**UNITED BANK FOR AFRICA PLC**

**V.**

**COMRADE CYCLE LTD & ANOR**

IN THE COURT OF APPEAL OF NIGERIA

ON FRIDAY, THE 26TH DAY OF APRIL, 2013

CA/K/185/2011

**LEX (2013) - CA/K/185/2011**

**OTHER CITATIONS**

2PLR/2010/67(CA)

(2013) LPELR-20737(CA)

**BEFORE THEIR LORDSHIPS**

ABDU ABOKI, JCA

ITA GEORGE MBABA, JCA

HABEEB ADEWALE ABIRU, JCA

**BETWEEN**

UNITED BANK FOR AFRICA PLC - Appellants

AND

COMRADE CYCLE LTD.

ALHAJI IBRAHIM A. MOHAMMED - Respondents

***ORIGINATING COURT***

HIGH COURT OF KADUNA STATE *(Dogara Mallam J., Presiding)*

**REPRESENTATION**

Mr. S. N. CHUKWURAH - For Appellant

AND

No appearance - For Respondent

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

COMMERCIAL LAW - CONTRACT - TERMS OF CONTRACT- whether parties are bound by the provisions or terms of the contract or agreement

INSURANCE AND REINSURANCE LAW:- Property insurance – Total damage of property by fire – Where premium paid for property is based on an undervalued estimation of property actual value – Whether ground for court to reasonably infer failure in the exercise due of diligence in and duty of care against party charged with securing the insurance

TORT AND PERSONAL INJURY - NEGLIGENCE:– Need to plead Negligence and establish 'duty of care' owed in a claim in negligence – Effect of failure to so plead

TORT AND PERSONAL INJURY – NEGLIGENCE:- Issue of 'duty of care' as synonymous with a claim in negligence and as one of the constituent elements to be established in a case predicated thereon – Where party did not predicate case on negligence and the parties did not join issues on whether or not duty of care owed was breached – Proper treatment of

ALTERNATIVE DISPUTE RESOLUTION – COMPROMISE AGREEMENTS:- Agreement for a payment to prevent or terminate ongoing litigation – Bindingness of

DEBTOR AND CREDITOR – SETTLEMENT OF INDEBTEDNESSS:- Compromise agreement as full and final settlement of outstanding indebtedness in return for the discontinuation all the pending actions relating thereto – Bindingness of

**PRACTICE AND PROCEDURE ISSUES**

COURT:- Duty of trial Court, in the course of evaluating the evidence led by the parties, to draw inferences and make conclusions therefrom – Where such inferences and conclusions arise from the evidence led and are on issues joined by the parties on the pleadings – Whether does not amount to a court setting up a different case for a party

COURT:- Duty of trial court in respect of the evidence led by parties in a trial – Duty of perception: to receive into its records all the relevant evidence – Duty of evaluation: to weigh the evidence in the context of the surrounding circumstances – Need for a court’s finding of fact to involve both perception and evaluation

COURT:- Duty of trial court to hear parties, watch and observe the demeanour of witnesses called to testify before it, admit or reject documents tendered, ascribe probative value to the evidence and then come up with a decision – Necessity for trial court to place the totality of the testimonies of both parties on an imaginary scale with evidence of parties on opposing scales

COURT:- Duty of trial in the observance of the procedure for evaluation of evidence – When court will apply the relevant laws to the facts or evidence adduced, in order to reach a decision

COURT:- Style of writing judgment – Rule of law that there is no specific format prescribed either by adjectival or substantive law for writing a judgment or ruling – Right of every Judge to his own style of writing whether sitting at the trial or appellate level of courts – Whether right does not supplant duty of Judge to pronounce on the issues submitted by the parties for adjudication and state the reasons for resolving the issues one way or the other

COURT:**–** Evaluation of evidence – Where facts are established as proved by a party - Duty of trial court to act on same or show reason why it would not

EVIDENCE - ESTOPPEL:- Meaning and nature of – Implication for a party from providing anything that contradicts his previous acts or declarations to the prejudice of a party who, relying upon them, has altered his position

EVIDENCE – ESTOPPEL:- Distinction from a rule of evidence and a cause of action - Variants - Estoppel by representation also known as estoppel by conduct and as estoppel in pais – Meaning – When arises – When deemed to constitute fraud

EVIDENCE – DOCTRINE OF ESTOPPEL:- Nature and essence of the doctrine – How arises - Proper order to make in an action caught by the doctrine

JUDGMENT AND ORDER:**-** Style of writing of a judge – Entitlement thereto

JUDGMENT **-** MISCARRIAGE OF JUSTICE:- How determined - What party alleging miscarriage of must show

PLEADINGS:- Rule that parties and the court are bound by pleadings – Duty of court thereto

**MAIN JUDGMENT**

**HABEEB ADEWALE OLUMUYIWA ABIRU, J.C.A** (DELIVERING THE LEADING JUDGMENT):

This is an appeal against the judgment of the High Court of Kaduna State in Suit No KDH/Z/45/98 delivered by Honorable Justice Dogara Mallam on the 28th of September, 2010. The claim of the Respondents, as plaintiff, against the Appellant, as defendant, was for the sum of N10 Million as compensation for the loss of their property. The Respondents filed an amended statement of claim dated the 19th of January, 2006 (pages 42 to 44 of the records).

