Summons and Statement of Claim, both dated 9/12/2005, the Appellant sought the following reliefs, pages 1 - 13 of the Record of Appeal:

(i) The sum of US$2,943,750.00 (Two Million, Nine Hundred And Forty-Three Thousand, Seven Hundred And Fifty United States Dollars) being principal and accrued interest [as at the 5th day of April 2005, due to the Plaintiff by virtue of the terms of a Letter of Credit issued by the Defendant and bearing Letter of Credit issued by the Defendant and bearing Letter of Credit No. GBN/2003/0037.

(ii) Interest on the said sum US$2/943/750.00 at the rate of 7% from the 6th day of April 2005, until the final liquidation of the judgment-debt and costs.

(iii) Costs of this action in the sum ₦2,000,000,00 (Two Million Naira) only.

For the Appellant, the contention was that the lower Court had the jurisdiction to entertain the complaint because it arose from a Letter of Credit transaction and not from a simple contract, the Appellant not being a buyer or seller of goods, or from the supply of goods. The Appellant relied on the provisions of Section 251(1)(d) of the 1999 Constitution, as amended. For the Respondent, the opposite

position was that the action had nothing to do with issuance of letter of credit, defect in letter of credit or any dispute intrinsic in the nature of the letter of credit The Appellant's complaint was, rather, for payment of a specified sum of money, purportedly due from a contract for supply of the buses.

Now, Section 251(1)(d) provides:

> 251.
> *(1) Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters –*
>
> *(d) connected with or pertaining to banking, banks, other financial institutions, including any action between one bank and another; any action by or against the Central Bank of Nigeria arising from banking, foreign exchange, coinage, legal tender; bills of exchange, letters of credit; promissory notes and other fiscal measures: Provided that this paragraph shall not apply to any dispute between an individual customer and his bank in respect of transactions between the individual customer and the bank;*

Section 251(1)(d) confers exclusive jurisdiction on the Federal High Court in these specified matters; *NDIC v. Okem Enterprises* (supra), (2004) LPELR-1999(SC).

Now, a *Letter of Credit* represents an instrument under which the issuer, usually a bank, at a customer's request, agrees to honour a draft or other demand for payment made by a third party, the beneficiary, as long as the draft or demand complies with specified conditions, and regardless of whether any underlying agreement between the customer and the beneficiary is satisfied; Black's Law Dictionary 9th Edition, 2009 at 987; *Imoka & Anor v. UBA Plc* (2012) LPELR-19837(CA); *Nwangwu v. FBN* (2008) LPELR-4478(CA).

Article 2 of the Uniform Customs and Practice for Documentary Credits (1993 Revision) ICC No 500, which the Letter of Credit issued by GBN, the Respondent, was subject to (page 112 of the Record of Appeal), defines the expressions 'documentary credits(s)' and 'credits(s)' used therein *to mean any arrangement; however named or described, whereby a bank (the issuing bank, acting at the request and in accordance with the instructions of a customer (the Applicant) or on its behalf (i) is to make a payment to or to the order of a third party (the Beneficiary) or is to accept and pay bills of exchange (Draft(s)) drawn by the Beneficiary, or (ii) authorises another bank to effect such payment; or to accept*

and pay such bills of exchange (Draft(s), or (iii) authorises another bank to negotiate, against stipulated document's), provided that the terms and conditions of the Credit are complied with.

Expounding further on the nature of *letters of credit,* the Supreme Court, per Bello, JSC (as he then was) in *Nasarawa Enterprises Ltd v. Arab Bank (Nig) Ltd* at pages 20-22 cited with approval the case of *United City (Investments) Ltd v. Royal Bank of Canada* (1983) A.C. 168, thus:

> "In the recent case of *United City (Investments) Ltd. v. Royal Bank of Canada* (1983) A.C. 168 at 182-183, Lord Diplock explained that four contracts are involved in a commercial letter of credit. He said –
>
> "It is trite law that there are four autonomous though interconnected contractual relationships involved.
>
> (1) the underlying contract for the sale of goods, to which the only parties are the buyer and the seller;
>
> (2) the contract between the buyer and the issuing bank under which the latter agrees to issue the credit and either itself or through a confirming bank to notify the credit to the seller and to make payments to or to the order of the seller (or to pay, accept or negotiate bills of exchange drawn by the seller) against presentation of stipulated documents; and the buyer agrees to reimburse the issuing bank for payments made under the credit. For such reimbursement the stipulated documents, if they include a document of title such as a bill of lading, constitute a security available to the issuing bank;
>
> (3) if payment is to be made through a confirming bank the contract between the issuing bank and the confirming bank authorising and requiring the latter to make such payments and to remit the stipulated documents to the issuing bank when they are received, the issuing bank in turn agreeing to reimburse the confirming bank for payments made under the credit;
>
> (4) the contract between the confirming bank and the seller under which the confirming bank undertakes to pay to the seller (or to accept or negotiate without recourse to drawer bills of exchange drawn by him) up to the amount of the credit against presentation of the stipulated documents."

At page 183 of the Report, Lord Diplock said:

"Again, it is trite law that in contract (4), with which alone the instant appeal is directly concerned, the parties to it, the seller and the confirming bank, "deal in documents and not in goods," as Article 8 of the Uniform Customs puts it. If, on their face, the documents presented to the confirming bank by the seller conform with the requirements of the credit as notified to him by the confirming bank, the bank is under a contractual obligation to the seller to honour the credit, notwithstanding that the bank has knowledge that the seller at the time of presentation of the conforming documents alleged by the buyer to have, and in fact has already, committed a breach of his contract with the buyer for the sale of the goods to which the documents appear on their face to relate, that would have entitled the buyer to treat the contract of sales as rescinded and to reject the goods and refuse to pay the seller the purchase price."

