**BIOSOLA NIGERIA LIMITED & ANOR**

**V.**

**MAINSTREET BANK LIMITED & ORS**

IN THE COURT OF APPEAL OF NIGERIA

ON THURSDAY, THE 28TH DAY OF NOVEMBER, 2013

CA/L/890/07

**LEX (2013) - CA/L/890/07**

OTHER CITATIONS

3PLR/2016/7 (CA)

(2013) LPELR-22062 (CA)

**BEFORE THEIR LORDSHIPS**

AMINA ADAMU AUGIE, J.S.C

JOSEPH SHAGBAOR IKYEGH, J.S.C

CHINWE EUGENIA IYIZOBA, J.S.C

**BETWEEN**

1. BIOSOLA NIGERIA LIMITED

2. ELUWOLE DOSU ELUYEMI Appellant(s)

AND

1. MAINSTREET BANK LIMITED

2. REGISTRAR OF TITLES LAGOS STATE

3. ATTORNEY GENERAL LAGOS STATE

4. GOVERNOR OF LAGOS STATE Respondent(s)

**ORIGINATING COURT(S)**

HIGH COURT OF LAGOS STATE, IKEJA JUDICIAL DIVISION (ONYEABO J., Presiding)

**REPRESENTATION**

O. A. OLUGASA Esq. - For Appellant

AND

ADEKUNLE ADENIYI Esq., for the 1st Respondent

S. Y. KOLAWOLE (Mrs) for the 2nd - 4th Respondents - For Respondent

**ISSUES FROM THE CAUSE(S) OF ACTION**

BANKING LAW – BANKER-CUSTOMER RELATIONSHIP: Whether customers are entitled to have their money back on demand

BANKING LAW - OVERDRAFT OR LOAN AGREEMENT: Existence of legally binding agreement between the parties to grant credit facilities – How determined

**PRACTICE AND PROCEDURE ISSUES**

ACTION - AVERMENTS IN PLEADINGS: Whether can take the place of concrete evidence in proof of the averments

ACTION **-** WAIVER: Meaning of

APPEAL - FRESH EVIDENCE: Discretion of court in allowing fresh evidence - Order 4 Rule 2 of the Court of Appeal Rules, 2007

COURT - DUTY OF COURT: Admission of fresh evidence ex improviso - Whether may be admitted in the interest of justice by a court under its equitable jurisdiction - Guiding principles thereof

COURT - RECORD OF PROCEEDINGS: Whether the court is bound by the record of proceedings

COURT:- Appellate jurisdiction - Whether a court exercising appellate juridiction is generally precluded from taking evidence

EVIDENCE - ADDRESS OF COUNSEL: Whether counsel's address can be a substitute for credible evidence

EVIDENCE - ADMITTED FACTS: Whether facts admitted need no further proof

EVIDENCE - CALLING OF EVIDENCE: Whether the court can interfere with the calling of evidence by counsel

EVIDENCE - ONUS OF PROOF: Repayment or Liquidation of admitted indebtedness – On whom rests

EVIDENCE - ORAL EVIDENCE: Whether can be allowed to contradict contents of a document

**MAIN JUDGMENT**

**CHINWE EUGENIA IYIZOBA, J.C.A**. (Delivering The Leading Judgment):

This appeal is against the judgment of ONYEABO J. of the High Court of Lagos State, Ikeja Judicial Division in suit No. ID/2016/2000 delivered on the 6th day of November, 2006 wherein the Court dismissed the Appellants' claims and granted the reliefs sought by the 1st Respondent in its Counter-Claim.

The reliefs claimed by the Appellants in their Further Amended Writ of Summons and Further Amended Statement of Claim are as follows:

a. A DECLARATION that the 1st Defendant's offer letter to the 1st Plaintiff dated 8/11/96 is wrongful, invalid, null, void, of no effect whatsoever and unenforceable.

b. A DECLARATION that there is no loan or credit facility or overdraft agreement between the 1st Plaintiff and the 1st Defendant in respect of the imported chemical covered by the Approved Form M application no. MA 085374 dated 4/7/96 and the documentary letters of credit no. L/029/00030/96/IFEM dated 2/8/96.

c. A DECLARATION that the 2nd Plaintiff's Certificate of Occupancy registered as No 45 at Page 45 in volume 1995N in the Lands Registry office at Ikeja, Lagos in respect of 2nd Plaintiff's property situate and known as No. 10, Ogo-Oluwa Street, (formerly Plot 3, Aboyade Karaole Estate) Off Olaniyi Street, New Oko-Oba, Agege, Lagos and on 2nd Plaintiff's 75 (seventy-five) share certificates in respect of 2nd Plaintiff's shares in 13 (Thirteen) quoted companies in Nigeria submitted to 1st Defendant were submitted to 1st Defendant by the Plaintiffs as proposed collaterals or proposed securities pursuant to 1st Plaintiffs applications to 1st Defendant for loan or credit facility dated 27/5/99 and 1/7/96 which were not granted by the 1st defendant to the 1st Plaintiff.

d. A DECLARATION that the imported chemical covered by the Approved Form M Application and the Documentary Letters of Credit respectively dated 4/7/96 and 2/8/96 is a joint venture transaction between the 1st Plaintiff and the 1st Defendant to all intents and purposes.

e. A DECLARATION that the Tripartite Deed of Legal Mortgage executed by the 1st Defendant on the 2nd Plaintiff's property covered by Certificate of Occupancy registered as No. 45 at Page 45 in volume 1995N of the Lands Registry at Alausa, Ikeja, Lagos State is invalid, null and void and unenforceable against the 2nd Plaintiff.

f. A DECLARATION that the sale and disposal of the 2nd Plaintiff's shares in paragraph 64(c) in the Further Amended Statement of Claim by the 1st Defendant without the knowledge of the Plaintiffs is wrongful, and lacks legitimate basis as it was carried out of mala fide.

