

ALHAJJ AMINU ISHOLA
(Substituted by Mr. Abdul Ganiyu Ishola)
v.
UNION BANK OF NIGERIA LIMITED
SUPREME COURT OF NIGERIA

SC.J 25/1996

SALIHU MODIBBO ALI'A BELGORE. J.S.C. (*Presided*)
UMARU ATI KAEGO. J.S.C. (*Rend the leading judgment*)
DAHIRU MUSDAPHER. J.S.C.
DENNJS ONYEJEE EDOZIE. J.S.C.
SUNDAY AKINOLA AKJNTAN. J.S.C.

FRIDAY 18TH FEBRUARY, 2005

APPEAL - Evaluation of evidence - When appellate court can embark on - Relevant consideration.

APPEAL - Finding of fact by trial court - Attitude of appellate court thereto - When it will interfere there with.

COURT - Case made out by parties - Duty on court not to depart therefrom.

COURT - Evaluation of evidence - Duty on trial court in respect of - Where it fails to discharge same - Inject.

COURT- Evaluation of evidence - When appellate court can embark on - Relevant consideration.

COURT - Finding of fact by court - Attitude of appellate court thereto - when - it will interfere there with.

COURT- Reliefs - Reliefs claimed in an action - clear and unambiguous word in a document - How construed

DOCUMENT'- Construction of documents - Clear and unambiguous words in a document - How construed.

DOCUMENT - Documentary evidence - Document admitted for a purpose - Duty on court to limit use of to that purpose - Where sought to be relied on for other purpose - Proper step for court.

DOCUMENT - Documentary evidence - Where document admitted in evidence - Use to which it can be put - Need to limit to purpose for which admitted.

EVIDENCE - Documentary evidence - Document admitted for a purpose - Duty on court to limit use of to that purpose - Where sought to be relied on for other purpose - Proper step for court.

EVIDENCE - Documentary evidence - Where document admitted in evidence - Use to which it can be put - Need to limit to purpose for which admitted.

EVIDENCE - Evaluation of evidence - When appellate court can embark on - Relevant consideration.

EVIDENCE - Proof- Burden of proof in civil cases - On whom lies - How discharged.

PRACTICE AND PROCEDURE - Case made out by parties - Duty on court not to depart therefrom.

PRACTICE AND PROCEDURE - Evaluation of evidence - Duty on trial court in respect of - Failure to discharge - Effect

PRACTICE AND PROCEDURE- Evaluation of evidence - when appellate court can embark on- Relevant consideration.

PRACTICE AND PROCEDURE - Finding of fact by trial court Attitude of appellate court thereto - When it will interfere therewith..

PRACTICE AND PROCEDURE - Pleadings - Issue not raised in pleadings - Duty on court nor to decide.

PRACTICE AND PROCEDURE - Pleadings - What must be specifically pleaded.

PRACTICE AND PROCEDURE - Proof- Burden of proof in civil cases - On whom Hex - How discharged.

PRACTICE AND PROCEDURE - Reliefs - Reliefs claimed in an action - Whether constitute part of facts in pleading - How proved.

PRINCIPLES OF INTERPRETATION - Construction of documents - Clew and unambiguous words in a document - How construed

Issues:

1. Whether, having regard to the agreement between the parties, the respondent was at liberty to fix the rate of interest on the loan it granted to the appellant.
2. Whether the issues of illegality/invalidity of the consent to mortgage contained in exhibit J was a new issue raised by the trial High Court that entitled the Court of Appeal to set aside the decision of the trial court on the point.
3. Whether, having regard to the pleadings of the parties and the evidence adduced at the trial court, the appellant did not prove his case and whether the Court of Appeal was right when it set aside the judgment of the trial court in favour of the appellant and dismissed his suit.

Facts:

The appellant was a customer of the respondent. He was the Managing Director of a business in the name of Salawal Motor House and he maintained a business account with the respondent through which he obtained an overdraft facility for the purpose of the smooth running of his business, the appellant of N250,000.00 in 1982. By way of security for the loan, the appellant mortgaged his property a 5-storey building in Ilorin to the respondent. The appellant fully utilised the loan but he was unable to repay the amount-as-agreed by the parties. The respondent thereafter resorted to realising the amount of the facility and the interest on the mortgaged property and the appellant contested the move and filed an action at the High Court in 1988, claiming *inter alia* a declaration that the mortgage between the parties is invalid, illegal and unenforceable; an order of injunction restraining the respondent from selling the mortgaged property; and an order directing the respondent to pay to the appellant the sum of N700,000.00 or any amount the court may find the appellant entitled to recover from the respondent. In his statement of claim, the appellant averred that the respondent wrongly debited his account; that although the Governor's consent to the mortgage of his property to the respondent was obtained by the respondent, the respondent failed to perfect the mortgage deed on time as a result of which a penalty was imposed by the Government for late registration. The appellant, however, did not aver any fact in respect of the illegality of the mortgage transaction. The respondent, on its part, admitted that the Governor's consent to the transaction was obtained but denied that the mortgage deed was registered late. It also averred that it was the duty of the appellant to pursue diligently the completion of the mortgage deed because he -was the mortgagor.

