**PATAMA LIMITED & ORS**

**V.**

**UNION BANK OF NIGERIA PLC**

IN THE COURT OF APPEAL OF NIGERIA

ON FRIDAY, THE 20TH DAY OF MARCH, 2015

CA/L/372/2008

**LEX (2015) - CA/L/372/2008**

OTHER CITATIONS

2PLR/2015/124 (CA)

(2015) LPELR-24535(CA)

**BEFORE THEIR LORDSHIPS**

SIDI DAUDA BAGE , JCA

CHINWE EUGENIA IYIZOBA, JCA

JAMILU YANMAMA TUKUR, JCA

**BETWEEN**

1. PATAMA LIMITED

2. CHIEF PATRICK I. UMUNEGBE

3. MR. J. O. UMUNEGBE

4. MR. A. DAN UKAOGO

(APPELLANTS/RESPONDENTS) Appellant(s)

AND

UNION BANK OF NIGERIA PLC - (RESPONDENT/APPELLANT) Respondent(s)

**ORIGINATING COURT(S)**

HIGH COURT OF LAGOS STATE, LAGOS JUDICIAL DIVISION (Justice R.I.B. Adebiyi., Presiding)

**REPRESENTATION**

A. U. IGRI Holding the brief D. E. OJIEKHAUDU - For Appellant

AND

A. O. LAJIDE with A. O. AKANJI For Respondent

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

BANKING AND FINANCE LAW: Banking Practices – Extension of overdraft facility secured by the Deed of Title of receiver’s property – refusal by bank to allow customer draw on the balance of the overdraft facility – whether breach of contract against which a claim for damages can proceed – relevant considerations

DEBTOR AND CREDITOR: Bank – recovery of outstanding balance on the overdraft facility via a cross claim – relevant considerations for success

**PRACTICE AND PROCEDURE ISSUES**

ACTION - PLEADINGS: Rule of pleadings – whether parties are bound by their pleadings – whether any evidence which is at variance with the averment in the pleadings goes to no issue and should be disregarded by the court

APPEAL - ISSUES FOR DETERMINATION: Meaning- “Crucial and central issue which if decided in favour of the Appellant or Respondent will in itself give him a right to relief he claims subject of course to some consideration arising from other subsidiary issues” - Rule on formulation of issues for determination – proliferation of issues from one ground of appeal – whether proliferated issues are deemed invalid – whether court is under any regimental duty to follow issues as formulated by the parties – whether court has the power to formulate issues suo motu

EVIDENCE - ADMITTED FACTS: Whether admitted facts need further proof

EVIDENCE - AUTHENTICATION OF A LEGAL DOCUMENT: a person's name written in whatever form typed or by hand, or mark written by that person or at person's directive has authenticated the document – whether name of legal practitioner entitled to practice as a barrister and solicitor Nigeria is a signature

JUDGMENT AND ORDER - DAMAGES - ASSESSMENT OF SPECIAL DAMAGES: How special damages for breach of contract are assessed – rule in HADLEY VS BAXENDALE: "Now we think the proper rule in such a case as the present is this: where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." – whether formula leaves any room for any further classification of damages into general or special damages – need for damages claimed to flow naturally from the breach of the contract in the sense that it was contingent or dependent upon a matter or factor expressly or impliedly within the contemplation of the parties to the time of its institution

JUDGMENT AND ORDER - JUDGMENT AGAINST WEIGHT OF EVIDENCE: When judgment of the Lower Court is against weight of evidence – Guidelines for determining same –Need for appeal court to determinate same on the evidence, not disregarding the judgment appealed from but carefully weighing and considering it and not shrinking from over-ruling it, if on full consideration, it comes to the conclusion the judgment is wrong

WORDS AND PHRASES – “SIGNATURE” - "AN ISSUE":

**MAIN JUDGMENT**

**SIDI DAUDA BAGE, J.C.A. (Delivering The Leading Judgment):**

This is an appeal against the judgment of Honourable Justice R.I.B. Adebiyi (Mrs) of the High Court of Lagos State, Lagos Judicial Division.  The Appellant instituted the suit at the High Court via a writ of summons dated the 6th day of July, 1995 accompanied by a statement of claim of the same date:

1. The sum of N15,370,175 (Fifteen Million, Three Hundred and Seventy Thousand, One Hundred and Seventy Five Naira only) representing damages suffered by the Plaintiffs for the breach of contract consisting in the wrongful refusal of the Defendant to allow the Plaintiffs draw on the balance of the overdraft facility granted to the Plaintiffs by the Defendants and secured by the Deed of Title of the second Plaintiffs property.