g. An Order compelling the 1st Defendant to return or restore all the aforesaid shares to the 2nd Plaintiff and all the bonus shares/scripts declared and or credited or accrued on the said shares as from the profits of the year 1997 till the date of judgment and thereafter until finally returned/restored to the 2nd Plaintiff.

h. An Order compelling the 1st Defendant to refund or restore to the 2nd Plaintiff all the accrued dividends declared and paid on all the shares from the profits of the year 1997 to the date of judgment and accrued interest thereon at 21% p.a. from January 1999 to the date of judgment and thereafter at 21% p.a. until final payment.

i. A DECLARATION that the 1st Defendant is not entitled to any payment from the Plaintiffs in respect of the aforesaid agreement dated 8/11/96

j. IN ALTERNATIVE an order for the reconciliation of the account of the 1st Plaintiff with the 1st Defendant.

k. A DECLARATION that the 1st Defendant is not entitled to the statutory rights of occupancy over the property situate at No. 10, Ogo-Oluwa Street (formerly known as Plot 3 Aboyade Karaole Estate) Off Olaniyi Street, New Oko-Oba, Agege, Lagos State and registered as No. 45/45/1995N at the Land Registry, Ikeja, Lagos State.

l. An Order compelling the 1st Defendant to return to the Plaintiffs the Certificate of Occupancy No.45/45/1995N deposited with the 1st Defendant.

m. A PERPETUAL INJUNCTION restraining the 1st Defendant either by itself or acting through its agent from selling and or disposing of 2nd Plaintiff's property covered by Certificate of Occupancy registered as No. 45 at Page 45 in Volume 1995N of the Lands Registry at Alausa, Ikeja, Lagos State which said property situate at No. 10, Ogo-Oluwa Street (formerly known as Plot 3 Aboyade Karaole Estate) Off Olaniyi Street, New Oko-Oba, Agege, Lagos State.

n. A PERPETUAL INJUNCTION restraining the 2nd - 3rd and 4th Defendants their agents, servants or privies from processing, treating and or granting the 1st Defendant application for Governor's Consent in respect of the property covered by the instrument registered as No.45/45/1995N at the Land Registry, Ikeja, Lagos State.

o. The sum of N2,151,145.00 (Two Million One hundred and Fifty-One Thousand One Hundred and Forty-Five Naira only) as special damages against the 1st Defendant.

The 1st Respondent in its further amended statement of defence denied the above claims and counterclaimed as follows:

"24(a). The sum of N970,693.40 (nine hundred and seventy thousand, six hundred and ninety three naira forty kobo) (as at 18th March 2000) being the outstanding principal and accrued interest on the overdraft facility and short term working capital granted to the claimant in 1996.

(b). Interest at the rate of 21% per annum from 19th March 2000 until judgment sum is fully paid.

ALTERNATIVELY

(c). An order for the 1st Defendant to sell the property situate at plot 3 Aboyade Karaole Estate, off Olaniyi Street, New Oko-Oba Agege, Lagos pledged by the 2nd claimant as security for the facilities granted to 1st claimant which is covered by a Deed of Legal Mortgage dated 18th June 1998..."

The Appellants filed a reply and a defence to the 1st Respondent's counter claim. The 2nd to 4th Respondents did not file any defence and did not participate in the trial. From the pleadings the facts leading to this suit may be summarized thus:

The Appellants who had a fixed deposit of N300.000.00 with the 1st Respondent applied for banking facility from the 1st Respondent by a hand written letter dated 1/7/96 at page 109 of the record. The Appellants in the hand written letter indicated that they deposited with the bank amongst other documents, a Certificate of Occupancy and share certificates. The bank then opened letters of credit in favour of the Appellants following the usual procedure of paying the importers through the CBN under the existing CBN regulations. The form M was duly signed by the 2nd Appellant. The 1st Respondent in opening the letters of credit utilized the Appellant's fixed deposit of N300,000.00 along with the facility granted by the bank to complete the required amount. The goods arrived and where warehoused by the Appellants. Subsequently documentation in respect of the facility granted by the bank was duly completed. The Appellants defaulted in repaying the facility despite repeated demands by the 1st Respondent. Eventually, the 1st Respondent sold off the 2nd Appellant's shares in some companies comprised in the share certificates deposited with the bank. The amount realised from the sale was insufficient to cover the Appellants' indebtedness. The outstanding balance continued to attract interest. When the 1st Respondent tried to realize the outstanding sum by resorting to the tripartite deed of legal mortgage, the Appellants instituted this suit. In spite of signing the form M and taking delivery of the goods, the Appellant claimed that the 1st Respondent carried out the transaction relating to the opening of the letters of credit unilaterally and without their consent. They claimed that they were not indebted to the 1st Respondent for any amount because the arrangement between the parties was a joint venture agreement and that the sale of the 2nd Appellants shares was done mala fide and without their consent. At the hearing, the 2nd Appellant testified on behalf of the Appellants while the 1st Respondent called one witness. The learned trial Judge in his judgment at pages 574 - 589 of the Record dismissed the Appellants claims and granted the main reliefs sought by the 1st Respondent in its counter claim. Dissatisfied with the judgment the Appellants appealed to this Court. The amended notice of appeal contained five grounds of appeal. The parties subsequently exchanged briefs. The initial brief of the Appellant settled and filed by Prince F. E. O. Adewuyi was 138 pages contrary to Order 18 Rule 3(6) of the Court of Appeal Rules that except by order of the Court a brief shall not exceed 30 pages of size A4 paper with typeset in Arial, Times New Roman or Verdana of 12 points with at least single spaces in-between. When Counsel's attention was called to the error, he simply went back and condensed almost the entire 138 pages into 30 pages of Arial Narrow of 11 points without any space in-between, and the Reply brief in like manner into 22 pages. Clearly, this defeats the purpose of Order 18 Rule 3(6). Briefs are supposed to be concise, to the point and easy to read. I was constrained to seek for the soft copies of the Appellants' briefs to enable me put the briefs in a state where they can be easily read. Counsel should please endeavour to read the Rules and comply with the directives. The Registry ought not to have accepted the brief for filing.