In the light of this elucidation, the following contracts can be identified from the Statement of Claim:

1. The contract for the sale of goods between WTII, the seller in USA, and FC & T, the buyer in Nigeria. This contract was predicated on the terms of the contract of sale, and acceptance of the documents under a Letter of Credit.

2. The contract between WTII, the seller, and RZB, the confirming Bank, to finance the export of the goods from USA to Nigeria, whereby RZB agreed to act as a confirming Bank in respect of any Letter of Credit which shall be issued or opened in respect of the sale of the goods, and RZB undertook to disburse funds to *cover* the Letter of Credit.

3. The contract between FC & T, the buyer, and GBN, the issuing Bank for Letter of Credit in favour of WTII, whereby GBN undertook to issue credit through RZB, the confirming Bank, upon agreed conditions.

4. The contract between GBN, the Issuing Bank and RZB, the confirming Bank.

The four contracts were based on documents. Now, there was a fifth contract identified in this case:

5. The contract between RZB and the Appellant, which was an insurance policy contract whereby the Appellant insured the payment of UD$1,962,500.00 being the value of the goods.

This fifth contract arose from one of the conditions stipulated as a condition

precedent to RZB acting as a confirming Bank. This was that RZB should take out an insurance policy to insure the payment of the sum of UD$1,962,500.00, being the value of the goods as evinced by the Letter of Credit issued by GBN, the Respondent. The insurance was to be covered by the buyer, FC & T. See paragraph 15 of the Statement of Claim, page 7 of the Record of Appeal. Thus, with the knowledge and agreement of WTII, FC & T and GBN, the Respondent, RZB took out the insurance policy with the Appellant, which is an agency of the USA Government that is engaged in the financial support of exports from the USA and whose services include giving insurance cover to exporters based in the USA against payment defaults by foreign buyers. The Appellant pleaded in paragraphs 22 - 28 of the Statement of Claim, pages 9 - 10 of the Record of Appeal:

> 22. In conformity with the Uniform Custom and Practice for Documentary Credit applicable to the issuance of the Letter(s) of Credit and the giving of value for same, GBN is under obligation within seven (7) days of the receipt of RZB's letter of 6th November, 2003 to inform RZB whether or not it intends to accept the Letter(s) of Credit for payment.
>
> 23. In accordance with Article 13 of the Uniform Custom and practice for Documentary Credit, RZB as the confirming bank is entitled upon the failure by GBN to state within seven (7) days whether or not it intends to accept the Letter of Credit for payment to assume that the same is good for payment and proceed to give value to WTII.
>
> 24. The Plaintiff avers in relation to the contents of paragraphs 21 - 23 above that GBN did not within seven (7) days of the receipt of the letter of RZB dated the 6th days of November, 2003, respond in any manner or form to the contents of RZB's letter. RZB in conformity with the terms of the Letter of Credit and its obligation as a confirming bank as stipulated, both by the terms contained in the Letter of Credit and the Uniform Custom and Practice for Documentary Credit, did accordingly make payment to WTII.
>
> 25. The Plaintiff avers that upon the failure/refusal of GBN to make payment to RZB in compliance with the terms of its letter of 6th November, 2003, RZB did in conformity with the terms of its insurance policy taken out with the Plaintiff and dated the 20th day of June, 2002 with No. ELC-221325 and insuring the payment of the value of the afore-mentioned Letter of Credit, deliver upon the Plaintiff, a Notice of Claim and Proof of Loss dated the 11th day of February, 2005 demanding that the Plaintiff make payment to it in accordance with the insurance policy which it took out.

26. By the terms of clause 6 (e) of the insurance policy, RZB agreed to execute upon delivery of the Notice of Claim and Proof of Loss upon the Plaintiff, the Release and Assignment form incorporated in the Proof of Loss form.

27. Accordingly, on the 11th day of February, 2005, RZB in compliance with the terms of the insurance policy taken out with the Plaintiff, particularly its clause 6(e), did assign to the Plaintiff its rights to recover from the Defendant, all sums due and payable to RZB by virtue of the terms contained in the aforementioned Letter of Credit by executing in favour of the Plaintiff, a Release and Assignment form/agreement which stipulated thus:

> *"And in further consideration of the claim payment by Exim-Bank the insured does assign to Exim Bank, its successors and assigns, all right, title and interests in and all sum of money now due, or to become due, to the insured from the buyer under the transactions and accounts relating to the claim and any all contracts, security and evidence of indebtedness relating thereto; to have and to hold the same with full power, at their own cost to collect and enforce the same for their own use and benefit by any action or proceeding in the name of the insured or otherwise and to take all legal steps as they deem proper or necessary in connection herewith."*

28. The Plaintiff has since paid over to RZB, all sums due and payable to it under the terms of the Letter of Credit issued by the Defendant and referred to in the earlier parts of this process.

Thus, notwithstanding the default by the Respondent, the issuing Bank, in payment to RZB, the confirming Bank, as agreed, RZB, as obligated by agreement, made payment to WTII. There being an insurance cover with the Appellant for the value of the payment, the Appellant settled RZB. As averred by the Appellant, by the terms of Clause 6(e) of the Insurance Contract, RZB assigned to the Appellant its rights to recover from the Respondent all sums due and payable to RZB by virtue of the Letter of Credit issued by GBN in favour of WTII. Having settled RZB and upon being assigned the rights of RZB under the Letter of Credit, the Appellant then sought to enforce the said contract between RZB and GBN. The present action is the result of unsuccessful attempts to enforce the said contract with GBN, the Respondent.