2. An order that Defendant release the second Plaintiffs Deed of Title.

3. An order discharging the second, third and fourth Plaintiffs as particulars of special damages total N15,370,175.

4. The Plaintiffs also claim the cost of this suit.

The Defendant filed a statement of defence and counter-claim on the 10th day of October, 1995.  The Appellant filed an amended statement of claim on the 18th December, 1997 and a second amended statement of claim on the 16th December, 2003.  On its part, the Respondent filed its statement of defence and counter-claim on the 10th day of October, 1995 and filed another one on the 9th day of November, 1995.

The Appellant filed a reply to statement of defence and sequence to counter-claim in response to the statement of defence and counter-claim filed on the 10th day of October, 1995.  The Defendant corrected its statement of defence just once on the 10th day of January, 2005.  It is worth of note that the statement of defence and counter-claim filed on the 10th day of October, 1995 has the sum of N7,669,769.16 as the monetary claim by the Respondent against the Appellant, in the counter-claim.  However, in the exhibit attached to the motion for leave to amend the statement of defence and counter-claim, the relief claimed by the Respondent in the counter-claim was N1,769,669.16.  please see pages 97-106 of the record of appeal.  The amended statement of defence and counter-claim made pursuant to the order of court on the 11th November, 2004 bears the same sum of N1,669,769.16 as the outstanding balance on the overdraft facility owed the Respondent.

After the trial, the Respondent filed its written address on the 13th day of June, 2005.  The Appellant filed their written address on the 11th day of July, 2005.  The Respondent filed a written reply on points of law on the 11th day of July, 2005.  The Appellants' notice of appeal dated the 16th December, 2005 and filed same date.  The Respondent on its part filed a cross appeal on the 9th day of February, 2006.

**ISSUES FOR DETERMINATION**

i. Whether or not the lower court properly appraised the evidence adduced by the parties at the trial and if the answer is in the negative whether there was any evidential basis upon which the lower court could have reduced the sum of N1,251,500.00 claimed as special damages or the sum of N450,000.00 claimed specifically as loss of profit on two contracts as pleaded and proved by the Appellants at the trial court and whether the judgment was not thereby perverse and a miscarriage of justice.

ii. Whether the lower court was right in awarding the Respondent the sum of N14,112,626.10 as per its counter claim when:

a) The amount awarded exceeded the amount pleaded by the respondent in the amended statement of defence and counter claim

b) In making the award, the lower court relied solely on the ipse dixit of DW1 without more.

iii. Whether or not the cluster of reliefs by the Respondent and the award by the lower court was right and proper and met the justice of the case and whether deed of legal mortgage was before the court and if the answer is in the affirmative whether the lower court properly appraised the document at the trial in order to ascertain its validity and if the answer is in the negative whether Court of Appeal can interfere and void the Mortgage transaction.

iv. Whether from the totality of the evidence adduced at the trial, the judgment of the lower court was right and had not entailed a miscarriage of justice.

The learned counsel to the Respondent in his amended Respondent/Cross Appellant's brief of argument and reply to Appellant's notice of preliminary objection filed on 10th March, 2014, formulated a sole issue for determination in response to the main appeal.  The issue raised is as follows:

"Whether the lower court was right to enter its judgment in favour of the Respondent in the sum of N14, 112,626.10k (Fourteen Million, One Hundred and Twelve Thousand, Six Hundred and Twenty Six Naira, Ten Kobo."

I have carefully examined the four (4) issues propose by the Appellants for the determination of this appeal, as against the sole issue proposed by the Respondent/Cross Appellant, in the humble opinion of this court, a sole issue arise for the determination of this appeal to wit:

"Whether the lower court properly appraised the evidence by the parties before it, in the award of the special damages, the grant of the counter claim, the foreclosure of the mortgagors equity of redemption, and whether the judgment of the lower court is against the weight of evidence."