In his voluminous brief for the Appellants Prince Adewuyi distilled three issues for determination. The issues are:

i) Whether the learned trial judge was right when he held that there was a loan agreement based on EXHIBIT B5 in the absence of other elements that are precedent to a valid loan contract. (Ground 1 of the Amended Notice of Appeal).

ii) Whether the purported Tripartite Deed of Legal Mortgage (EXHIBIT R1) was properly executed and admissible in evidence; and if not whether the trial Judge was right to have concluded that the doctrine of waiver would apparently apply with respect to any perceived anomaly. (Grounds 2 and 3 of the Amended Notice of Appeal).

iii) Whether from the totality of the evidence adduced by both parties the learned trial judge came to a right decision by dismissing the Appellant's claim and granting the reliefs sought by the 1st Respondent in its Counter-Claim. (Grounds 1, 2, 3 & 4 of the Amended Notice of Appeal).

The 1st Respondent in its brief settled by Adekunle Awodiji Esq also formulated three issues thus:

"1. Whether Ground 2 giving rise to new or fresh issues not canvassed at the Court below (sic) are competent"

2. Whether the learned trial judge was right to have admitted and relied upon Exhibit B5 (Letter of offer) and Exhibit R1 (Tripartite Deed of Legal Mortgage) in dismissing the Appellant's claims and giving judgment in favour of the 1st Respondent."

3. Whether the judgment of the learned trial judge delivered on the 6th of November, 2006 was right in view of the totality of evidence before the court"

The 1st Respondents issue 2 encompasses the Appellant's issues i and ii while their issue 3 are basically the same. The 1st Respondent's issue 1 was dealt with by the Appellants in their Reply brief. I shall therefore adopt the 1st Respondent's issues in the determination of this appeal.

ISSUE ONE:

"Whether Ground 2 giving rise to new or fresh issues not canvassed at the Court below (sic) are competent?"

On this issue Mr Adekunle Awodiji for the 1st Respondent contended that it is trite Law that an Appellant will not be allowed to raise, for the first time on appeal, a point of Law or issue which was not canvassed at the Trial Court for the Trial Judge to rule on or pronounce upon except with the leave of the Appellate Court. Counsel argued that in the absence of such leave, the ground of appeal must be struck out. He relied on the cases of DAGACI of DERE & ORS V. DAGACI of EBWA & ORS (2006) ALL FWLR (pt.306) 786 at 841E, ABRAHAM SAKARI V. BAKO KUNINI & ANOR (2000) FWLR (Pt.18) 309 at 319 E-H and ENGINEER VASIL VASSILEW Vs. PAAS INDUSTRIES (NIG) LIMITED & 2 ORS (2000) FWLR (Pt.18) 418 at 428 B-C. Counsel submitted that the issue of whether the Tripartite Deed of Legal Mortgage (Exhibit R1) was properly executed and admissible in evidence was not canvassed in the lower court and could not therefore be raised at the appeal stage without the leave of the court. Counsel consequently urged the Court to strike out Ground 2 of the Amended Notice of Appeal and the issue arising therefrom as incompetent Prince F. E. O. Adewuyi for the appellant responded to this issue in his reply brief. He contended that Ground 2 of the Appellants' amended notice of appeal does not constitute new or fresh issues. He submitted that the fact that the purported tripartite deed of legal mortgage EXHBIT R1 was not properly executed and therefore inadmissible in evidence was fully canvassed at the trial court in paragraph 7 of the Appellants' final Address. Counsel argued that it was submitted by the Appellants Counsel at the trial court that EXHIBIT R1 was "a fraudulent misrepresentation", "an untrue statement made (i) knowingly, or (ii) without belief in its truth or (iii) recklessly careless whether it be true or false" - Derry Vs Peek (1889) 14 App. Case. 337. He urged the court to strike out 1st Respondent's issue no. 1 and to expunge Exhibit R1 as improperly admitted at the hearing.

At this point it is necessary to reproduce ground 2 of the amended notice of appeal:

"The learned trial judge erred in law when she held:

"Now with regard to the tripartite deed of legal mortgage the evidence before the court is clear and unambiguous......There is also the evidence ...wherein the Claimant Witness 1(sic) admitted in clear terms that he executed a tripartite deed of legal mortgage - EXHIBIT R1... In view of such admission, and without any evidence tending to vitiate the agreement of parties, the finding of the court is that the mortgage agreement EXHIBIT R1 is valid and enforceable between the parties."

(Page 11 of the judgment)

PARTICULARS OF ERROR

i. The evidence of the CW1 is that he signed a blank deed of legal mortgage.

ii. The purported deed of legal mortgage marked as EXHIBIT R1 fell short of the requirements of a valid deed of legal mortgage for the purpose of its enforcement in the circumstances of the case.

iii. Being a public document EXHIBIT R1 ought to be certified to be admissible in this case.

iv. The Claimants never received a copy of the deed and therefore had no notice of the full content of the deed.

v. EXHIBIT R1 is such that the court ought to expunge or discountenance it where it falls short of the requirements for its validity.

vi. There is evidence before the court that the deed was as of the date the suit was instituted not registered."

The claim of the 2nd Appellant that he signed a blank deed of legal mortgage is more or less a claim that the legal mortgage was not properly executed. Learned counsel for the 1st Respondent, with due respect is consequently wrong in his contention that the above ground 2 raised new issues not canvassed in the Lower Court. The issue was raised by the Appellant both in his pleadings and in his written address at the lower court. See Appellant's written address at Paragraph 7.02(25) at page 541 of the Record - paragraph 7.02 (25) (3). The learned trial Judge resolved the issue as set out above. Ground 2 of the amended notice of appeal is competent. Issue 1 is consequently resolved against the 1st Respondent and in favour of the Appellant.