At the trial, the appellant testified on his own behalf and called one witness who testified as PW1. The witness, an accountant, testified that based on the documents and account books given to him to analyse, the respondent made double or triple entries of some cheques in the appellant's account. He testified that the appellant's account ought to be in credit in the sum of N594,517.78 but did not explain how he arrived at the sum. Under

cross-examination, he admitted several times that some of his conclusions were based largely on guess work as he did not have full information to support his conclusion.

The respondent, on the other hand, called two of its employees as witnesses. They testify that the appellant's statement of account was regularly given to him: that the appellant did not complain to the respondent or any of us staff about any double or triple entries overdraft facility he took from the respondent.

In the course of the trial, the deed of mortgage of the appellant's property was also tendered in evidence without objection as exhibit

1. Clause 3 of the deed states as follows:

"3 All interest on the moneys hereby secured shall accrue due from day to day a. the rate from time to time simulated by the bank and may be capitalised at such intervals as the bank may from time to time prescribe but not more often than monthly and added to the moneys hereby secured and shall there upon bear interest accordingly at the rate aforesaid "

In its judgement, the trial court raised the issue of the validity and legality of the mortgage and held that it was invalid and illegal. It granted all the alternative prayers of the appellant and found the respondent liable to pay the appellant the sum of N594,517.78.

The respondent was dissatisfied and it appealed to the court of appeal which held that the virtue of clause 3 of exhibit 1 (mortgage deed), the respondent was entitled to change the rate of interest on respondent. In coming to its decision, the court of appeal relied on the supreme court decision in union bank of NIGERIA Ltd. V. Ozigi (1994) 3 NWLR (pt. 333)385 which is found was on all fours with this case. The court of Appeal allowed the respondent's appeal. It set aside the judgement of the trial court and dismissed the appellant's claim in the trial court.

The appellant was dissatisfied and he appealed to the supreme court

Held (*Uuiniinously dismissing tiie appeal*):

1. *On Construcion oj clear and itiuunbigunus \vonl\ in a document -*

Where the words of any instrument are free from ambiguity in themselves and where the circumstances of the case have not created any doubt or difficulty as to the proper application of the words to claimants under the instrument or the subject matter to which the instrument relates, such instrument is always construed according to the strict, plain and common meaning of the words themselves. In the instant case, by virtue of clause 3 of exhibit 1 the respondent was at liberty to fix the rate of interest on the loan it granted to the appellant as the respondent deemed fit and it was not bound to adhere to the rate of interest of 11 % agreed at the time of the negotiation for the loan. Consequently, the Court of Appeal was right when it so held. [*U.B.N. Ltd. v. Ozigi* (1994) 3 NWLK (Pt. 333) 385 referred to and followed.] (*Pp. 434-436, paras. E-E; 444, paras. C-E*)

2. *On Whether reliefs claimed in suit constitute part of facts in pleading -*

A relief sought by a party to a suit does not constitute part of the facts in the pleading and it cannot be granted unless there are facts contained in the party's pleading in support of it upon which evidence can be called. In the instant case, the appellant did not plead facts in his statement of claim challenging the validity or legality of the mortgage deed, exhibit 1. Consequently, the declaration sought by the appellant in respect of the validity or legality of the exhibit could not be granted and the Court of Appeal was right when it so **held.** (*P. 438-439, paras. E-A*)

3. *On Dutv on conn not to decide issue not raised by parties in their pleadings -*

A court should not and cannot make a case for the parties different from what they set out in their pleadings. A court should refrain from deciding on any matter not specifically pleaded. In the instant case, both parties agreed that the

consent to the legal mortgage (exhibit 1) was granted by the Governor. In the circumstance, the Court of Appeal was right when it held that there was no controversy between the parties on the Governor's consent and that the trial court was wrong to raise and determine the issue *suo motu*. [*Adebanjo v. Brown* (1990) 3 NWLR (Pt. 141) 661; *Adeniji v. Adeniji* (1972) 4 SC 10; *African 1 Continental Seaways Limited v. N.D.R. & G.W. Ltd. I* (1977) 5 SC 235; *Overseas Const. Co. (Nig.) Ltd. v. Creek Enterprises (Nig.) Ltd.* (1985) 3 NWLR (Pt. 13) 407 referred to.] (*Pp. 439, paras. B-D; 439-440, paras. H-A*)

4. *On Use to which admitted document can be put in a case -*

A court can only use a document properly admitted before it for the purpose for which it was admitted. It is not open to the court to use the document other than for the purpose not intended by the parties as pleaded unless the attention of the court is drawn by any of the parties before it to do so. And even in such a case, the court must invite all the parties before it to address it on the point before making a decision on it. (*P. 439, paras. D-E*)