The insurance contract that had the rights of RBZ assigned to the Appellant was predicated on the terms of the various agreements reached by WTII, FC & T, GBN and RZB. Now, the foundation of the contracts between WTII, FC & T, GBN (the

Respondent), RBZ and the Appellant was the contract between WTII, the seller, and FC & T, the buyer. The trial Court would only be able to comprehensively examine and determine any issue or issues in controversy on the merit by also examining due compliance with the terms of the contract between WTII and FC & T by the parties. The question now is whether the exercise of jurisdiction by the lower Court over this issue is within the purview of Section 251(1)(d).

In my humble but considered view, I do not think so. In the first place, the contract in issue herein cannot be said to have been founded on the Letter of Credit issued by the Respondent (GBN) and in favour of the confirming Bank, RZB. The terms of the Letter of Credit were not in issue. WTII, the seller, and FC & T, the buyer, negotiated and agreed upon the terms for the purchase of the goods, the mode of the credit and the mode of transportation or dealing of the goods from the country of purchase, USA, to the country to which the goods are to be delivered, being Nigeria. The mode of payment was in the form of documentary credit, the Letter of Credit issued by GBN, the Respondent.

The insurance contract between RZB and the Appellant may have some connection with the documentary credit issued by the Respondent, but resolving any controversy arising therefrom cannot be done in isolation of similar examination of the original contract between WTII and FC & T. It is important to note that in the contract between the buyer and the seller, the acceptance of documents under a letter of credit does not preclude the buyer from rejecting the goods subsequently, if the goods, on their arrival, do not conform to the contract of sale; *Akinsanya v. UBA Ltd (supra),* (1986) LPELR-355(SC). The lower Court certainly did not have the vires by virtue of Section 251(1) to examine issues arising from any breach or otherwise of the contract between WTII and FC & T. This is well settled. In a plethora of judicial pronouncements, it has been established that disputes founded on simple contracts are not among those envisaged in the exclusive jurisdiction conferred on the Federal High Court under Section 251 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended); *Onuorah v. Kaduna Refining & Petrochemical Co. Ltd (supra)*, (2005) LPELR-2707(SC); *Adelekan v. Ecu-Line NV (supra)* (2006) 12 NWLR (Pt. 993) 33, (2006) LPELR-113(SC); *Roe Ltd v. UNN* (2018) LPELR-43855(SC); *Dec Oil & Gas Limited v. Shell Nigeria Gas Limited* (2019) LPELR-49347(SC).

The mere fact that documentary credit by way of Letter of Credit was issued in the course of the trade relationship between WTII and FC & T, did not immediately catapult the instant claim into one that was covered by Section 251(1)(d) of the 1999 Constitution, as amended. Article 3 of the Uniform Customs and Practice for Documentary Credits (1993 Revision) ICC No 500, on *Credits v. Contracts* provided:

> **a.** **Credits, by their nature, are separate transactions from the sale or other contract(s) on which they may be based and**

banks are in no way concerned with or bound by such contract(s), even if any reference whatsoever to such contract{s) is included in the Credit. (Emphasis mine)

Therefore, the rights of the confirming bank, RZB as assigned to the Appellant, was a separate transaction from the Letter of Credit transaction, as issued by the Respondent. I am also guided by the decision of the Supreme Court in *Akinsanya v. UBA Ltd (supra).*

I agree with Senior Counsel for the Respondent that the decisions in *Central Bank of Nigeria v. Industrial Bank Ltd. (supra)* and *Owens Bank Nig. Plc v. Michael Ade Ojo (supra)* relied on by the Appellant, do not support their position. The same goes for the case of *Societe Bancaire (Nigeria) v. Margarida Salvado De Lluch (supra)*. The issue therein revolved around a banking matter which, not being affected by the proviso in Section 251(1)(d), was within the jurisdiction of the Federal High Court.

It is for the entirety of the afore reasons that I see no reason to disturb the decision of the lower Court declining jurisdiction to adjudicate over the complaint of the Appellant.

Before I conclude, I must confess that I have personally wondered if the Appellant would not have fared better by refraining from lodging this appeal, which has for various reasons been pending for about ten years, but rather have had the matter heard and determined by the Lagos State High Court on the merits. The matter would long have been resolved one way or the other by the State High Court. An appeal by either party would then be predicated on a complaint arising from the decision of the trial Court, having heard the case on its merit. It seems to me that the Appellant appears to have colossally lost a lot more, taking into consideration changes that impact businesses, such as fluctuating exchange rates and global rises in inflation indices. That said, the sole issue arising for determination is resolved against the Appellant.

This appeal is without merit and hereby fails. The decision of the lower Court delivered on 14/1/2011 is hereby affirmed. It is further ordered that the consequential Order made by the lower Court that the case file be transferred to the Lagos State High Court by the Hon Chief Judge of the Federal High Court for hearing and determination is also hereby affirmed.

It is further ordered that parties are to bear their costs.

DANIEL-KALIO, JCA: I have read the judgment of my lord ONYEKACHI AJA OTISI, JCA and I am in complete agreement with my lord that the appeal has no merit whatsoever. The appeal is dismissed and the judgment of the lower Court is affirmed.

IKYEGH, JCA: I agree with the robust judgment prepared by my learned brother, Onyekachi Aja Otisi, JCA, with nothing extra to add.

BAYERO, JCA: I agree.