**ARGUMENTS**

Learned counsel to the Appellants submitted that in paragraph 25 of the 2nd amended statement of claim, the Appellant sought the sum of N13,370,175.00 as special damages from the Respondent.  The trial court in its finding stated that the loss of profit by the Appellants on the contract should be at best no more than 20% of the contract sum.  The court awarded N192,985.25 to the Appellant as special damages.

Learned counsel submitted further that, the trial court failed to properly and correctly evaluate exhibits PW17 (1-20), PW18 (1-70) PW19 (1-19) and PW20 (1-54) which were tendered and proved at the trial.  If the court had properly appraised the evidence, it would have found that the special damages was indeed proved and granted the relief of the Appellants as prayed.  The failure of the court to properly evaluate the evidence adduced at trial is a grave error.  See CAPPA D'ALBERTO LTD VS. AKINTILO (2003) NWLR (Pt. 824) 49; OCEANIC BANK INTERNATIONAL PLC VS. CHITEX INDUSTRIES LTD (2000) 6 NWLR (Pt. 661) 464.

Learned counsel submitted that, Appellants' contention is that the Respondent/Counter Claimant did not plead the award sum of N14,112,626.10 in the counter-claim.  What was pleaded was the sum of N1,669,769.16 as per the amended counter-claim, amended by order of court made on the 11th November, 2004.  It is equally contended that it was in the course of the trial when DW1 was being led in evidence that he mentioned the sum of N14,112,626.10 as the total debt owed the Respondent by the 1st Appellant.

Learned counsel submitted further that prior to the judgment of the court no amendment of the pleading was done by the Respondent (as Defendant Counter Claimant) to amend the counter-claim in line with the evidence in the case.  If this had been done, it would have raised the pleading to the level of evidence adduced at the trial.  The position of the law is that a counter-claim being a separate and distinct action must be proved distinctly. See OBI VS. BI-WATER SHELLABEAR (MG LTD) (1997) 1 NWLR (Pt. 484) 722; DALEX NIG LTD VS. OMPADEE (2007) 9 NWLR (Pt. 1033); GEORGE VS. DOMINION FLOUR MILLS LTD (1963) 1 SCNLR 117; JOSADEC (NIG) LTD VS. NDIC (2005) 9 NWLR (Pt. 929) 167 at 184.  The lower court was in grave error to have awarded the sum of N14,112,626.10 which was not pleaded.

Learned counsel submitted further that the Appellants contention here is that the lower court fell into grave error when it fore closed the mortgagor's (Appellants') equity of redemption and ordered the sale of the 2nd Appellant's property situate at No. 4 Israel Kuponiyi Street Ajao Estate Anthony Village, Lagos just because the Respondent as Counter-Claimant  sought the relief.

Learned counsel submitted further that the Respondent did not ask for an order that the said property be sold.  All the Respondent did as a counter claimant was what was pleaded in paragraph 32 to the effect that the 2nd Plaintiff pledged as security his landed property.  In the province of the law of real property, as pledge is distinct from a mortgage.  A pledge as a rule is and must be accompanied by delivery of possession...  A mortgage involves in its essence, not the delivery of possession but a conveyance of title as security for the debt.  See PER COTTON L.JIN RE MORRITT (1866) 18 QB 222 at 223; I.O. SMITH-PRACTICAL APPROACH TO LAW OF REAL PROPERTY IN NIGERIA; SIDIKU AJALA SUBERU VS. ATIBA IYALAMU SAVINGS & LOANS LTD & ANOR (2007) 10 NWLR (Pt. 1043) 590 at 604-605; UNION BANK OF NIGERIA PLC VS. AYODARE & SONS (NIG) LTD & ANOR (2007) 13 NWLR (Pt. 1052) 567 at 584.

Learned counsel submitted further that the Respondent cannot claim two reliefs in one suit.  Once the court has found for and awarded judgment to the Respondent for the debt plus accrued interest including pult judgment interest, the court ought not to have granted the other reliefs for fore closure and sale.  It will tantamount to double jeopardy on the part of the Appellant and will entail a miscarriage of justice.  It will be tantamount to court awarding relief more than the party's entitled to.

Learned counsel submitted further that, the cause of action of Appellants being forwarded on contract, the trial court ought to award the amounts the full quantum of damages pleaded and proved at the trial.  If this court finds that Exhibit DW1 (b) was wrongly admitted then the Respondent's case would be absolutely hollow see MOGAJI VS ODOFIN (1978) 4 SC 91; in ATTORNEY GENERAL OF LAGOS STATE VS. PURIFICATION TECHNIQUES (NIG) LTD (2003) 16 NWLR (Pt. 845) 1 at 13.  The judgment of the trial court is against the weight of evidence adduced at the trial.