5. *On What must be specifically pleaded -*

By virtue of Order 25 rule 6(1) of the High Court of Kwara State (Civil Procedure) Rules 1989, a party shall plead specifically any matter for example, *performance, release, any* relevant statute of limitation, fraud, or any fact showing illegality, if not specifically pleaded, might take the opposite party by surprise. In the instant case, both parties agreed that there was consent by the Governor to the legal mortgage. In the circumstance, it would be a surprise to the respondent for the appellant to raise the issue of illegality of the mortgage on ground of lack of consent thereto by the Governor. [*Wayne (W.A.) Ltd. v. Ekwunife* (1989) 5 NWLR (Pt. 122) 422 referred to.] (*P. 439, paras. E-G*)

6. *On Standard of proof required in civil cases -*

All civil cases or claims are proved on the balance of probabilities and the preponderance of evidence, not on proof beyond reasonable doubt. (*P. 440, paras. D-E*)

7a. *On On whom onus of proof lies in civil cases -*

Although the onus of proof in a civil case shifts depending on the nature of the evidence produced, the initial duty is always on the plaintiff to prove his case. In the instant case, although the appellant alleged that his account was wrongly debited by the respondent and that it was in credit, his witness could not adduce credible evidence in support of his allegations. On the other hand, the respondent adduced both oral and documentary evidence of the appellant's indebtedness to the respondent. In the circumstance, the Court of Appeal was right when it set aside the finding of the trial court that the respondent was liable to pay to the appellant sum of N594,517.17 as money standing as credit in favour of the appellant. (*Pp. 440-441, paras. E-G; 443-444, paras. C-A*)

7b. *On Duty on trial court to evaluate evidence and make findings thereon -*

It is the duty of a trial court which saw and heard the witnesses testify and observed their demeanour to evaluate the evidence adduced before it and make findings of fact. (*P. 442, para. H*)

8. *On When appellate court can evaluate evidence adduced at trial -*

Where the evidence adduced before a trial court is documentary and not based on the demeanour or credibility of witnesses, an appellate court is in as good a position as a trial court to evaluate such documentary evidence and draw necessary inferences from it. [*Okpiri v. Jonah* (1961) 1 SCNLR 174; *Laval v. Dawodu* (1972) 8-

- 9 SC 83; *Balogim v. Agboola* (1974) 10 SC 111 referred to.] (P. 443, paras. A-B)
9. *On When appellate court will interfere with finding of fact by trial court -*
An appellate court does not normally disturb a finding of fact made by a trial court except where such finding is shown to be perverse or not supported by evidence. In the instant case, the finding of the trial court that the respondent was liable to pay the appellant a sum of money was unreliable because \ there was no credible evidence on which the finding was made. In the circumstance, the Court of Appeal was right when it set it aside. [*Woluchem v. Gudi* (1981) 5 SC 219 referred to.] (P. 442-443, paras. H-A; 444, paras. A-B)

Nigerian Cases Referred to in the Judgment:

Adebanjo v. Brown (1990) 3 NWLR (Pt. 141) 661
Adeniyi v. Adeniji (1972) 4 SC 10
African Continental Seaways Limited v. N.D.R. & G. W. Ltd. (1977)5SC235
Balogun v. Agboola (1974) 10 SC 111
Lawal v. Dawodu (1972) 8-9 SC 83
Okpiri v. Jonah (1961) 1 SCNLR 174
Overseas Const. Co. (Nig.) Ltd. v. Creek Enterprises (Nig.) Ltd. (1985) 3 NWLR (Pt. 13)407
U.B.N. Ltd. v. Ozigi (1994) 3 NWLR (Pt. 333) 385
Wayne (W.A.) Ltd. v. Ekwunife (1989) 5 NWLR (Pt. 122) 422
Woluchem v. Gudi (1981) 5 SC 219

Nigerian Rules of Court Referred to in the Judgment:

High Court of Kwara State (Civil Procedure) Rules, 1989, O.25 r.6(1)

Appeal:

This was an appeal against the judgment of the Court of Appeal setting aside the judgment of the trial court granting the claims of the appellant. The Supreme Court, in a unanimous decision, dismissed the appeal.

History of the Case:

Supreme Court:

Names of Justices that sat on the appeal: Sulihu Modibbo Alfa Belgore, J.S.C. (*Presided*); Umaru Atu Kalgo, J.S.C. (*Read the Leading Judgment*); Dahiru Musdapher, J.S.C.; Dennis OnyejifeEdozie, J.S.C.; Sunday AkinolaAkintan, J.S.C.

Appeal No. : SC. 125/1996

Date of Judgment: Friday, 18th February, 2005

Names of Counsel: Appellant not represented

Alhaji Aliyu A. Salman SAN, (*with him*, Segun Idowu, Esq.) -*for the Respondent*

Court of Appeal:

Division of the Court of Appeal to which the appeal was brought: Court of Appeal, Kaduna

Names of Justices that sat on the appeal: Umaru Abdullahi, J.C.A. (*Presided*); James Ogenyi Ogebe, J.C.A. (*Read the Leading Judgment*); Mahmmud Mohammed, J.C.A.