ISSUE 2:

"Whether the learned trial judge was right to have admitted and relied upon Exhibit B5 (Letter of offer) and Exhibit R1 (Tripartite Deed of Legal Mortgage) in dismissing the Appellant's claims and giving judgment in favour of the 1st Respondent."

On this issue, learned counsel for the Appellants submitted relying on the cases of ORIENT BANK (NIG.) PLC V. BILANTE INT'L LTD (1997) 8 NWLR (Pt.515) 37 at 76 and OKUBULE V. OYEBOOLA (1990) 4 NWLR (Pt.147) 723 that the law is trite that for a valid loan contract as usual with other contracts to be valid there must be a meeting of minds of the parties. Counsel submitted that the evidence before the trial court clearly showed that the parties in this appeal had different things In mind at different times. Counsel argued that their minds never met in terms of purpose and intention. Whereas the Appellants awaited the offer letter from the 1st Respondent to their application for a loan and for which purpose they had deposited their security and signed blank deed of mortgage, the 1st Respondent had taken steps to spend the loan being applied for on the request without the knowledge of the Appellants who only got to know at the point of importation of the chemical. Learned counsel submitted that the law established the mode of contracting for the species of loan contract such as is involved in this case. He argued that loans are required by section 4 of the Statute of Fraud to be written (i.e. executed by a deed). Pursuant to that, Section 13(1) of the Moneylender's Law Cap M7 Laws of Lagos State, 2003 requires as a mandatory precedent to issuance of any loan a memorandum in writing of the contract to be made and signed by the parties and the memorandum delivered to the borrower within seven days of execution. Counsel submitted that the trial court erred in its conclusion that EXHIBIT B5 was a valid loan agreement when it was a mere offer which cannot be deemed a contract. Learned counsel contended that the deposit of certificate of occupancy and the share certificates by the 2nd Appellant and the signing/execution of the blank tripartite mortgage deed as shown by evidence of CW were all part of invitation to treat, to negotiate and persuade the 1st Respondent to make the requisite offer. Counsel further submitted that Exhibit B5 was not only void but that the offer was also not accepted or utilized by 1st Appellant for which reason the Appellants are entitled to the reliefs claimed.

On Exhibit R1, learned counsel submitted that the law is trite that for a duly executed deed of legal mortgage to be enforceable it must among other things fulfill the condition in Section 22 of the Land Use Act, 1978, that is, the Governor's consent must be obtained. SAVANNAH BANK LTD V. AJILO (1989) NWLR 305; UNION BANK V. AYODARE & SONS (2007) 45 SCNJ 181; AND ORUMWENSE V. AMU (2008) Vol. 41 WRN 154 at 177 lines 15 - 20 (CA); BROSSETTE MANUFACTURERS NIGERIA LTD V. M/S O.I. LTD (2007) WRN (VOL.44) 88 at 113-114, lines 40-15 (SC) or (2007) 5 SC 84

It was further submitted that EXHIBIT R1 qualifies as an instrument and that the Court held in the case of ATM LTD V. BVT LTD (2007) 1 NWLR (PT.1015) 259 AT 302 that:

"Once a document qualifies as an instrument, it must be registered. An instrument affecting any land which is registrable but not registered cannot be pleaded and given in evidence and if pleaded, would be inadmissible and liable to be expunged or ignored."

Counsel submitted that EXHIBIT R1 ought to have been rejected or ignored by the trial court since it is an instrument that failed to meet the requirements of the law. Counsel further contended that under section 109 of the Evidence Act (now section 102 of Evidence Act 2011) Exhibit R1 is a public document and therefore ought to be certified to be admissible in this case. He argued that the law is settled that for such a public document to be admissible if it is indeed registered, it is only a certified true copy of it that can be admissible. Learned counsel concluded by urging the court to hold that Exhibits B5 and R1 are illegal and unenforceable.

Learned counsel for the 1st Respondent in their brief of argument submitted that that the Learned Trial Judge was right to have admitted and relied upon Exhibit B5 (Letter of Offer on pages 121-122 of the Records) and Exhibit R1 (Tripartite Deed of Legal Mortgage on pages 271-283 of the Records) in dismissing the Appellants' Claims and giving Judgment in favour of the 1st Respondent. Counsel further submitted that Exhibits B5 and R1 were never denied nor were their contents contradicted by the 2nd Appellant during his evidence before the Trial Judge. Similarly, the contents of Exhibits B5 and R1 were not debunked by way of Cross-Examination or even by the Defence to the 1st Respondent's Counter- Claim at the Trial Court. Learned counsel relying on the case of MOROHUNFADE & ANOR V. ADEOTI (1997) 6 NWLR (pt.508) 326 at 338 B-C submitted that where evidence that is relevant to the issues in a case were not debunked, such evidence ought to be accepted as reliable and credible. Learned counsel submitted that the Learned Trial Judge was right to have admitted and relied upon Exhibits B5 and R1 in reaching a decision as the Appellants had full and ample opportunity at the trial Court to challenge the admissibility of the said Exhibits but failed to do so. Counsel further contended that Exhibit B5 was accepted and acted upon by the 2nd Appellant which culminated in the Appellants utilizing the facility granted vide Exhibits B5 to import Chemicals from abroad, cleared the Chemicals when it arrived and kept the Chemical in the 1st Appellant's warehouse. There was thus a mutual agreement between the Appellants and the 1st Respondent as regards granting a loan to enable the 1st Appellant import Chemicals.