Cases cited in the Judgment

Adah v. N.Y.S.C (2004) 19 NSCQR 220
Adelakan v. Ecu-Line NV (2006) 12 NWLR (Pt. 993) 33
Adetayo & Ors v. Ademola (2010) LPELR-155(SC), (2010) 15 NWLR (Pt 1215) 169
Adetayo v. Ademola (2010) LPELR-155(SC)
Adeyemi & Ors v. Opeyori (1976) LPELR-171(SC)
Agu v. CBN (2016) LPELR-41091(CA)
Akinsanya v. UBA Ltd (1986) 4 NWLR (Pt 35) 273
Alsthom SA & Anor v. Saraki (2005) 3 NWLR (Pt 911) 208
Associated Discount House Limited v. Amalgamated Trustees Limited (2006) 10 NWLR (Pt. 989) 635
Central Bank of Nigeria v. Industrial Bank Ltd (1997) 9 NWLR (Pt. 522) 712
Chief Etuedor Utih & Ors. v. Jacob Umurhurhu Onoyivwe & Ors. (1991) LPELR-3436(SC)
Dec Oil & Gas Limited v. Shell Nigeria Gas Limited (2019) LPELR-49347(SC)
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Jev v. Iyortyom (supra); Abdulraheem & Ors v. Oduleye & Ors (2019) LPELR-48892(SC)
Melwani v. Five Star Industries Ltd (2002) 1 S.C. 120
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Obaba v. Military Governor of Kwara State (1994) 4 SCNJ 121
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Roe Ltd v. UNN (2018) LPELR-43855(SC)
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Tukur v. Government of Gongola State (1989) 4 NWLR (Pt 117) 517

Ugwu v. Ararume (2007) 6 SC (Pt 1) 88
Utih v. Onoyivwe (1991) 1 SCNJ 25
Zakirai v. Muhammad & Ors (2017) LPELR-42349(SC)

Foreign case cited in the Judgment
United City (Investments) Ltd v. Royal Bank of Canada (1983) A.C. 168

Statutes cited in the Judgment
Section 251(1)(d) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)

Book referred to in the Judgment
Black's Law Dictionary 9th Edition, 2009

History:

HIGH COURT
Federal High Court, Lagos
CORAM P. AJOKU, J
Suit No.: FHC/L/CS/1295/2005
Friday 14th January, 2011

COURT OF APPEAL (Lagos Division)
Joseph Shagbaor Ikyegh, JCA ***(Presided)***
Onyekachi Aja Otisi, JCA ***(Read the leading Judgment)***
Abdullahi Mahmud Bayero, JCA

COUNSEL
O. Iyayi, Esq. for the Appellant
O. Akinosun, SAN, with Ayodeji Jolaoso, Esq., for the Respondent

MR. TAIWO ADEBAKIN; MR. OLUWOLE AJAYI v. ARCHITECTS REGISTRATION COUNCIL OF NIGERIA; INCORPORATED TRUSTEES OF THE NIGERIA INSTITUTE OF ARCHITECTS

FEDERAL HIGH COURT
(LAGOS DIVISION)

WEDNESDAY 20TH MAY, 2020
SUIT NO. FHC/L/CS/1343/2011

(OWEIBO, J)

ADMINISTRATIVE LAW – Agency – factors determining whether an organization is a Federal Government agency – whether the government has control over it or whether the functions affect government policies.

COMMERCIAL LITIGATION – Originating Summon – Whether defendants can raise questions on their own in an originating summons – This is a suit commenced by originating summons to give answers to the questions raised therein. The Defendants are not permitted to raise questions of their own.

COMMERCIAL LITIGATION – When a suit becomes lifeless – A suit is said to be lifeless or an academic exercise where a decision reached in the matter will not ensure any right or confer any benefit on the successful litigant.

Facts:

The plaintiffs filed an amended originating summons before the Federal High Court, Lagos Division on the 7th of February, 2018, seeking several declarations from the court and praying the court for an order compelling the 1st Defendant to immediately cease and desist from performing any functions or exercising any statutory powers pursuant to the Architects (Registration Etc.) Act Cap. A19, Laws of the Federation of Nigeria 2004, until the inauguration of a validly constituted Council for the 1st Defendant, and compelling the 1st Defendant to, upon the inauguration of a validly constituted Council, immediately register the Plaintiffs as architects pursuant to the Architects (Registration Etc.) Act Cap. A19, Laws of the Federation of Nigeria 2004.

The 1st Defendant via a Motion contended that the plaintiff's suit is merely academic since the reliefs sought are no longer live issues in the substantive case, therefore no cause of action against the 1st defendant. It also contended that even if the 1st Defendant was dissolved as posited by the plaintiff's, a new Board of the 1st Defendant has since been inaugurated, and that the New Board cannot be held responsible for an action taken by the already dissolved Board; that until the Plaintiffs present themselves to the new Board and get rejected; they can no lon-

ger maintain this action against the 1st Defendant, and thus should be dismissed.

Held *(suit dismissed)*:

[1] ***Administrative Law – Agency – factors determining whether an organization is a Federal Government agency – whether the government has control over it or whether the functions affect government policies.***

The factors determining whether an organization is a Federal Government agency are (1) whether the Federal Government has control over it and (2) whether the functions of the organization are aimed at affecting the policies of the Federal Government: see *Omiolemhen & Ors v. Nigerian Gas Company* (2012) LPELR-7957 (CA); *Nigerian Reinsurance Corporation v. Cudjoe* (2008) 10 NWLR (Pt. 1095) 329. **(P. 196 lines 41 - 45; P. 197 line 1)**

[2] ***Commercial Litigation – Originating Summon – Whether defendants can raise questions on their own in an originating summons – This is a suit commenced by originating summons to give answers to the questions raised therein. The Defendants are not permitted to raise questions of their own.***

On the other hand, learned counsel for the Defendants raised three questions for determination and argued on each of those questions. This is a suit commenced by originating summons to give answers to the questions raised therein. The Defendants are not permitted to raise questions of their own: see *N.J.C & Ors. v. Aladejani* (2014) LPELR 24134 (CA). **(P. 195 lines 26 - 32)**

[3] ***Commercial Litigation – When a suit becomes lifeless – A suit is said to be lifeless or an academic exercise where a decision reached in the matter will not ensure any right or confer any benefit on the successful litigant.***

The only ground for the application is that this action has become merely academic as the reliefs sought in the substantive matter are no longer live issues. A suit is said to be lifeless or an academic exercise where a decision reached in the matter will not ensure any right or confer any benefit on the successful litigant: see *Hallmark Bank Plc v. Obasanjo* (2013) LPELR-20552 (CA). **(P. 195 lines 1 - 5)**

JUDGMENT (Delivered by OWEIBO, J): By an amended originating summons dated 1st of February, 2018 and filed on the 7th of February, 2018, the Plaintiffs sought answers to the following questions –

1. Whether the governing board of the 1st Defendant's Council was dissolved by the Presidential Directive issued on 15 July 2015.