In his response to all the arguments raised by the Appellants above, the learned counsel to the Respondent submitted that, having proved its counter claim based on the admission of the Appellant for money had and received in an over draft facility the judgment of the court entered in favour of the Respondent found in page 179-180 of the record is not against the weight of evidence.

Learned counsel submitted further that the Appellant in their statement of claim and evidence in chief admitted utilizing the over draft facilities granted them by the Respondent in the sum of N500,000 (Five Hundred Thousand Naira) N250,000 (Two Hundred and Fifty Thousand Naira) N130,000.00 (One Hundred and Thirty Thousand Naira) and N70,000.00 (Seventy Thousand Naira) and subsequent withdrawals by the Appellants.  This admission is clear and definite and the Respondent is entitled to money had and received by 1st Appellant. See PAS NEW NIGERIA SALT CO. LTD (1991) NWLR (Pt. 205) ratio 1, 4, 5 and TITILOYE VS. OLUPO (1990) 6 NWLR (Pt. 159) 519 ratio 10. The Appellants have no defense to the counter-claim.  See Order 10 Rule 1 Order 19 Rule 4 High Court of Lagos State (Civil Procedure) Rules 2004, and NISHIZAWA LTD VS. S.N. JETHWANI  J.S.C.N. (1984) 284.

Learned counsel further submitted that the Respondent is also entitled to charge interest on the overdraft facility granted on Appellants' account see UNION BANK OF NIGERIA PLC VS. OZIGI PART 176 at 679 and 678 ratio 14.  Despite repeated demands from the Respondent, the Appellant have refused, failed and or neglected to pay back the amount due on the over draft facility granted.

The Appellants filed a reply brief dated and filed on 14th February, 2013,  but deemed properly filed and served on the 24th February, 2015.  In the said reply brief, the Appellants contended that the Respondent in respect of first three issues formulated for determination formulated by Appellants did not contest or counter the arguments proffered by the Appellants.  The effect of this is that, the Respondent has admitted the issues raised by the Appellants in the Appellants' brief of argument.  See FIRST BANK OF NIG PLC VS. AKINYOSOYE (2006) 5 NWLR (Pt. 918) 340 at 380 paras  C.D.E.; OBIKE INTERNATIONAL LTD VS. AYI TELETRONICS SERVICE LTD (2005) 15 NWLR (Pt. 948) 362 at 372 paras A-E; P.D.P. VS. CHIEF ANAYO ROCHAS OKOROCHA & 10 ORS (2012) NWLR (Pt. 1323) 205 at 240 (paras F-G.)

Let me start with what is an issue. In law, by and large every disputed question of fact is an issue, but in every case, there is always the crucial and central issue which if decided in favour of the Appellant or Respondent will in itself give him a right to relief he claims subject of course to some consideration arising from other subsidiary issues.  See OVERSEAS CONSTRUCTION COMPANY (NIG) LTD VS. CREEK ENTERPRISES (NIG) LTD AND ABANDONED PROPERTY AUTHORITY (1985) 12 S.C. 158 at PP 190 & 191.

From the above, it is clear that each issue will succeed on its own merit before the court, regardless of whether controverted by the Respondent or not.

In the instant appeal, the three (3) issues which are said to be uncontroverted by the Respondent in the Appellants' brief of argument must succeed on their own merit.  This court therefore will proceed to examine those issues proposed by the Appellant.  For the ease of the management of this appeal, this court formulated a sole issue from the four (4) of the Appellants and the sole issue of the Respondent.  However, every aspect of the four (4) issues of the Appellants, is captioned in the sole issue formulated by this court.