Appeal No.: CA/K/1 67/94

Date of Judgment: Thursday, 18th April, 1996

Names of Counsel: Alhaji Aliyu Salman, SAN (*with him*, S.S. Kassim, Esq.) -*for the Appellant*

Yusuf O. Ali, Esq. (*with him*, S.U. Sogberu, Esq.) *-for the Respondent*

High Court:

Name of the High Court: High Court of Kwara State, Omu-Aran

Name of the Judge: Gbadeyan, J.

SititNo.: KWS/129/88

Dale of Judgment: Thursday, 14th April, 1994

Names of Counsel: Akin Olujimi, Esq. *- for the Plaintiff*

Alhaji A.D. Salman, SAN (*with him*, O. Agum, Esq.,

Kayode Akwode, Esq. and Amodu, Esq. *-for the Defendant*

Counsel:

Appellant not represented

Alhaji Aliyu A. Salman, SAN (*with him*, Segun Idowu, Esq.) *-for the Respondent—*

KALGO, J.S.C. (Delivering the Leading Judgment): The action giving rise to this appeal arose as a result of a banker-customer relationship between the parties. The appellant, who was the managing director of a business in the name of Salawal Motor House, maintained a business account with the respondent at its branch in Ilorin, Kwara State. For the purpose of the smooth running of his business, the appellant secured an overdraft facility of N250,000.00 (Two hundred and fifty thousand naira) from the respondent in 1982. Subsequent to the grant of the said facility, the appellant provided by way of security for the loan a legal mortgage on his landed property, a 5-storey building, in Ilorin. The facility was fully utilised by the appellant but was unable to repay the amount as agreed by the parties. The respondent thereafter resorted to realising the amount of the facility plus the accrued interest on the mortgaged property and the appellant contested the move and instituted this action in the trial court in 1988,

In the trial court, the parties filed and exchanged their respective pleadings. By paragraph 29 of the appellant's amended statement J of claim, his claim against the respondent was for:

- i.* Declaration that the mortgage between the plaintiff and the defendant covering the plaintiff's property situate, lying and being at Taiwo Road, Ilorin are illegal, unlawful, unenforceable and irregular.
- ii.* An order selling aside the mortgages.
- iii.* Alternatively, declaration that the defendant is not entitled to sell any property of the plaintiff without complying with the Land Use Act and the Auctioneers Law applicable to Kwara State.
- iv.* Declaration that the defendant is only entitled to charge on the account of Salawal Motor House interest at the rate prevailing when facility was granted to the said Salawal Motor House.
- v.* Declaration that in the absence of a legal mortgage over the business premises of Salawal Motor House at Oke-Ola Iludun-Oro Road, Oro, the defendant is not entitled to sell the said business premises without a court order.
- vi.* Declaration that the debit balance in the account of Salawal Motor House is not a true and accurate reflection of the indebtedness of Salawal Motor House, if any to the defendant.
- vii.* Declaration that the guarantee dated 19th November, 1984 executed by the plaintiff in respect of the indebtedness of Salawal Motor House is invalid, unenforceable, irregular, illegal and null and void.
- viii.* Injunction restraining the defendant by themselves, their agents, servants and or privies or otherwise howsoever from selling the plaintiff's property pursuant to the said

mortgages.

- ix. An order directing the defendant to pay to the plaintiff the sum of N700,000.00 or any amount the court may find the plaintiff entitled to recover from the defendant".

At the trial, the appellant testified on his own behalf and called one witness in support of his case. The respondent called two witnesses who are officials of the respondent's bank in Ilorin in its defence. At the end of the trial, learned counsel for the parties filed their respective written addresses and thereafter the case was adjourned for judgment. On the 14th of April, 1994, the learned trial Judge, Gbadeyan J, delivered a considered judgment in which he granted all the alternative prayers of the appellant and found the respondent liable to pay to the appellant the sum of N594,517.78 with costs of N3,500.00.

The respondent was dissatisfied with this decision and it appealed to the Court of Appeal, which after hearing the appeal, decided to allow it. Consequently, it set aside the judgment of the trial court including the order of costs and dismissed the appellant's case in the trial court. The appellant now appeals against that decision to this court.

Both parties filed and exchanged their briefs as required by the rules of this court. The appellant, identified 3 issues to be determined by the court in this appeal. They read:

- "1. Whether the court below was right to have relied on the decision of this court in *Union Bank of Nigeria Limited Ozigi* (1994) 3 NWLR (Pt. 333) 385 to hold that this present case was on all fours with the earlier case when this was factually not so.
2. Whether the issues of illegality/invalidity of the consent to mortgage contained in exhibit 1 was a new issue raised by the trial court that entitled the court below to set aside the decision of the trial court on the point.
3. Whether the Court of Appeal was right to have tampered with the unassailable findings of fact made by the trial court and whether the appellant did not prove his case as required by law, when the respondent did not answer the salient parts of the appellant's case at the trial court".