2. If the answer to question 1 is positive, whether the 1st Defendant can lawfully perform any function or exercise any of its statutory powers under the Architects (Registration, Etc.) Act Cap. A19 Laws of the Federation of Nigeria 2004 without complying with the procedure stipulated by the Presidential Directive issued on 15 July 2015.

3. Whether the 1st Defendant acted ultra vires its statutory powers when it purported to carry out the statutory functions of its validly constituted council in disregard of the Presidential Directive issued on 15 July 2015 without challenging the said directive in Court.

4. Assuming without conceding that the 1st Defendant can act in pursuance of its powers under the Architects (Registration Etc.) Act Cap. A19, Laws of the Federation of Nigeria 2004, whether the 1st Defendant's regulatory powers extend to refusing to recognize the Professional Practice Competence Examination conducted by the 2nd Defendant in September 2016.

5. If the answer to question 3 above is in the negative, whether the refusal of the 1st Defendant to register the Plaintiffs as architects on the grounds that it does not recognize the 2016 - Professional Practice Competence Examination conducted by the 2nd Defendant is illegal and ultra vires the 1st Defendant by virtue of the provisions of the Architects (Registration Etc.) Act Cap. A19, Laws of the Federation of Nigeria 2004.

6. Assuming without conceding that the 1st Defendant has regulatory powers over the Professional Practice Competence Examination by the 2nd Defendant, whether the 1st Defendant complied with the mandatory requirements of the Architects (Registration Etc.) Act Cap. A19, Laws of the Federation of Nigeria 2004 with regard to its refusal to recognize the September 2016 Professional Practice Competence Examination conducted by 2nd Defendant, and refusal to register the Plaintiffs.

On the above questions being answered in their favour the court is to grant the following reliefs –

a. **A DECLARATION** that the governing board of the 1st Defendant's Council having been dissolved, the 1st Defendant CANNOT law-

fully perform any function or exercise any of its statutory powers under the Architects (Registration Etc.) Act Cap. A19, Laws of the Federation of Nigeria 2004 except in the manner stipulated in the Presidential Directive issued on 15 July 2015.

b. **A DECLARATION** that the performance of any of the functions or exercise of any of the statutory powers of the 1st Defendant pursuant to the, Architects (Registration Etc.) Act Cap. A19, Laws of the Federation of Nigeria 2004 after its Council's dissolution on 15 July 2015 and without compliance with the procedure stipulated in the Presidential Directive issued on the said date is illegal, null and void; **OR IN THE ALTERNATIVE**

c. **A DECLARATION** that the dissolution of the 1st Defendant's Council having been done by a Presidential Directive and not in the statutorily provided manner of appointment and termination of members of the council, the purported refusal to recognize the 2nd Defendant's September 2016 examination and its refusal to register the Plaintiffs without challenging the Presidential Directive in Court, is illegal, null and void *ab initio.*

d. **A DECLARATION** that by virtue of the Architects (Registration Etc.) Act Cap. A19, Laws of the Federation of Nigeria 2004, the 1st Defendant has no power to refuse to register the Plaintiffs as Architects on the ground that it does not recognize the September 2016 Professional Practice Competence Examination conducted by 2nd Defendant and that its refusal to register the Plaintiffs as architects on the said grounds is ultra vires, illegal, null and void; **OR IN THE ALTERNATIVE**

e. **A DECLARATION** that the failure of the 1st Defendant to comply with the mandatory requirements of the Architects (Registration Etc.) Act Cap. A19, Laws of the Federation of Nigeria 2004 invalidates its refusal to recognize the September 2016 Professional Practice Competence Examination conducted by 2nd Defendant and its refusal to register the Plaintiffs:

f. **AN ORDER** compelling the 1st Defendant to immediately cease and desist from performing any functions or exercising any statutory powers pursuant to the Architects (Registration Etc.) Act Cap. A19, Laws of the Federation of Nigeria 2004, until the inauguration of a validly constituted Council for the 1st Defendant.

g. **AN ORDER** compelling the 1st Defendant to, upon the inauguration of a validly constituted Council, immediately register the

Plaintiffs as architects pursuant to the Architects (Registration Etc.) Act Cap. A19, Laws of the Federation of Nigeria 2004, **OR IN THE ALTERNATIVE.**

h. In the event that prayers a, band c above are refused, an Order compelling the 1st Defendant to immediately register the Plaintiffs as architects pursuant to the Architects (Registration Etc.) Act Cap. A19, Laws of the Federation of Nigeria 2004.

In support of the amended originating summons the Plaintiffs filed a 14 paragraph affidavit deposed to by the 2nd Plaintiff, exhibiting five documents marked Exhibits A1, A2, A3, A4 and B. The 1st Defendant entered appearance on the 16th of May 2018 and filed a counter affidavit in opposing the originating summons: it is of 20 paragraphs deposed to by Adeniyi Sunkanmi Otegbade on the 17th of May, 2018. Exhibited therein are four exhibits marked. Exhibits VC1, VC2, VC3 and VC4.

The 2nd Defendant entered an unconditional appearance on 4th January 2018. The records further show that on the 15th November, 2017, 18th January, 2018 and 18th April, 2018, one R.B. Ijomah had appeared as counsel for the 2nd Defendant. The 2nd Defendant however did not file any counter affidavit to the originating summons.