On the aspect of the special damages which the Appellants had sought for the sum of N13,370,175 from the Respondent.  The special damages were for a breach of contract.  After its finding and assessment, the trial court found that the loss of profit on the contract which affected the Appellants should be at best not more than 20% of the contract sum.  The court awarded to the Appellants the sum of N192,985.25 as special damages.  Special damages in law are of a different categories.  The instant one before this court is for breach of contract.  The question is how is special damages for breach of contract assessed.  The Supreme Court in the case of SHELL BP PETROLEUM DEV. CO. VS. JAMMAL ENGINEERING (NIG) LTD (1974) 4 S.C. 33 at PP 84 & 85 held as follows:

"The law with regard to the assessment of damages was laid down as far back as 1854 in the case of HADLEY VS BAXENDALE (1854) 9 EX. CH. 431, where at P. 354 of the Report, Alderson, B. expressed the law as follows:

"Now we think the proper rule in such a case as the present is this: where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

The formula does not leave any room for any further classification of damages into general or special for whatever species of damage it be, to be sustainable such damage must flow naturally from the breach of the contract in the sense that it was contingent or dependent upon a matter or factor expressly or impliedly within the contemplation of the parties to the time of its institution.  The categorization into general and special damages is exceptionally confusing and in some cases had occasioned substantial miscarriage of justice.  See CHANRAI & CO (NIG) LTD VS. KHAWAN (1965) 1 All N.L.R. 182, also MAIDEN ELECTRONIC WORKS LTD VS. THE ATTORNEY-GENERAL OF THE FEDERATION (1974) 1 S.C. 53 (especially at p. 97).

From the rule which now adopted in this country HADLEY VS. BAXENDALE (supra) assessment of damages in cases of breach of contract, should be such as may fairly and reasonably be considered either arising naturally from the breach of contract itself or such as may reasonably be supposed to have been in the contemplation of both parties.  The formula does not leave any room for further classification of damages into general or special for whatever species of damages.  In the instant case, the lower court made its own findings, examined the contract between the Appellants and the Respondents then came to its conclusion that the loss of profit on the contract by the Appellants should be at best no more than 20% of the contract sum.  The lower court followed the decision of the Supreme Court in SHELL BP PET DEV. CO. VS. JAMMAL ENGR (supra) which adopted HADLEY VS. BAXENDALE.  The Appellants in a claim for breach of contract cannot as it did in the instant cast, put separate heads of claim in its proof of special damages.  The damages Appellants are entitled to must flow naturally from their contract with the Respondent.  The Appellant had claimed N13,370.175.00 as special damages, broke that figure into different heads.  The lower court awarded N192,985.25 as special damages which it had found to have naturally flowed from the contract between the parties.  The lower court did this assessment, arrived at the figure it awarded as special damages in keeping with the guide provided by the Supreme Court.  I do not have any reason to disturb this finding made by the lower court and the award made.  I resolve this aspect of the appeal in favour of the Respondent and against the Appellants.

The 2nd aspect of the claim by the Appellant is that the Respondent as Defendant/Counter-Claimant did not plead the sum of N14,112,626.10 in the counter claim what was pleaded was the sum N1,669,769.16 as per the amended counter claim, amended by order of court made on the 11th day of November, 2004.  The Appellant equally contended that it was in the course of trial when DW1 was being led in evidence that he mentioned the sum of N14,112,626.10 as the total debt owed the Respondent by the 1st Appellant.

In reply, the Respondent said that the Appellant in their statement of claim and evidence in chief admitted utilizing the overdraft facilities granted them by the Respondent in sum of N500,000 (Five Hundred Thousand Naira) N250,000.00 (Two Hundred and Fifty Thousand Naira) N130,000.00 (One Hundred and Thirty Thousand Naira) and N70,000.00 (Seventy Thousand Naira) and subsequent withdrawals by Appellant.

The rule of pleading remains constant.  It is trite law that parties are bound by their pleadings.  Any evidence which is at variance with the averment in the pleadings goes to no issue and should be disregarded by the court.  See KANU NJOKU & ORS VS UKWU EME & ORS (1973) 5 S.C. 293 at pp 300-302; SHELL B.P. LTD VS. ABADI & ORS (1974) 1 ALL NLR (Pt. 1) 1 at 16; DR. A.A. NWAFOR ORIZU VS. FRANCIS E.A. ANYAEGBUNAM (1978) 5 S.C. 21 at pp 33 & 34; CHIEF DR. (MRS) OLUFUNMILAYO RANSOME KUTI & ORS VS. ATTORNEY GENERAL OF THE FEDERATION & ORS (1985) 6 S.C. 246 at 309.