The respondent adopted the issues formulated by the appellant with slight modification but the same in substance. I shall therefore consider the issues set out by the appellant in this appeal.

I take issue 1 first. This issue deals with the decision of this court in *Union Bank of Nigeria Limited v. Ozigi* (1994) 3 NWLR (Pt. 333) 385 and whether the ratio of that decision was correctly applied to the instant appeal as being on all fours with it. In the *Ozigi's* case the respondent Professor Albert Ozigi was as in this case, a customer of the appellant Union Bank of Nigeria Ltd. *Q G* (hereinafter referred to as the bank). In 1982, he negotiated and obtained a loan of N250,000.00 from the bank to complete his restaurant. Before he was granted the loan, he had a discussion with the Assistant General Manager of the bank and they agreed on interest of 11% on the loan. The terms of the loan were set out in two deeds H H of mortgage which were admitted in evidence as exhibits 5 and 6, and in each of the mortgage deeds, the rate of interest was contained in clause 3. In the course of repayment of the loan, there was disagreement between the parties on the rate of interest chargeable on the loan. While the respondent insisted that the rate of 11 % earlier

agreed was the only rate chargeable throughout the repayment of the loan, the bank maintained that by virtue of the credit guidelines issued by the Central Bank of Nigeria to commercial banks and the provision of clause 3 of exhibits 5 and 6, the appellant could change the rate of interest on the loan without the consent of the respondent. The respondent Ozigi succeeded in the trial court and in the Court of Appeal but on further appeal to the Supreme Court, the bank was successful.

Clause 3 in each of exhibits 5 and 6, reads:-

"All interest payable on the moneys hereby secured shall accrue due from day to day *at the rate from lime to lime stipulated by the bank* and may be capitalised at such intervals as the bank may from lime to time prescribe but not more often than monthly and added to the moneys hereby secured and shall thereupon bear interest accordingly at the rate aforesaid". (Italics mine)

In the interpretation of clause 3 above, this court applied the general principles of interpretation of instruments and it said:

"The general rule is that where the words of any instrument are free from ambiguity in themselves and where the circumstances of the case have not created any doubt or difficulty as to the proper application of the words to claimants under the instrument or the subject matter to which the instrument relates, such an instrument is always to be construed according to the strict, plain and common meaning of the words themselves; it was wrong to import into clause 3 of the mortgage deeds extraneous matters such as the requirement that the appellant obtain the prior consent of or give prior notice of increase in the rate of interest on the loan to the respondent".

This meant that the appellant in that case, (the bank) was at liberty to fix the rate of interest on the loan as it deemed fit. It was ^{not} bound to adhere to the rate of interest of 11 % agreed at the time of the negotiation for the loan.

Coming back to the instant appeal, it is not in dispute that the appellant accepted a loan of N250,000.00 from the respondent at a negotiated rate of interest of 10%. It was also not in dispute that he executed a deed of legal mortgage (exhibit 1) in favour of the respondent as security for the loan. It is also very clear to me and I am fully satisfied that the content of clause 3 in exhibit 1 in this appeal and that of clause 3 in each of exhibits 5 and 6 in the *Ozigi's* case (*supra*) are identical and the same in all respects. This was as set out in paragraph 4.11 of respondent's brief which was unchallenged by the appellant. Therefore the interpretation of the provisions of clause 3 in those instruments must be the same in both cases. The only difference which I observe between the two cases is that while in the *Ozigi's* case the appeal to the Court of Appeal by the bank failed, in the instant case the appeal by the bank was successful. Also while the negotiated interest rate on the loan (which was the same in each case) was 11% in respect of the *Ozigi's case*, it was only 10% in the instant case. The facts of the *Ozigi's* case are therefore on all fours with the instant appeal.

In both cases discussed above, the construction or interpretation of clause 3 of the mortgage deed set out above was made an issue and therefore the interpretation given by this court in *Ozigi's* case must be binding on the Court of Appeal and must of necessity properly apply to this instant appeal. Therefore the Court of Appeal was right to have relied on the decision of *Ozigi's* case (*supra*) in its application to this appeal. I answer issue 1 in the affirmative.

The 2nd issue deals with the validity or illegality of the mortgage deed in exhibit 1. The question was whether the Court of Appeal was right in setting aside the decision of the trial court on the ground that it was not properly raised by the trial court as an issue at the trial. The answer to this issue must in my respectful view depend entirely on the pleadings of the parties and the supporting evidence on the same. Let me now examine the parties' pleadings before the trial court.

In the amended statement of claim of the appellant the following (paragraphs are relevant:

"6. Accordingly in 1981 the *Governor's consent was obtained* for the purpose of mortgaging the plaintiff's property situate at Oja-lya, along Taiwo Road, Ilorin consisting of five-storey building.