On the 23rd of September, 2019 the 1st Defendant filed a motion on notice brought pursuant to Order 26 Rules 1-4 of the Federal High Court (Civil Procedure) Rules 2019. By that motion the 1st Defendant sought for an order of the court dismissing/striking out this matter for being merely academic.

On the 4th of March, 2020, both the originating summons and motion were taken together. The motion on notice has to do with the competence of the suit, so I shall have to consider it first.

MOTION FOR DISMISSAL/STRIKING OUT

The motion is supported by a 20-paragraph affidavit deposed to by Casmir Amadi, a legal Practitioner in the 1st Defendant's counsel's law firm. Except for a few additional paragraphs, the facts deposed to therein are mainly repetitions of the 1st Defendant's counter affidavit to the originating summons.

In opposition to the motion, the Plaintiffs filed an 8-paragraph counter affidavit deposed to by Oluwateniola Akeju on 9 October, 2019.

The main and only ground for the application is that –

> *"the suit is merely academic since the reliefs sought are no longer live issues in the substantive case, therefore no cause of action against the 1st defendant."*

In paragraphs 3 and 7 of the affidavit in support the 1st Defendant/Applicant deposed as follows –

> 3. That I know as a fact that the Plaintiffs' claims are merely academic since there is no longer any live issue before the court.
>
> 7. That even if the 1st Defendant was dissolved by the said circular, a new Board of the 1st Defendant has since been inaugurated on the 12th June, 2018. Attached and Marked Exhibit VC1 is a letter addressed to the 1st Defendant informing her of the inauguration.

Exhibit VC1 referred to above is a letter dated 7th June, 2018 from the Federal Ministry of Works informing the 1st Defendant of the reconstitution on - the 1st Defendant's Council and the date for the inauguration of the new Council. Casmir Amadi, Esq, learned counsel for the Applicants, referred the court to the case of *Ijaodola v. Unilorin Governing Council & Ors.* (2018) 7 SC (Pt. II) 3; *Odom v. PDP* (2015) 2 SC (Pt. 1) 46 on what constitutes an academic exercise. Counsel submitted that the New Board cannot be held responsible for an action taken by the already dissolved Board; that until the Plaintiffs present themselves to the new Board and get rejected; they can no longer maintain this action against the 1st Defendant; that whether the previous Council was acting wrongly or illegally is presently immaterial and no more a live issue to be adjudicated on by the court.

On the above counsel urged the court to dismiss or strike out the suit.

Learned counsel for the Plaintiffs, in opposition contended, firstly, that paragraphs 3, 13, 17 and 19 of the affidavit in support of the motion offends section 115(2) of the Evidence Act as they are legal arguments and conclusions. Counsel referred' the court to the case of *Ishaya Bamaiyi v. The State* (2001) 8 NWLR (Pt. 715) 270 on the position of the law on what an affidavit should and should not contain. Counsel urged on the court to expunge those paragraphs.

Counsel further contended that the application has delved into the substantive issues before the court, Counsel referred the court to the claims of the Plaintiffs in the substantive suit, and contended that the brought to the court for determination at this interlocutory stage the very issues presented by the Plaintiffs before the court. Counsel relied on the case of *Shining Star (Nig.) Ltd v. AKS Steel (Nig.) Ltd* (2011) 4 NWLR (Pt. 1238) 596 at 617; *Hashim v. Minister FCT* (2002) 15 NWLR (Pt. 789) 159 where the Court of Appeal refused to consider at the interlocutory stage, the substantive issues raised.

Counsel urged the court to dismiss the application with substantive cost.

RESOLUTION

The only ground for the application is that this action has become merely academic as the reliefs sought in the substantive matter are no longer live issues. A suit is said to be lifeless or an academic exercise where a decision reached in the matter will not ensure any right or confer any benefit on the successful litigant: see *Hallmark Bank Plc v. Obasanjo* (2013) LPELR-20552 (CA).

The main contention of the Plaintiffs is that the 1st Defendant's Board having been dissolved lacked the competence to take the decision it took with respect to the registration of the Plaintiffs as architects. The inauguration of the new Council has not resolved the issue whether by the circular of SGF of 16th July 2015, the 1st Defendant was dissolved, and whether its decision not to register the Plaintiffs upon their passing the Professional Practice Competence Examination was valid as the Council was not in existence at the time.

I believe that this suit will be only become academic if upon the inauguration of the new Board the issue of the registration and protests of the Plaintiffs against the rejection of their application for registration have been decided. On the above I hold that the suit of the Plaintiffs has not become academic exercise. The application in my view lacks merit. It Is dismissed.

SUBSTANTIVE MATTER

In the originating summons, the Plaintiffs raised six questions for determination. In his written submissions in support of the originating summons, learned counsel for the Plaintiffs offered arguments in respect of each of the questions, referring to statutory and judicial authorities. On the other hand, learned counsel for the Defendants raised three questions for determination and argued on each of those questions. This is a suit commenced by originating summons to give answers to the questions raised therein.

The Defendants are not permitted to raise questions of their own: see *N.J.C & Ors. v. Aladejani* (2014) LPELR 24134 (CA). Let me also note that learned counsel for the plaintiffs in his written address also formulated some issues outside the questions in the originating summons, I believe that is also not allowed, I will according concentrate on the questions for determination posed by the Plaintiffs in the amended originating summons.

Question (1)

Whether the governing board of the 1st Defendant's Council was dissolved by the Presidential Directive issued on 15 July 2015.