Counsel also submitted relying on - R. BENKAY (NIGERIA) LIMITED V. CADBURY (NIGERIA) PLC (2003) FWLR (Pt.14) 2342 at 2350 and ZAKHEM CONSTRUCTION NIGERIA LIMITED V. NNEJI (2003) FWLR (Pt.143) 298 at 311 A-B that parties are bound by the provisions of the agreement between them. Thus, any purported variation, additions or deductions are irrelevant unless agreed to by both parties. In effect, parole evidence is not admissible to vary a written agreement. On how a contract is ascertained counsel referred to the dictum by Achike JSC in SPARKLING BREWERIES LIMITED & ORS V. U.B.N. LIMITED (2001) FWLR (PT.71) 1682 Paras. F-G.

Learned counsel urged the court to uphold the contents of Exhibits B5 and to also hold that the Learned Trial Judge was right to have admitted and relied upon the Exhibit to determine the Case at the Lower Court. In respect of Exhibit R1, learned counsel submitted that the Learned Trial Judge was right to have admitted and relied upon the Exhibit as contrary to the submissions of Appellants in their brief of Argument Exhibit R1 was legally registered and the ORIGINAL COPY of the Tripartite Legal Mortgage voluntarily and unconditionally executed by the Appellants and the 1st Respondent. Counsel submitted that Exhibit R1 satisfied the provisions of Section 86 (1) and 88 of the Evidence Act being the original and not a copy. He urged the court to so hold.

On this issue a good starting point in the resolution is to determine whether the learned trial Judge was right in holding that there was a valid loan agreement between the parties. In his judgment at page 577 of the Record, the learned trial Judge observed:

"....It is canvassed on behalf of the Claimants that there was no loan agreement between the parties because the 1st defendant's letter of offer Exhibit A7 was written and received in November 1996 after the chemical had been ordered and had in fact arrived Nigeria. It was also argued that because of certain anomalies and conduct of the 1st Defendant, what existed between the parties was a joint venture agreement. It was further contended that the sale of shares of the 2nd Claimant by the 1st Defendant was done without the consent of the Claimants and therefore illegal.

The evidence of Claimant Witness 1 in paragraphs 10, 11, 15 and 22 of his evidence sworn to on 17 November 2004 is relevant. Witness testified inter alia that by Exhibit A7, 1st Claimant applied for a loan facility from the 1st Defendant. Apparently, this was not the first attempt - See Exhibit 42 which did not yield result. In Exhibit A7, certain documents were listed as being forwarded in respect of the application - see Exhibits A6 (Valuation Report on the property of 2nd Claimant offered as part of the collateral for the loan), Exhibit A5 (Certificate of Occupancy in respect of said property); and Exhibit A3 (covering letter in respect of Share Certificates of 2nd Claimant).

Exhibit B5 tendered by the Claimants is the copy of 1st Defendant's letter in response to Claimant's letter of application Exhibit A7. As can be observed Exhibit A7 is dated 1st July 1996 while Exhibit B5 is dated 8th November 1996 and was received on 25 November 1996 as endorsed thereon - said facts are uncontested. Exhibit B3 is the covering letter dated 23 July 1996 referred to by Claimant witness in paragraph 15 of evidence in chief sworn to on 17 November 2004. In that Exhibit B3, Claimants referred to the loan application (Exhibit A7) and stated inter alia that they (Claimants)

"have delivered the documents for the collaterals, and have signed all official documents relating to the two types of collaterals offered by us...."

It is to be noted that Exhibit A7 (application for loan facility) stated the purpose for which the facility was sought as follows:

"(a) overdraft facility

(b) import finance facility"

Subsequently and on the directives of the 1st Defendant, Claimants filed and signed Form M dated 4th July 1996 (Exhibit B2) and submitted along with same an application for opening Documentary credit dated 8/7/96 (Exhibit B1) to 1st Defendant. Exhibit B is an incorrect application for documentary credit - see generally paragraphs 11 and 12 of evidence on oath of claimant witness. Apparently, and without any further or formal offer, foreign exchange was purchased, documentary letters of credit established and an order for a consignment of industrial chemical was placed with the Claimants overseas supplier by the 1st Defendant.

The evidence of the Claimant's witness is also to the effect that the Claimants received debit in the sum of N669,209.21k (see Exhibit C and C1 and paragraph 13 of evidence in chief). Moreover it is in evidence that the overseas supplier contacted the claimants, confirming the order and notified of the scheduled date of the arrival of the consignment of the chemicals see paragraphs 16 and 17 of the evidence deposition of 17 November 2004. Claimants' witness further gave evidence during cross-examination that the said cargo did arrive and that Claimants took delivery of same and took them into their warehouse. However, the offer of the credit facility Exhibit B5 dated 8 November 1996 and received on 25 November 1996 was received after the consignment had arrived. The 1st Defendant does not deny the said fact but maintained that all the steps it took was in furtherance of the loan agreement and on behalf of the Claimants.

From all the above, the conclusion which is inescable is that there was a loan agreement between the parties in the terms stated in Exhibit B5 and in furtherance of which documentary letters of credit were opened.... It is my view in the circumstances that the agreement between the parties was that captured and described in Exhibit B5 notwithstanding that same had not been received before the order for the consignment was placed.