The Appellant responded by filing a better and further amended statement of defence and counter-claim dated the 18th of May, 2009 (pages 100 to 102 of the records). By the counter-claim, the Appellant prayed for:

i. The sum of N2, 900,000.00 (Two Million Nine Hundred Thousand Naira only) being the outstanding indebtedness of the plaintiffs to the Defendant of principal and interest standing unpaid as a result of the plaintiffs breach of legal mortgage agreement dated the 13th of August, 1990 registered as No KDR 84 at page 84 in Volume 69 (Miscellaneous) of Kaduna State Land Registry at Kaduna.

ii. Interest on the N2, 900,000.00 at the current bank rate.

iii. The cost of this counter-claim.

The Respondents filed an amended reply to the statement of defence and it was dated the 15th of February, 2007 (pages 59 to 60 of the records).

The case of the Respondents was that the first Respondent was a customer of the Appellant and that it applied for and was granted an overdraft facility of N260,000.00 in 1991 on terms and conditions embodied in a deed of legal mortgage registered on the 17th of January, 1991 and the mortgage was created over a property lying and being at Zaria and covered by certificate of occupancy No 18056, It was their case that the first Respondent was subsequently granted an enhancement in the overdraft facility and for which the Appellant demanded for an additional property as further security and the second Respondent deposited the certificate of occupancy No NC17772 of his house situate at the end of Manchester Road, GRA, Zaria. It was the case of the Respondents that this said property was gutted by fire before it was embodied as additional security in the deed of legal mortgage.

It was the case of the Respondents that the said property was valued at N10 Million at the time it was deposited with the Appellant as additional security and that by the terms of the original deed of legal mortgage, clauses 3(c) and 3(d) thereof, the property was to be comprehensively insured under an all risk insurance cover by themselves or the Appellant for its true value of N10 Million at the time of the insurance. It was their case that the Appellant opted to insure the property for its full value and assumed full responsibility for paying the premiums and it paid the premiums by debiting the account of the first Respondent whenever the premium fell due. It was their case that in November of 1994, during the life of the insurance policy, the property was gutted by fire and destroyed beyond economic repairs and that they thereby became entitled to the payment of compensation under the insurance policy. It was their case that since the fire incident they have made several demands from the Appellant for the payment of the insurance compensation and all they received were barren promises from the Appellant to request for payment of the compensation.

The Appellant, in response, admitted that it extended an overdraft facility to the first Respondent and that the loan facility was secured by the second Respondent's property situate at No 3, Hanwa Road, Zaria. It was its case that the Respondents stopped operating their account in 1991 after the facility was granted and that the valuation of the property was not N10 Million as at the time the loan was granted. It was its case that it was a condition for the grant of the loan that the Respondents must insure the property sought to be mortgaged and that it did not enter into or sign any insurance policy on behalf of the Respondents and that it was the Respondents that entered into an insurance policy before the disbursement of the loan sum and it only took over the payment of the premiums to ensure effective and prompt payments thereafter.

It was the case of the Appellant that after the property was gutted by fire; the Respondents brought to it an alleged cost of repairs claiming that the property was under insured when it was the second Respondent that actually insured the property. It was its case that it empathized with the Respondents and it held discussions with the second Respondent to seek ways of assisting them and that there were pending actions, including the present action, between the parties at the time. It was its case that as its way of assisting the Respondents, it reached an agreement with the Respondents that the Respondents pay the sum of N1.7 Million in full and final settlement of their N4.6 Million indebtedness to it and in return for which all pending suits, including this present one, will be withdrawn by the Respondents. It was its case that the second Respondent paid the agreed sum N1.7 Million in full and final settlement of its indebtedness and which the Appellant accepted but surprisingly turned around to continue this case against it and that its offer was not based an admission of liability to the Respondents on the insurance claim, rather it was to save its corporate image from unnecessary litigation. It was its case that the insurance company offered the sum of N193, 000.00 and that several claim forms were sent to the second Respondent for his signature to enable the processing of the sum from the insurance company but that the second Respondent refused to sign the forms.