7. The defendant however failed to perfect the mortgage deed until 1984 as a result of which a penalty of over N1,000.00 was imposed by the Government for *late registration* ". (Italics mine)

In the amended statement of defence of the respondent, paragraphs 1, 3 and 5 read thus:

"1. The defendant admits paragraphs 1, 2, 3,4, 5, 6, 16,17, 22 and 23 of the amended statement of claim.

4. In further reply to paragraph 7, of the amended statement of claim, the defendant say that it was the duly of the plaintiff to pursue diligently the completion of the mortgage deed as he is the grantor of the mortgage.

5. In further reply to paragraph 7 of amended statement of claim, the defendant says that she was not aware of any penalty imposed by the Government and no penalty debited to the account of the plaintiff by the defendant".

From paragraph 6 of the appellant's amended statement of claim at the trial set out above, it is very clear from the averment of the 1m appellant himself that the Governor's consent necessary for making exhibit 1 was obtained in 1981. And the respondent in the amended statement of defence in paragraph I set out above, admitted the contents of paragraph 6. Therefore both parties are agreed that the governor's consent was obtained in 1981. The respondent however denied paragraph 7 of the appellant's amended statement of claim concerning the payment of penalty of N 1,000.00 or any amount in respect of late registration as stated in paragraphs 3 and 5 of the amended statement of defence set out above.

I have carefully examined the pleadings of the parties filed and exchanged between the parties at the trial, and I found nothing in either of them where the issue of illegality or invalidity of the legal mortgage exhibit I was raised. Nor do I find any averment therein challenging the said Governor's consent to the mortgage. This to my mind means that the parties did not at the trial join issue on the question of the invalidity or illegality of the legal mortgage exhibit 1.

Learned counsel for the appellant in his brief, relied on paragraphs 26, 27 and 29 of the appellant's amended statement of claim to show where the issue of illegality of exhibit 1 was raised by H the appellant. These paragraphs read as follows:

"26. The plaintiff will further at the hearing contend that any *sale of his property* in breach of the Auctioneers Law of Kwara State, the Land Use Act or during the pendency of this action is invalid, illegal and null and void.

27. The plaintiff will at the hearing contend that the loan/ overdraft granted by the defendant to Salawal Motor House is void and cannot be basis of the liability of the plaintiff to the defendant.

29(1). *Declaration* that (he mortgage between the plaintiff and the defendant covering the plaintiff's property situate, lying and being at Taiwo Road, Ilorin are illegal, unlawful, unenforceable and irregular".

(Italics mine)

A careful look at the contents of paragraphs 26 and 27 above clearly show that no attempt was made whatsoever to challenge the Governor's consent given for the purpose of exhibit 1 and no mention was made of who granted the consent. In paragraph 26, the appellant was challenging the sale of his property mortgaged to the respondent (not the mortgage itself) as being in breach of the Auctioneers Law of Kwara State, Land Use Act or during the trial of the case, as being invalid, illegal, null and void. And paragraph 27, was challenging the validity of the loan/overdraft granted to the appellant by the respondent as being void. These paragraphs therefore had nothing to do with the legality or validity of the legal mortgage itself,

The opening words of paragraph 29 of the amended statement of claim of the appellant at the trial reads:

"WHEREFOR the plaintiff claims as follows against the defendant".

The claims are then set out from (i) - (ix) in separate paragraphs, These are not facts pleaded but are claims which constitute the reliefs which the appellant is praying the court for at the end of the trial. Paragraph 29(i) is one of the prayers or reliefs asked for. It is a *declaration* and is asking the trial court to declare at the end of the case that the mortgage executed by the parties in respect of the appellant's property is illegal, unlawful, irregular and unenforceable. The whole of paragraph 29 is not and cannot constitute any pleading at all as no valid order can be made under it without any facts contained in the pleadings in support of it and upon which evidence can be called. As I said earlier in this judgment, there is no iota of pleading in the appellant's amended statement of claim challenging the validity or legality of the legal mortgage exhibit 1 and so no valid declaration can be made on illegality or invalidity which was not alleged in the pleadings. I agree with the Court of Appeal that the question of the illegality of the legal mortgage did not arise in the pleadings. In fact the learned counsel for the appellant himself stated on page 13 of his brief about the legal mortgage, exhibit 1 that:

"The document was regularly and legally admitted by the trial court without objection".

From the record, it is abundantly clear that both parties agreed that the consent to the legal mortgage was granted by the Governor. And when the legal mortgage was tendered in evidence at the trial, there was no objection whatsoever by the appellant and was admitted as exhibit 1. I therefore agree entirely with the Court of Appeal that there was no controversy between the parties on the Governor's consent and that the trial court was wrong to raise and determine that issue *suo main* as it did. It is trite law that a court should not and cannot make a case for the parties different from what they set out in their pleadings. See *Ad*-banjo v. Brown* (1990) 3 NWLR (Pt. 141) 661 at 675. The court can only use a document properly admitted before it for the purpose for which it was admitted it is not open to the court to use the document other than for the purpose not intended by the parties as pleaded unless the attention of the court is drawn by any of the parties before it to do so. And even in that case, the court must invite all the parties before to address it on the point before making a decision on it. This, in my view is the only legitimate use of the document admitted in evidence in court.