In the instant appeal, there is a clear admission by the Respondents, that in their amended counter claim, which was amended by an order of court of the 11th of November, 2004, the sum of N14,112,626.10 was never pleaded by them.  The trial court wrongly though based its decision in awarding the above sum above on the premise of the Appellants admission in its statement of claim and evidence in chief utilizing the overdraft facilities granted them by the respondent in various sums of N500,000.00, N250,000.00, N130,000.00 & N70,000.00.  These were the only figures pleaded.  The subsequent withdrawals by the Appellant as claimed by the Respondent were never pleaded.  The Respondents by the amended counter claim pleaded the sum of N1,669,769.16.  The trial court fell into a grave error to have awarded the amount it did outside what the Respondent itself pleaded.  The parties are strictly bound by their pleadings.  The Appellant is said to have admitted various sums in their statement of claim and evidence in chief, the court must restrict itself only to those sums allegedly admitted.  The paragraphs of such admissions were not provided by Respondent.  However, the court can award those sums based on the admission of the Appellants alone.  The law is already trite, that facts admitted need no further proof.  The award of N14,112,626.10 which was an amount not duly pleaded before the court and which was awarded it, less the amount of money admitted in the statement of claim and evidence in chief, is hereby set aside by this court.  This aspect of the sole issue is resolved in favour of the Appellants and against the Respondent.

The resolution of the 2nd aspect of the sole issue in this appeal, has a direct effect on the 3rd aspect, which is the order made by the court for the sale of the Appellants' property situate at No. 4 Israel Kuponiyi Street, Ajao Estate Anthony Village, Lagos provided a security for the overdraft facility for the sum of N14,112,626.10.  The said amount of money was found not have been duly pleaded before the trial court.  The award made by the trial court on it (being unpleaded fact) was set aside by this court in resolution to second aspect less the amount admitted by the Appellant in his statement of claims and evidence in chief.  The order made by the trial court for an order to sell the Appellants' property (No. 4 Israel Kuponiyi Street, Ajao Estate, Anthony Village, Lagos) in favour of the Respondent, provided as security for the overdraft is hereby set aside by this court.  The order made sequel to the unpleaded amount of the said overdraft.  The 3rd aspect of the sole issue for determination is resolved in favour of the Appellants and against the Respondent.

On the fourth (4) aspect of the sole issue for determination whether judgment of the lower court was/is against weight of evidence.  The rule here is for the Appellate court to examine the evidence which was before the trial court, we should be directed on what portion of the judgment is against the weight of evidence.  The   full guide is to be found in the Supreme Court's decision in LION BUILDINGS LIMITED VS. M.M. SHADIPE (1976) 12 S.C. 135 at pp 152-153.  The apex court stated as follows:

"When a judgment is appealed from being against the weight of evidence the Appeal Court must make up its own mind on the evidence, not disregarding the judgment appealed from but carefully weighing and considering it and not shrinking from over-ruling it, if on full consideration, it comes to the conclusion the judgment is wrong."

On the issue of judgment against weight of evidence see MOGAJI VS. ODOFIN & ORS (1978) 4 S.C. 91 at pp 93-95.

From the appraisal of the judgment, the subject of this appeal, and the resolution to the sole issue for determination, one (1) aspect of the resolution was made in favour of the Respondent against the Appellants.  Again, two (2) aspects of the resolution was made in favour of the Appellants and against the Respondent.  It cannot be said therefore, that, the whole judgment was wrong.  The judgment appealed against is therefore not against the weight of evidence.

On the whole therefore, this appeal is allowed in part.  The aspect of none pleading of the sum of N14,112,626.10, and the sale of the Appellants' property (N0.4 Israel Kuponiyi Street, Ajao Estate Anthony Village, Lagos) which this court set aside earlier in this judgment are all resolved in favour of the Appellants and against the Respondent.  On the other hand, the aspect of assessment of special damages done by the trial court is resolved in favour of the Respondent and against the Appellant

The judgment of the Honourable Justice R.I.B. Adebiyi of the High Court of Lagos State, Lagos judicial division in suit No. LD/2946/95 delivered on 9th November, 2005 is set aside on the 2 aspects resolved in favour of the Appellants, and affirmed on the sole aspect which is resolved in favour of the Respondent.

The parties shall bear their own costs.

**CHINWE EUGENIA IYIZOBA, J.C.A.:**

I read before now the judgment just delivered by my learned brother, SIDI DAUDA BAGE JCA. I am in full agreement with the reasons given and the conclusions reached in both the main appeal and the cross appeal. I abide by the consequential orders of my learned brother in the lead judgment.