In their reply to the counter-claim, the Respondents admitted that the Appellant made an offer to them to pay the sum of N1.7 Million in full and final settlement of an indebtedness of N4.6 Million and it was their case that it was to settle the case in Suit No KDH/Z/39/94 - Comrade Cycle Co. (Nig) Ltd V. UBA Plc & Anor.

It was their case that they commenced that suit as a result of the Appellant's mischievous instruction to an auctioneer to sell their property at No. 3, Hanwa Road, GRA, Zaria and that they accepted the offer, paid the sum of N1.7 Million in full and final settlement of their indebtedness and they ceased prosecuting the said Suit No KDH/Z/39/94 and by reason whereof the suit was struck out. It was their case that the offer of compromise had nothing to do with this present case as the issue that brought about this case arose subsequent to the offer and this suit did not form part of their discussions.

The matter went to trial and in the course of which the Respondents called one witness and tendered exhibits while the Appellant called three witnesses and also tendered exhibits. At conclusion of trial, the lower Court entered judgment awarding the sum of N6, 451,651.32 to the Respondents and dismissing the counter-claim of the Appellant. The Appellant was dissatisfied with the judgment and it caused a notice of appeal dated the 12th of October, 2010 to be filed against it and the notice of appeal contained four grounds of appeal.

Counsel to the Appellant filed a brief of arguments before this Court and it was dated and filed on the 21st of July, 2011. The brief of arguments of the Respondents was dated and filed on the 17th of November, 2011. At the hearing of this appeal on the 19th of March, 2013, Counsel to the Appellant was present in Court and he adopted his brief of arguments while the Counsel to the Respondents was absent and the brief of argument was deemed argued under the provisions of Order 18 Rule 9(4) of the Court of Appeal Rules 2011.

Counsel to the Appellant distilled three issues for determination in his brief of arguments and these were:

i. Whether the fact of lack of due diligence and non-disclosure of all facts about the insured property was part of either party's case at the trial court, and if not, the effect of raising same suo motu by the trial Court,

ii. Whether the trial Court failed to evaluate the evidence led and whether such failure occasioned a miscarriage of justice.

iii. Whether the failure to act on the evidence accepted by the learned trial Judge on the issue of settlement/withdrawal of this suit resulted in injustice to the Appellant.

In the Respondents' brief of arguments, Counsel to the Respondents adopted the three issues as formulated by the Appellant. The issues shall be dealt separately.

On the first issue for determination, Counsel to the Appellant stated that in its judgment, the lower Court said thus:

"Since by Exhibit P. 3 the Plaintiff's burnt mortgaged property is worth N10,296,000.00 as at the time it was insured by the Defendant for only N650, 000.000, the reasonable inference or conclusion to be drawn from this is that the defendant did not exercise due diligence in the discharge of their duty and omitted to or failed in their duty of care to the plaintiffs to ensure that the proper value of the mortgage property was insured.

Another inference to be drawn from this is that the defendant has not disclosed all the facts or the whole truth regarding the insured value of the burnt property and the actual money paid by the insurance company to the defendant..."

Counsel stated that neither party pleaded lack of due diligence or non-disclosure of facts about the insured property and also that no evidence was led at the trial Court suggesting either lack of due diligence by the Appellant or non-disclosure of facts about the insured property. Counsel stated that the issues were raised suo motu by the lower Court and that the parties should have been invited to address the Court before the Court went ahead to make the findings in its judgment. Counsel submitted that this amounted to a travesty of justice and Counsel referred to a plethora of authorities on the point. Counsel urged the Court resolve the issue in favour of the Appellant.

In the response arguments, Counsel to the Respondents stated that the lower Court did not raise any of the issues complained about by Counsel to the Appellant suo motu and submitted that sometimes there is no need to call evidence to prove the materiality of a fact if such a fact is obvious in the eyes of the court, Counsel submitted that the finding of the lower Court on the issue of non-disclosure of facts was a conclusion reached from the evidence led by the parties particularly on the issue of the withholding of the cheque for the insurance sum by the Appellant. Counsel stated that the findings were a product of the evaluation of the evidence of the parties which was the sole duty of the lower Court. Counsel urged that this issue for determination be resolved in favour of the Respondents.

It is a principle of civil litigation that parties and the court are bound by the pleadings and a court cannot make out its own case outside the pleadings of the parties. A court should not set up for parties a case different from the one set up by the parties in the pleadings Skye Bank Plc V. Akinpetu (2010) 9 NWLR (pt 1198) 179 and Baliol (Nig) Ltd v. Navcon (Nig) Ltd. (2010) 16 NWLR (pt 1220) 619. A court must confine its judgment to the determination of the issues raised on the pleadings - First Bank of Nigeria Plc V. Olaleye (2013) 1 NWLR (Pt 1334) 102.