It is also well settled that any allegation of illegality in a case must be pleaded so that the opposing party would not be taken by surprise. See *Wayne (W. Africa) Lid. v. Ekwunife* (1989) 5 NWLR (Pt. 122) 422, (1989) 2 SCNJ 99. In this respect Order 25 rule 6(1) of Kwara State High Court (Civil Procedure) Rules 1989 is relevant. It says:

"A party shall plead specifically any matter for example, performance, release, any relevant statute of limitation, fraud or *any fact showing illegality* which if not specifically pleaded might take the opposite party by surprise". (Italics mine)

In this case both parties agree that there was consent to the mortgage granted by the Governor without more. It would be a great surprise to raise any question of illegality without the allegation specifically made in the pleadings and a court should refrain from deciding on any matter not specifically pleaded. See *Adeniji & Ors v. Adeniji & Ors.* (1972) 4 SC JO at page 17; *African Continental Seaways Limited v. Nigerian Dredging Roads & General Works Limited* (1971) 5 SC 235 at 250; *Overseas Construction Company (Nig.) Ltd. v. K Creek Enterprises (Nig.) Ltd. & An or.* (1985) 3 NWLR (Pt. 13) 407 at 414.

Having made the above findings, I do not intend to go into the details of any law or evidence on the legality or otherwise of the legal mortgage exhibit 1 since it was not challenged in the pleadings, From all what I said above, that there was no pleadings by the parties joining issue on the validity or legality of the legal mortgage exhibit 1 and that the

Court of Appeal was right in holding that the trial court was wrong in picking up that issue *suo motu* and making a decision on it. The Court of Appeal was therefore right in setting aside that decision. In the circumstances, I also answer this issue in the affirmative.

The 3rd issue is the last to be determined in this appeal. It deals with the evidence produced by the parties at the trial and the findings made thereon by the trial court and questioned whether the Court of Appeal was right to have interfered with those findings.

It is the general and accepted principle of law that all civil cases or claims are proved on the balance of probabilities and the preponderance of evidence not on evidence beyond reasonable doubt. And although the onus of proof shifts depending on the nature of the evidence produced, the initial duty is always on the plaintiff to prove his case. In this case, the appellant, who was the plaintiff at the trial, called one witness (PW1) and he gave evidence himself in support of his case. The respondent called 2 witnesses who are staff of the bank in their defence.

Both PW1 and the plaintiff testified on the contents or entries in the plaintiff's statement of account produced by the respondent (exhibit 3). They both elicited some cheques and their numbers which were allegedly entered either twice or thrice in exhibit 3 on different dates with different amounts. But PW1 and the plaintiff were not in full agreement with the numbers of the cheques affected. Whereas PW1 listed 11 cheques, the plaintiff listed only 3 (exhibits 7, 8 and 9) which he called special cheques bearing the name of his company Salawal Motor House. He relied on the findings of PW1 on exhibit 3 and denied owing N367,785.82 to the respondent.

PW1, a chartered accountant who examined the appellant's statement of account (exhibit 3) said he found multiple, double and in some cases triple entries of same cheques in exhibit 3. and said that "the total of all such double and triple entries is N680,861.83). He did not explain how he came by that total amount in his evidence. If the sum of N680,861.83 is the total amount of all the double and triple entries in exhibit 3, and only one entry is the correct and normal one, which amount represented the correct entries in exhibit 3. This has not been explained by PW1 who also admitted in his testimony that there are other entries in exhibit 3 which he could not challenge because according to him, "we did not audit Salawal Motor House". PW1 also said in his testimony that:

"The account of the plaintiff should be in credit. I can compute the balance. It amounts to N594,517.78 credit in favour of the plaintiff.

Here again, PW1 did not explain how he came to arrive at the figure of N594,517.78 in favour of the appellant. He did not prove to the court how he computed the balance to get this amount, and there is nothing to support it. And as I said earlier the appellant who was PW2, completely relied on the evidence of PW1 on this amount apart from denying liability to the claim of the respondent for N367,785.82 or any amount at all.

DWs 1 and 2 in their testimony flatly denied any double or triple entry in exhibit 3 and that at no time did the appellant complain to the respondent or any of its staff of any such entries in his account, the statement of which has regularly been given to him. They both confirmed the grant to the appellant of the loan facility of N250,000.00 in 1981 by the respondent which has not been repaid. In the circumstances, the appellant has not proved how he repaid the loan facility granted to him and how he made an excess of N594,517.78 credit in his favour. It is therefore not correct as the trial court found that the evidence of PW1 to the effect that the amount of N594,517.78 said to be in credit in favour of the appellant was unchallenged. In my view, that evidence seems to me to be speculative as held by the Court of Appeal and cannot be relied upon in law. I therefore find that the Court of Appeal was right to have tampered with the findings of the trial court on this issue. I resolve this issue against the appellant.