The first question posed by the Plaintiff is the main question that calls for serious consideration. All the other questions will fall into their proper places depending on the answer to the first question. I would however like to note that no Presidential

Directive issued on the 15th July 2015 has been placed before the court: see questions 2 and 3 also referring to a circular of 15th July 2015, and reliefs (a) and (b) and paragraph 9 of the affidavit in support of the Amended Originating Summons. The court should accordingly dismiss this suit as nothing of the description has been exhibited. In order to do substantial justice, I want to proceed on the belief that the Plaintiffs were referring to their Exhibit E dated 16th July, 2015.

By a circular emanating from the office of the Secretary to the Government of the Federation dated 16th July, 2015, titled "DISSOLUTION OF BOARDS OF FEDERAL GOVERNMENT PARASTATALS, AGENCIES, INSTITUTIONS AND GOVERNMENT-OWNED COMPANIES" the Presidency directed the dissolution of all the Federal Government parastatals, agencies, institutions and government-owned companies, except the Boards, Commissions and Councils· listed in the Third Schedule, Part I of the Constitution. It is the case of the Plaintiffs that the Architects Registration Council of Nigeria (1st Defendant) was one of the bodies whose Governing Boards were dissolved.

Learned counsel for the Plaintiffs referred the court to Black's Law Dictionary, 10th Edition page 75 on the definition of Federal Agency. He also referred the court to *N.O.H.B. v. Ajogwu* (2000) 12 NWLR (Pt. 682) 626 at 638; *J.U.T.H. v. Ajeh* (2007) 1 NWLR (Pt. 1016) 490 at 517; *Agbule v. W.R. & P. Co. Ltd* (2013) 6 NWLR (Pt. 1350) 318 at 350 in contending that the 1st Defendant is a regulatory body of the Federal Government set up to regulate standards in the architectural profession on behalf of the Federal Government, that it is an agency of the Federal Government.

Counsel contended that in consonance with the clear and unambiguous wordings of the circular, it is evident that the 1st Defendant, being an agency of the Federal Government and not expressly excluded by the circular, is affected by it; that the 1st Defendant with its Council was dissolved.

Learned counsel for the 1st Defendant on the other hand submitted that: the said circular did not apply to the 1st Defendant; that the members of the 1st Defendant were not appointed by the President and so the President cannot validly dissolve the body. Counsel further referred to section 2 of the Act and paragraphs 1(5) and 11 of the First Schedule to the Act and Exhibits VC2 and VC4.

RESOLUTION

The Architects Registration Council of Nigeria is a statutory body established by the Architects (Registration, Etc.) Act. The factors determining whether an organization is a Federal Government agency are (1) whether the Federal Government has control over it and (2) whether the functions of the organization are aimed at affecting the policies of the Federal Government: see *Omiolemhen & Ors v. Nigerian Gas Company* (2012) LPELR-7957 (CA); *Nigerian Reinsurance*

Corporation v. Cudjoe (2008) 10 NWLR (Pt. 1095) 329.

By the provisions of section 2 of the Act, it is seen that the Council is a regulatory body acting on behalf of the Federal Government. By the provisions of sections 3 and 4 of the Act the council is subject to the control of the Federal Government through the Minister charged with the responsibility for architecture. I agree with learned counsel for the Plaintiffs in that regard that the 1st Defendant is an agency of the Federal Government.

It is the contention of the Plaintiffs that the said Presidential circular of 16th July, 2015 affected all the Federal Government agencies, including the 1st Defendant as it was not specifically excluded. In paragraph 4 of the said circular all the Ministries, Departments and Agencies were to ensure compliance with the provisions of the circular. It also advised all Permanent Secretaries to inform the Chief Executive Officers of the affected Agencies under their supervision for immediate compliance. The Federal Ministry of Power, Works & Housing which is the supervising ministry of the 1st Defendant in a reply to a letter written by the 2nd Defendant stated that the 1st Defendant was not one of those affected by the circular: see Exhibit VC 4. This, coupled with Exhibit VC 2 from the office of the Attorney General of the Federation, decided conclusively that the circular did not affect the 1st Defendant. I accordingly answer question No, 1 in the negative, that is to say, that the 1st Defendant was not dissolved by the Presidential Directive issued on 16th July 2015.

Questions (2) & (3)

Questions 2 and 3 will be taken together and they flow from question (1). I have in answer to question (1) held that the 1st Defendant's governing board was not dissolved by the SFG's circular of 16th July, 2015. That being the case, question (2) is answered in the affirmative; that is to say, that having not been dissolved it could properly exercise its statutory powers under the Act. The answer to question (3) would be in the negative, meaning that the 1st Defendant did not act *ultra vires* its statutory power.

Question (4)

In question (4), the Plaintiffs asked whether the regulatory powers of the 1st Defendant extend to refusing to recognize the Professional Practice Competence Examination conducted by the 2nd Defendant in September, 2016.

Learned counsel for the Plaintiffs refer to section 7(5) of the Act, emphasizing particularly the word "shall" in paragraph (c) thereof, which he submitted is mandatory; that having complied with the statutory requirements, the Plaintiffs are entitled to be registered; that the Act does not give the 1st Defendant power to refuse to recognize the examinations conducted by the 2nd Defendant; that a

statutory body such as the 1st Defendant cannot act outside the powers granted it by the enabling statute, relying on the case of *U.N.T.H.M.B. v. Nnoli* (1994) 8 NWLR (Pt. 363) 376; *Incorporated Trustees of the Nigerian Baptist Convention v. Governor of Ogun State* (2016) LPELR-41134 (CA) and other authorities.

Counsel contended that the 1st Defendant cannot exercise any discretion, and is obliged to register any individual who complies with the mandatory provisions of section 7(5) of the Act. He urged the court to so hold.