The reasoning of the learned trial Judge in my view cannot be faulted. In the case of SPARKLING BREWERIES LIMITED & ORS V. U.B.N. LIMITED (2001) FWLR (PT.71) 1682 Paras. F-G which learned counsel for the 1st Respondent referred to Achike JSC of blessed memory observed:

"Whether or not there is a semblance of a legally binding agreement between the parties, that is, situation where the parties to the contract confer rights and impose liabilities on themselves - will largely depend on whether there exists a mutual assent between them. Where there is doubt on whether the parties have concluded a legally binding agreement, the Court had the responsibility to analyze the circumstance surrounding the alleged agreement and determine whether the traditional notion of 'offer' and 'acceptance' can be distilled from the purported agreement. The mutual assent must be outwardly manifested. The test of the existence of such mutuality is objective"

From the analysis of the learned trial judge above any objective observer would conclude that there was a mutual agreement between the parties to grant credit facilities to the Appellants. Both parties were ad idem on the fact that the Claimants were to import certain chemicals and 1st Defendant was to provide the funding based on the application in Exhibit A7. The Claimants' sole witness did testify that he deposited documents requested by the 1st Respondent pursuant to his letter of application for facility Exhibit A7. He fulfilled all the conditions necessary for the grant of the loan. He filled Form M and took delivery of the chemical when it arrived. Again in the case of OMEGA BANK NIGERIA PLC V.O.B.C. LIMITED (2005) 8 NWLR (Pt.928) 547 @ 576, the Supreme Court observed:

"...the Courts will seek to uphold bargains made commercially whenever possible, recognizing that they (parties) often record the most important agreements in crude and summary fashion, and will seek to construe any document fairly and broadly without being too astute or subtle in finding defects. After due consideration of all the circumstances and if satisfied that there was an ascertainable and determinate intention to contract, the Court will strive to give effect to that intention looking at the intent and not the mere form."

The learned trial Judge after due consideration of the circumstances was satisfied that there was ascertainable and determinate intention of the parties to enter into the loan agreement. The court looking at the intent and not the mere form rightly gave effect to the intention of the parties. Exhibit B5 codified the intentions of the parties as shown by the following events:

(i) The 2nd Appellant pledging his share certificates. (ii) Deposit of the Title documents of the 2nd Appellant's property

(iii) Unconditional execution of a Tripartite Legal Mortgage by the parties (Exhibit R1).

(iv) Filling and submission of Form M (Exhibits B2 on page 115 of the Records) by the Appellants to the 1st Respondent.

(v) Clearing, receipt and warehousing of the imported Chemicals upon arrival by the Appellants.

Learned counsel for the Appellant made strenuous effort to drag the Appellant out of an agreement he voluntarily entered into. He argued that Exhibit R1 was not registered and that only a certified true copy was admissible. Counsel lost sight of the fact that the rule does not apply when the document tendered is the original. See Section 86 (1) of the Evidence Act, 2011 The Appellant's contention that what he signed was a blank document cannot hold water. He led no evidence in proof. On the contrary, the 2nd Appellant, as witness for the Appellants before the Learned Trial Judge, both during his Evidence-in-chief and under cross-examination clearly and unequivocally admitted signing and executing Exhibit R1. See pages 203-209 of the Records. Further at page 484 of the Records under cross-examination, the 2nd Appellant, as sole witness for the Appellants stated thus;

"To give effect to the facility, I pledged my Property at Karaole Estate, Oko-Oba, Agege. Pursuant to that, yes I signed a tripartite deed of legal mortage."

It is rather sad that in the face of this overwhelming evidence the Appellants are struggling to avoid the consequences of their voluntary act. The evidence on record supports the view of the Learned Trial Judge that Exhibit R1 was validly executed. He was right to have relied on the said Exhibit R1. The Learned Trial Judge was also right to have applied the doctrine of waiver in respect of any perceived anomalies or irregularities in the transaction between the Appellants and the 1st Respondent for the reasons as set out by learned counsel for the 1st Respondent that:

(i) The Appellants cleared, warehoused and sold the Chemicals imported with the facility obtained from the 1st Respondent vide Exhibits B5 and secured amongst other securities by Exhibits R1.

(ii) The Appellants continued to transact business with the 1st Respondent even seeking further Credit facilities from the 1st Respondent vide Exhibits P, Q, and S on Page 292, 294 -298 and 300 of the Records.

(iii) The Appellants had knowledge of the importation of the Chemicals financed by the 1st Respondent pursuant to Exhibits B5 and R1 and also accepted Exhibits B5 and signed Exhibits R1 without any reservation whatsoever.

Clearly, the Appellants by their actions voluntarily surrendered or relinquished whatever rights or reservation they may have had as regards the transaction. They had every opportunity to renege from the transaction on the grounds of the anomalies they are now harping on to avoid their obligation. They did not. Rather they signed all the necessary documents for the Form M. They took delivery of the chemicals, kept the chemicals in their warehouse from where they were selling same. To all intents and purposes, they waived whatever right they may have had in the circumstances. The Learned Trial Judge was perfectly right to have suo-moto inferred and implied the doctrine of waiver. It is settled Law that a Court can only act on the basis of the evidence placed before it. N.B.C.I. V. ALFIJIR (1993) 4NWLR (Pt.287) 346 at 357C. The address of Counsel is no substitute for evidence. The Learned Trial Judge was perfectly right to have admitted and relied upon Exhibit B5 (Letter of offer) and Exhibit R1 (Tripartite Deed of Legal Mortgage) in dismissing the Appellant's claims and giving judgment in favour of the 1st Respondent. Issue 2 is resolved against the Appellants and in favour of the 1st Respondent.

Issue 3:

"Whether the judgment of the learned trial judge delivered on the 6th of November, 2006 was right in view of the totality of evidence before the court"

On issue 3, the Appellants submitted that the Trial Judge was in grave error when he finally held that there was a valid contract and that the deed of legal mortgage was enforceable thereby dismissing the Appellants' claims and upholding the counterclaim of the 1st Respondent. It was argued that nowhere in the trial proceedings on record did the 1st Respondent lead evidence as to the amount of money allegedly owed it by the Appellants. Counsel submitted that the pronouncement of the trial judge that the Appellants are to pay the sum of N970,693.42k to the 1st Respondent being the total sum outstanding from the purported loan is not only perverse but also a gross miscarriage of justice. It was further contended that the transaction was unsustainable and illegal on grounds of contravention of the Moneylender's Law CAP M7, Laws of Lagos State. Learned counsel urged the court to allow the appeal, set aside the judgment of the lower court and grant all their claims.