**JAMILU YAMMAMA TUKUR, J.C.A.:**

I have had the privilege of reading in draft before today the lead judgment just delivered by my Lord ***Sidi Dauda Bage*** JCA.

I agree with the reasoning and conclusion and I have nothing useful to add. I also abide by the consequential order made therein.

**CROSS APPEAL**  
  
**SIDI DAUDA BAGE, J.C.A.:**

By its preliminary objection filed on the 14th of February, 2013, the Appellants/Cross Respondents objected to the competence of the cross appeal, the notice of cross appeal as dated 9th February, 2006.  The ground for the objection is that, the notice of the cross appeal dated 9th February, 2006, does not comply with Order 10 Rule 4 of the Court of Appeal Rules, 2011, which requires a notice of appeal to be signed by the Appellant.  The notice of cross appeal was not signed by the Respondent/Cross Appellant or being a corporate personality by its representative, therefore, the notice of cross appeal is grossly defective and therefore incompetent.  The incompetence robs this court of the requisite jurisdiction to hear the cross appeal.

The Respondent/Cross Appellants in their amended brief of argument and reply to Appellants' notice of preliminary objection contended that, the Appellants raised the omission of signature on the notice of cross appeal filed by the Respondent. However, the correct position remains as at the time of filing the Respondents' notice of cross appeal in 2006, it was a requirement of the Court of Appeal Rules 2002 which was the operative rule at that time and not the Court of Appeal Rules 2011 relied upon by the Appellants and this rule cannot take retroactive effect.

Order 10 Rule 4 of the Court of Appeal Rules, 2011 provides:

"Every notice of appeal shall be signed by the Appellant or his legal representative which in this case includes his counsel."

The record admits, which is not denied that, the notice of the cross appeal was filed in 2006, under the Court of Appeal Rules 2002.  The question here is that, can the coming in of the 2011 Rules, invalidate the existing or hitherto valid processes filed under the old Rules.  The definite answer is no, as at the time of filing the process in 2006, it was guided by the 2002 Rules.  On this score alone, the processes or the notice of the cross appeal filed in 2006 remains a valid processes, and the 2011 Rules cannot be invoked at this stage to operate retroactively.  This takes us to the ground 2 of the preliminary objection.  The main contention here is that, the name of "Adebukola Lajide" was merely typed on the first statement of defence and counter claim filed on the 10th October, 1995.  The main quarrel by the Applicant here is that, only the name of counsel appears without particular mark or a mark peculiar to him.  The question here is, what is name, what is signature or mark.  The Black's Law Dictionary Eight Edition defines signature at page 1415 as follows:

"A person's name or mark written by that person or at person's direction ... any name, mark or writing used with the intention of authenticating a document. Also termed legal signature."

From the definition above, a person's name written in whatever form typed or by hand, or mark written by that person or at person's directive has authenticated the document.  The word "or" is used which makes disjunctive as either of the two used suffices to authenticate the document.  This definition had been subjected to several judicial authorities see OKAFOR VS. NWEKE (2007) 10 NWLR 521 at 531 where the Supreme Court relied on the provisions of section 2 (1) and section 24 of the Legal Practitioners Act CAP 207 of the Laws of Federation.

Section 2 (1) of the Legal Practitioners Act, CAP 207 of the Laws of Federation of Nigeria 1990 provides thus:

"Subject to the provisions of this Act, a person shall be entitled to practice as a barrister and solicitor if, and only if, his name is on the roll"

Section 24 of the Legal Practitioners Act defines:

"A person entitled in accordance with the provision of this act to practice as a barrister or as a barrister and solicitor, either generally or for the purpose of any particular office proceedings"

Hon. Justice Onnoghen JSC, in giving interpretation to the above provisions in his leading judgment stated as follows:

"From the above provision, it is clear that the person who is entitled to practice as legal practitioner must have his name on the roll.  I do not say that his signature must be on the roll but his name."

The process complained about clearly has the name "Adebukola Lajide" thereon.  It has not been said or argued that, the said name cannot be found in the roll of legal practitioners in Nigeria.  This aspect of the objection also fails.