Having resolved all the 3 issues for determination in this appeal against the appellant, I find no merit in this appeal. I accordingly dismiss the appeal and affirm the decision of the Court of Appeal. I award N10,000.00 costs against the appellant in favour of the

respondent.

BELGORE, J.S.C.: I read in advance the judgment of my learned brother, Kalgo, JSC and I am in full agreement with his reasonings and conclusions. I adopt his judgment as mine in dismissing this appeal as totally lacking in merit. I award the respondent N10,000.00 costs for this appeal.

MUSDAPHER, J.S.C.: I have had the honour to read in advance the judgment of my Lord Kalgo, JSC just delivered with which I entirely agree. For the same reason contained in the aforesaid judgment, which I adopt as mine, I too dismiss the appeal and abide by the order for costs contained in the aforesaid judgment.

EDOZIE, J.S.C.: The plaintiff/appellant had borrowed from the defendant/respondent bank his banker the sum of N250,000 for running his business and as a collateral for the loan, he mortgaged his property at Ilorin to the bank, which maintained a business account with the appellant. The entries in that account were disputed by the parties. Apprehensive that the bank was about to sell the mortgaged property, the appellant initiated the present action to forestall the sale alleging, *inter alia*, the invalidity of the mortgage deed, wrongful charging of interest rate on the loan, double and triple debit entries in the account and a claim of credit balance. The trial Judge entered judgment in his favour but this was reversed by the Court of Appeal.

One of the three issues agitated in this appeal in the briefs of the parties is:

"Whether the Court of Appeal was right to have tampered with the unassailable findings of fact made by the trial court and whether the appellant did not prove his case as required by law, when the respondent did not answer the salient parts of the appellant's case at the trial court."

Admittedly, it is the duty of a trial court which saw and heard the witnesses testify and observed their demeanours to evaluate the evidence adduced before it and make findings of fact. An appellate court should not normally disturb such findings of fact made by the trial court except where such findings are shown to be perverse or not supported by evidence: see *Woluchem v. Gudi* (1981) 5 SC 291 at 326. Where the evidence adduced before the trial court is documentary and not based on the demeanour or credibility of witness, the appellate court is in as good a position as the trial court to evaluate such documentary evidence and draw the necessary inferences: see *Okpiri v. Jonah* (1961) 1 SCNLR 174; (1961) All NLR 102 at 104-105; *Lawa I v. Dawodu* (1972) 8-9 SC 83; *Balogun v. Agboola* (1974) 10 SC 111 at 118.

In the instant case, the bank tendered its statement of account with the appellant as ex. 3 and this showed that the appellant had a debit balance. For the appellant to succeed in his claim, the onus was upon him to falsify that account. He called PW1 a chartered accountant who as an expert witness gave evidence on some of the entries in ex. 3. The trial court relied heavily on his evidence in upholding the appellant's claim. In rejecting the findings of the trial court, the court below at p.326 of the record held:

"I have examined the record of proceedings and the testimonies of the parties very carefully and I have found that PW1 the chartered accountant who gave copious evidence in support of the respondent's claim did so on the basis of documents and account books given him to analyse. Under cross-examination he candidly admitted that some of his conclusions were based on half knowledge. For example at p. 102 of the printed record, he said as follows under cross-examination:

'As an expert, I am not in a position to say if Salawal Motor House did any transaction to justify that debit, because we were not auditing Salawal's Motor House'.

Indeed from pages 102 to 104 he admitted several times under cross-examination that his report was based largely on guess work as he did not have full information to support his conclusion. It is my firm view that the case of the respondent before the trial court was largely speculative and that court was wrong in giving judgment in his

favour. If the court had properly considered exh. 1, the mortgage deed, it would have had no hesitation in dismissing the respondent's claim."

The substance of the above excerpt is that there is no evidence to support the findings of the trial court as the evidence upon which the findings were made was unreliable. I have examined the records carefully and I take the view that the court below cannot be faulted.

In the light of the foregoing and for the more comprehensive reasons set out in the lead judgment of my learned brother, Kalgo, JSC which I endorse as mine, I also dismiss the appeal with costs as ordered in the lead judgment.

IAKINTAN, J.S.C.: I had the privilege of reading the draft of the leading judgment just delivered by my learned brother, Kalgo, JSC. He has fully discussed all the issues raised in the appeal and I entirely agree with his reasoning and conclusion that the appeal lacks merit.

The facts of the case are similar to those in *Union Bank of Nigeria Ltd. v. Ozigi (1994)* 3 NWLR (Pt. 333) 385 which had earlier been decided by this court. The appellant has not been able to show why the principle of law decided in that case should not be followed. As I too cannot see any reason why the decision should not be followed, I hold that there is no merit in the appeal and accordingly dismiss it. I make similar order on costs as made in the leading judgment.

Appeal dismissed