It was argued for the 1st Respondent in this issue that the Judgment of the Learned Trial Judge was right in view of the totality of the Evidence before the Court. Learned counsel submitted that the Appellant who alleged illegality neither pleaded the relevant statute nor led evidence of same. Counsel submitted that the transaction between the Appellants and the 1st Respondent which eventually culminated in Exhibits B5 and R1 was not only valid but also legal and the Learned Trial Judge was right to have relied on these Exhibits in giving Judgment for the 1st Respondent on its counter claim. Counsel urged the court to dismiss the appeal and affirm the judgment of the lower court.

With all due respect to learned counsel for the Appellants, I subscribe to the views of Tobi JSC in Egesimba v. Onuzuruike (2002) 15 NWLR (PT.791) 466 @ 520-521 H-C referred to by learned counsel for the 1st Respondent:

"Litigation is not a game of smartness but one in which the parties must not cunningly but decently and overtly place their cards on the table of justice for purpose of measuring where the pendulum really tilts. justice in its total practical content is truth in action. And the Court has a duty to search for the truth and find it. Justice is not built on technicalities or caricatures."

It is difficult to understand why the Appellants who freely and voluntarily participated in the loan agreement between them and the 1st Respondent as shown by the overwhelming documentary evidence in the Record would turn round trying to clutch at whatever technical ground they could possibly conceive of to avoid the consequences of their action. If the 2nd Appellant was so naive as to sign blank documents for the 1st Respondent, he has no one to blame but himself. In so far as the 1st Respondent was able to adduce before the court well documented evidence of the bank loan and collaterals duly executed and surrendered to it by the Appellants in writing, it is hard for the Appellants to substantiate their claim that they signed blank documents or that they were forced to sign documents.

Indeed apart from the averments in the pleadings, no credible evidence was led in proof. Averments in pleadings without proof and statements in the written address of Appellants' counsel cannot take the place of concrete evidence in proof of the averments. Learned counsel further claimed that the record of proceedings did not reflect accurately the answers given by CW1 and went on to reproduce what he claimed were the answers given. This Court is bound by the record of proceedings. If the Appellant wanted to challenge the records, he should have adopted the proper procedure.

The attempt to debunk the contents of the available documentary evidence cannot avail the Appellants because it is trite law that oral evidence is inadmissible to vary the contents of a document; Section 128(1) Evidence Act 2011 and Womiloju v. Kiki (2009) 16 NWLR (Pt.1166) 143 @ 153 C-H.

There may have been anomalies in the sequence of events leading to the grant of the loan and the execution of documents pertaining thereto but the Appellants did not complain but went ahead with the transaction. They thereby waived any right they may have had. Having taken advantage of the arrangement by the opening of LC for the chemical, taking delivery and embarking on sale of same, they cannot subsequently turn round to avoid their liability under the agreement on the ground of illegality or for whatever reason. What is crucial is whether an objective observer evaluating the sequence of events will deduce from the transactions an offer of credit facility by the 1st Respondent to the Appellant and acceptance of same by the Appellant. The sequence in which the transaction was carried out and documents executed is of little consequence. What is important is that the bank eventually took steps very meticulously to secure the loan advanced to the Appellant. The Appellant did admit that he was granted the facility and that he failed to repay the loan. At page 292 of the record, the appellants wrote the letter below to the 1st Respondent:

"RE:- CREDIT FACILITY

We acknowledge that you granted us credit facilities in August 1996, details of which are in schedule C of this letter. The facilities were approved by your bank for us to import and market industrial raw materials.

The first consignment under the facilities arrived in November 1996. In normal economic/stable political climate, the goods ought to have been completely sold within 6 months of arrival in Nigeria.

However difficult economic/political crisis affected manufacturers in 1997 and became even worse in 1998 and 1999. Therefore the chemicals remain unsold until now; because of long storage (December 1996 to date) chemical action has decomposed the bags and the prospect of sale is remote. This fact is responsible for our default..."

This letter was admitted in evidence as exhibit P. Similar letters were admitted as exhibits Q, S and S1. In the face of these exhibits, how do the Appellants expect the lower court to believe their "after thought and newly spurn" story that they did not owe the bank and that it was a joint venture agreement? To buttress the unreliability of the evidence of the 2nd appellant who testified as CW1 - at page 485; during cross-examination he said he did not authorize the bank to sell off part of the shares pledged as security when he defaulted in repaying the loan. But when confronted with exhibits O and O1 (letters written by him authorizing the bank to sell the shares), he now said he wrote the letters but that he was forced to write them. This is what runs through the entire gamut of the evidence of the Appellants. It is either that the 2nd Appellant signed blank forms or that he was forced to write or sign documents. No attempt was made to adduce evidence in proof. The learned trial Judge properly evaluated the evidence and came to the right conclusion that the Appellants were not entitled as claimed.

On the counterclaim of the 1st Respondent, the Appellants did admit owing the 1st Respondent the amount counter claimed. At page 295 of the record is Exhibit S with an annexure termed "TRADE FINANCE: A PROPOSAL". Therein the Appellants put their outstanding indebtedness to the 1st Respondent as at September 30 1998 at N919,768.72. Further, in paragraph 46 of the 2nd Appellant's written deposition on oath of 17th November, 2004, it was clearly and unambiguously stated that the sum of N1,120,159.69 was disbursed by the 1st Respondent for the procurement of imported Chemical meant for the Appellants. See page 208 of the Records. Apart from the contribution of N300,000.00 from the Appellant's fixed deposit, no further payment was made by the appellants. As very well put by learned counsel for the 1st Respondent, what has been admitted needs no further proof. See Olale v. Ekwelendu (1989) 7 SCNJ 787; Buhari v. Obasanjo (2005) NWLR (Pt.910) 241 @ 483; Oruwari v. Osler (2012) LPELR - 19764 (SC). From the totality of the evidence, the learned trial Judge was right in granting the counter-claim of the 1st Respondent.