Counsel for the 1st Defendant submitted that by virtue of sections 7, 8 and 11 of the Architects (Registration Etc.) Act the 1st Defendant has the power to recognize or not to recognize a particular examination conducted by the 2nd Defendants if it does not conform with laid down principles of the Council; that it also gives the 1st Defendant the power and discretion to fully register or not to register an applicant as an architect.

RESOLUTION

Sections 7(5) of the Act to which the court has been referred is very relevant in the consideration of this issue; it provides as follows –

> 7.(5) subject as aforesaid, a person shall be entitled to be fully registered, if being a citizen of Nigeria or a person within section 8(2) or (3) of this Act, he satisfies the Council (a) as to his experience for the purposes of section 11(1) of this Act;
>
> (b) that he is of good character;
>
> (c) that he has passed the professional practice competence examination conducted by the institute;
>
> (d) that his qualification as an architect are for the time being accepted by the council for the purposes of this subsection as respects the profession of an architect; and save where section 8 (3) of this Act applies –
>
> (e) that where a qualification was acquired outside Nigeria, the applicant for registration under this Act was under no legal disability in the practice of architecture, and if the council so requires, that he has sufficient experience in the profession of an architect, and the Council shall from time to time publish in the Federal Gazette, particulars of the qualifications for the time being accepted as aforesaid.

In determining the powers of the 1st Defendant in respect of the qualifications of persons for registration as architects, I believe that the provisions of section 7(1) of the Act is also relevant. It provides –

> 7. (1) subject to the provisions of this Act, a person shall not be entitled to be fully or provisionally registered under this Act as an architect, and when so registered, to practice as such unless –
>
> (a) He has attended a course of training approved by the council under section 9 of this Act; and
>
> (b) The course was conducted at an institution so approved, or partly at one of such institution and partly at another or others; and
>
> (c) He holds the qualification so approved.

Reading these provisions along with the provisions of section 9 of the Act, it appears to me that the Council has enormous powers and discretion in determining the criteria for the registration of a person as an architect. The Professional Practice Examination conducted by the Nigeria Institute of Architects is on behalf of the Council to ascertain the professionalism of candidates before admitting them. I believe it also includes the approval of examinations conducted by the Nigeria Institute of Architects.

Question (5)

This question depends on question (4) being answered in the negative. I have held that the 1st Defendant has the regulatory powers to refuse to recognize the examination conducted by the Institute. Therefore, the refusal by the 1st Defendant to register the Plaintiffs on that ground is not *ultra vires* the powers of the 1st Defendant under the Act.

Question (6)

This question on the originating summons is –

> "Assuming without conceding that the 1st Defendant has regulatory powers over the Professional Practice Competence Examination by the 2nd Defendant, whether the 1st Defendant complied with the mandatory requirements of the Architects (Registration Etc.) Act Cap. A19, Laws of the Federation of Nigeria 2004 with regard to its refusal to recognize the September 2016 Professional Practice Competence Examination conducted by 2nd Defendant, and refusal to register the Plaintiffs."

However, in his written address, learned counsel for the Plaintiff posed a different issue and proffered arguments on the new issue, namely:

> "Whether or not the 1st defendant ought to be compelled to register the Plaintiffs as architects pursuant to the Architects (Registration, etc.) Act Cap A19, Laws of the Federation of Nigeria, 2004."

No arguments having been proffered; I will take it that question (f) has been abandoned. The issued No.6 not being one of the issues set out for determination, I will discountenance it.

On the above all the questions for determination are resolved against the Plaintiffs. The attendant reliefs sought by the Plaintiffs are consequently refused. The suit is dismissed with cost assessed at ₦30,000.00 in favour of the 1st Defendant.

Cases cited in the Judgment
Agbule v. W.R. & P. Co. Ltd (2013) 6 NWLR (Pt. 1350) 318
Hallmark Bank Plc v. Obasanjo (2013) LPELR-20552 (CA)
Hashim v. Minister FCT (2002) 15 NWLR (Pt. 789) 159
Ijaodola v. Unilorin Governing Council & Ors. (2018) 7 SC (Pt. II) 3
Incorporated Trustees of the Nigerian Baptist Convention v. Governor of Ogun State (2016) LPELR-41134 (CA)
Ishaya Bamaiyi v. The State (2001) 8 NWLR (Pt. 715) 270
J.U.T.H. v. Ajeh (2007) 1 NWLR (Pt. 1016) 490
N.J.C & Ors. v. Aladejani (2014) LPELR 24134 (CA)
N.O.H.B. v. Ajogwu (2000) 12 NWLR (Pt. 682) 626
Nigerian Reinsurance Corporation v. Cudjoe (2008) 10 NWLR (Pt. 1095) 329
Odom v. PDP (2015) 2 SC (Pt. 1) 46
Omiolemhen & Ors v. Nigerian Gas Company (2012) LPELR-7957 (CA)
Shining Star (Nig.) Ltd v. AKS Steel (Nig.) Ltd (2011) 4 NWLR (Pt. 1238) 596
U.N.T.H.M.B. v. Nnoli (1994) 8 NWLR (Pt. 363) 376

Statutes cited in the Judgment
Section 2 of the Act
Section 7(1), (5) of the Act
Sections 7, 8 and 11(1) of the Architects (Registration Etc.) Act
Section 8(2), (3) of this Act
Section 9 of this Act
Section 115(2) of the Evidence Act

Rules of Court referred to in the Judgment
Order 26 Rules 1-4 of the Federal High Court (Civil Procedure) Rules 2019

Book referred to in the Judgment
Black's Law Dictionary, 10th Edition

History:

HIGH COURT
Federal High Court (Lagos Division)
I.N. OWEIBO, J
SUIT NO: FHC/CS/1343/2017
Wednesday 20th May, 2020

APPEARANCE:
Oyinkansola Badejo-Okunsany for the Plaintiffs
C.E. Amadi, Esq., for the 1st Defendant