Another aspect is grounds 3 & 4 of the preliminary objection.  The grouse here essentially is the "issues" for determination in the Cross Appellants' brief of argument.  From what it shows, the Cross Appellant has formulated four issues for determination from just one ground of appeal.  The grouse here again is not that the issues formulated do emanate or relate to the sole ground of appeal, it is said they do.  However, the issues have been proliferated to four (4) from one ground.  This situation is only frowned at by the superior courts.  At best, the proliferation of the issues from only one ground, makes a case for a bad drafting, but the issues do not become invalid.  The issues propose by the Appellants, are not binding on the Respondent or the court itself.  The Respondent can chose to adopt the issues formulated by the Appellant, or may frame or formulate his issue(s) from the ground of the appeal.  Equally, the court is not under any regimental duty to follow issues as formulated by the parties.  The court has the power to formulate issues suo motu.  On all these see ADUKU VS. ADEJOH (1994) 5 NWLR (Pt. 346) 582 at 594; SANUSI VS. AYOOLA (1991) 9 NWLR (Pt. 265) 275; SALIBA VS. YASSIN (2002) 4 NWLR (Pt. 756) 1 at 14; AJA VS. OKORO (1991) 7 NWLR (Pt. 203) 260 at 273; ADELAJA VS. FANOIKI (1990) 2 NWLR (Pt. 131) 137.  

From the above therefore, those issues proposed for determination by the Cross Appellants, as the all relate to the ground of the appeal remain valid.  Objection No. 3 and 4 also fails.

Finally, since all the grounds of the objection, 1, 2, 3 and 4 have failed, the Cross Respondent's notice of preliminary objection is without merit and it is hereby dismissed.

**CROSS APPEAL**  
  
In the said Cross Appellants' brief of argument three (3) issues were proposed for determination as follows:

1. Whether the Appellants can unilaterally vary the agreement entered into by the Appellant and the Respondent in this suit and or alternatively whether the Appellants' letter dated 25th day of October, 1991 (i.e. Exhibit PW4) can unilaterally vary the repayment date of letter dated the 24th day of October, 1991 (i.e. Exhibit DW3)

2. Whether the Appellants' letter dated the 25th day of October, 1991 (Exhibit PW4) and received on 24th day of October, 1991 can vary letter dated 24th day of October, 1991 (i.e. Exhibit DW3) received on the 29th day of October, 1991.

3. Whether the Respondent has right to refuse to grant an overdraft and or further overdraft facility to the Appellant.

On the other hand, the Cross Respondents in their brief of argument proposed a sole issue for determination to wit:

"Whether the substance of the Cross Appeal (if any) has not already been argued by the parties in the main appeal.  If the answer is in the affirmative whether the cross appeal ought not to be dismissed."

On the part of the court, after a careful perusal of the two (2) sets of issues proposed by the parties, for the determination of this cross appeal, I tend to be guided by the sole issue of the Cross Respondent.  Looking at the first and second issue proposed by the Cross Appellants, they have been adequately answered in the determination of issue No. 1 to the main appeal.  In the resolution to issue No. 1 to the main appeal, this court, had agreed with the decision of the trial court, that, there was in breach of contract committed by the Respondent (Cross-Appellant) on the Appellant (Cross Respondents).  This court also accepted the assessment made, and the award of special damages of 20% of the contract sum in favour of the Appellants. With this resolution, issues No. 1 & 2 of the Cross Appeal becomes unnecessary and or academic questions only.  Also, the resolution to issue No. 1 takes care of the 3rd issue in the cross appeal whether the Respondent has the right to refuse to grant an overdraft and or further overdraft facility to the Appellant.  Resolution to issue No. 1 in the main appeal reduces this issue to a mere academic question.  All the three (3) issues proposed for determination in the cross appeal are unmeritorious, and the entire cross appeal is dismissed.

**CHINWE EUGENIA IYIZOBA, J.C.A.:**

I read before now the judgment just delivered by my learned brother, SIDI DAUDA BAGE JCA. I am in full agreement with the reasons given and the conclusions reached in both the main appeal and the cross appeal. I abide by the consequential orders of my learned brother in the lead judgment.

**JAMILU YAMMAMA TUKUR, J.C.A.:**

I have read in advance the lead judgment of my learned brother Sidi Dauda Bage JCA, with which I agree.

The Cross Appeal is lacking in merit and same is also dismissed by me.