By way of emphasis, the main issue in this appeal is whether the learned trial Judge was right in his conclusion that the 1st Respondent advanced money to the Appellants as a banking institution and that the Appellants failed to repay the loan. The Appellant admitted being granted the facility and also admitted that the money had not been repaid. It was when the 1st Respondent after several demands began serious moves towards selling the Appellant's property used as collateral for the loan that the Appellants rushed to court making all kinds of farfetched and frivolous claims to avoid facing the consequences of their default in repaying the bank loan. The Appellants claimed that the transaction with the 1st Respondent was a joint venture. No credible evidence of any such joint venture was adduced. The Appellants claimed that certain sections of the Rules of the Uniform Customs and Practice of Documentary Credits 600 [UCP] 2007 Revision and The Rules and Regulations of the Nigerian Stock Exchange (Copies of which they made available to the court) were not complied with by the 1st Respondent. I do not see the relevance of these to the loan facility granted to the Appellants which they duly acknowledged and which facility was used in opening an LC for chemicals in their favour. They admitted taking delivery and warehousing the chemical. Bad business environment prevented them from realizing their hopes in respect of the consignment (as they claimed in Exhibit P). The Appellants' pleadings and evidence were replete with irrelevant matters that had nothing to do with the issue at hand. The learned trial Judge was not swayed or hood winked by the intricate and unusually verbose story spurn by the Appellants. He was able to sift the chaff from the wheat. The 1st Respondent did not need to adduce further evidence in proof of its counter claim, the Appellants having admitted the outstanding debt in Exhibits P, Q, S and S1. Facts admitted need no further proof. See Sections 20 and 123 of the Evidence Act 2011. The Learned Trial Judge was right to have granted the reliefs in the counter claim in view of the totality of the Evidence before the Court. One factor the Appellants appeared to have closed their eyes to is the fact that money in a bank belongs to depositors. The loan facility was made available to them through money deposited in the bank by customers. The customers are entitled to have their money back on demand. Early repayment would have reduced drastically the interest element in the outstanding balance.

In the final result, this appeal fails. It is hereby dismissed as lacking in merit. The judgment of ONYEABO J. of the High Court of Lagos State, Ikeja Judicial Division in suit No.ID/2016/2000 delivered on the 6th day of November, 2006 is affirmed. Cost assessed at N30,000.00 in favour of the 1st Respondent.

**AMINA A. AUGIE, J.C.A**.:

I read in draft the lead Judgment delivered by my learned brother, Iyizoba, JCA, and I agree with his reasoning and conclusion. He has dealt with all the issues, and I will only comment on the concept of waiver, which Eso, JSC, described in the notable case of Ariori & Ors. V. Elemo & Ors (1983) NSCC (Vol. 14) 1 thus -

"- - The concept of waiver must be one that presupposes that the person who is to enjoy a benefit or who has the choice of two benefits is fully aware of his right to the benefit or benefits, but he either neglects to exercise his right to the benefit or where he has a choice of two, he decides to take one but not both - - - The exercise has to be a voluntary act. There is little doubt that a man, who is not under any legal disability, should be the best judge of his own interest. If therefore, having full knowledge of the rights, interests, profits or benefits conferred upon or accruing to him by and under the law, but he intentionally decides to give up all these, or some of them, he cannot be heard to complain afterwards that he has not been permitted the exercise of his rights, or that he has suffered by his not having exercised his rights. He should be held to have waived those rights. He is, to put it another way, estopped from raising the issue. - - - The next enquiry is the extent to which a person could waive rights conferred upon him by law. When a right is conferred solely for the benefit of an individual there should be no problem as to the extent to which he could waive such right. The right is for his benefit. He is sui juris. He is under no legal disability. He should be able to forgo the right or in other words waive it either completely or partially, depending on his free choice. The extent to which he has forgone his right would be a matter of fact and each case will depend on its peculiar facts. A simple example could be seen in a right which has been conferred by contract. A person who is beneficiary to a contract, whereby the benefit is principally for him, has full competence to waive that right. What obtains in the case of a contract should go for benefits conferred by statute. A beneficiary under statute should have full competence to waive those rights once the rights are solely for his benefit. The only exception I can think of where the statute itself forbids waiver of its statutory provisions".

In this case, the Appellants had every chance to back out from the transaction because of the anomalies complained of, but they did not and the Lower Court was right to imply waiver on their part. I also allow the appeal, and I abide by the consequential orders in the lead Judgment including order as to costs.

**JOSEPH SHAGBAOR IKYEGH, J.C.A**.:

The appellants admitted their indebtedness to the 1st respondent vide Exhibits P, Q, S and S1. It is trite that facts admitted need no further proof vide section 123 of the Evidence Act. See Akinlagun v. Oshoboja (2006) 12 NWLR (pt.993) 60 at 84 and 92; Egbunike V. A.C.B. Ltd (1995) 2 NWLR (pt.375) 34 at 53, Ndayako v. Dantoro and Ors (2004) 13 NWLR (Pt.889) 189.

Having admitted the indebtedness, the burden rested on the appellants to establish repayment or Liquidation of the indebtedness. See Michael Phares v. Joseph Abdallah (1941) 7 W.A.C.A. 15 at 16 as follows-

"Where a defendant pleads, as the appellant in this case pleaded, that the indebtedness represented by the admitted Promissory Note has been settled, the onus of proof of the settlement is upon him. It impossible for us to hold that the Court below was wrong on the evidence before it in holding that the appellant had failed to discharge the onus of proof upon him."

They failed to do so. It is amazing that rather than own up the obligation created by the indebtedness, the appellants rushed to court to sort of delay the evil day or postpone the day of reckoning.

For the reason rendered (supra) and for the comprehensive reason given by my learned brother, Chinwe Eugenia Iyizoba, J.C.A., in the lead judgment, I too see no merit in the appeal and hereby dismiss it and abide by the consequential orders contained in the said lucid lead judgment.