These said, however, it must be recognized that it is part of the duty of the trial Court, in the course of evaluating the evidence led by the parties, to draw inferences and make conclusions there from. Such inferences and conclusions, where they arise from the evidence led and are on issues joined by the parties on the pleadings, cannot amount to a court setting up a different case for a party.

The full passage of the part of the judgment complained against by the Appellant read thus:

"... Exhibit D.6 is the valuation report prepared by Charlie Aniagolu and Co. a firm of Estate surveyors and valuers for and on behalf of the Defendant which puts the open market value of the burnt mortgage property at N2,350,000.00 as per Exhibit D. 3 which is the value of their interest in the property without consideration nor interest charges. DW3 said that the Defendant contacted the insurance company over the issue of the burnt mortgage property and they paid the sum of N193, 000.00 for the plaintiffs and which sum they wrote the plaintiffs to come and collect and they refused.

Since by Exhibit P. 3 the Plaintiff's burnt mortgaged property is worth N 10,295,000.00 as at the time it was insured by the Defendant for only N650, 000.000, the reasonable inference or conclusion to be drawn from this is that the defendant did not exercise due diligence in the discharge of their duty and omitted to or failed in their duty of care to the plaintiffs to ensure that the proper value of the mortgage property was insured. Another inference to be drawn from this is that the defendant has not disclosed all the facts or the whole truth regarding the insured value of the burnt property and the actual money paid by the insurance company to the defendant. This is because neither the cheque nor a copy of same or the letter forwarding same to the Defendant had been made available to the plaintiffs or tendered in evidence except the voucher evidence of the DW3 that the sum of N193,000.00 was paid by the insurance company to the Defendant and for the plaintiffs. The insured value of the burnt property is N650,000.00 as per Exhibit D3 whereas, the insurance company paid the sum of N193,000.00 to the plaintiffs. The Defendant did [not disclose] how much was paid to it since it too has an interest in the property." (See pages 191 - 192 of the records)

Now, one of the issues joined by the parties in this matter was on the insured value of the mortgaged property. Reading through the above reproduced portion of the judgment, it is beyond contest that the inference drawn by the lower Court that the Appellant did not disclose all the facts or the whole truth regarding the insured value of the burnt property and the actual money paid to it by the insurance company arose from the evidence led by the parties and it was on an issue joined by the parties on the pleadings. The inference was thus properly made by the lower court and did not amount to the lower court raising an issue suo motu.

The same cannot, however, be said for the other inference made by the lower court that the Appellant "did not exercise due diligence in the discharge of its duty and omitted to or failed in their duty of care" to the Respondents to ensure that the proper value of the mortgage property was insured. The issue of 'duty of care' is synonymous with a claim in negligence; it is one of the constituent elements to be established in a case predicated on negligence - Abubakar v. Joseph (2008) 13 NWLR (Pt 1104) 307, Iyere V. Bendel Feeds and Flour Mills Ltd (2008) 18 NWLR (pt 1119) 300, GKF Investment Nigeria Ltd v. Nigerian Telecommunications Plc (2009) 15 NWLR (Pt 1164) 344. The Respondents did not predicate their case in this matter on negligence and the parties did not join issues on the whether or not the Appellant breached its duty of care to the Respondents. The inference by the lower Court was on a matter alien to the pleadings of the parties and was thus improper.

The Appellant has urged this court to find that this wrong inference amounted to the lower Court raising an issue suo motu without inviting the parties to address on it and that this has led to a miscarriage of justice in the matter.

It must be stated that the concept of miscarriage of justice is not a speculative concept and it is not considered in the abstract but in concrete terms based on the peculiar facts of each case. Therefore, a party alleging miscarriage of justice by reason of issues raised suo motu by a court will not succeed by merely parroting the concept, he must show in clear and real terms the injustice or injury he suffered on the face of the records and which is traceable to the issues so raised suo motu by the Court. In Abubakar V. Nasumu (No 2) (2012) 17 NWLR (Pt 1330) 523 at 588 D-E Rhodes-Vivour, JSC put the point thus:

"Miscarriage of justice varies from case to case. The facts and circumstances of the case must be examined. It could mean failure of the court to do justice, or justice misapplied. Put in another way, it is failure of justice. In effect, there is miscarriage of justice if the order of the court is prejudicial or inconsistent with the right of a party.

The respondents were unable to show how they were prejudiced by the appellants' application by letter, or how an application by letter to trigger pre-hearing session, granted by tribunal amounts to miscarriage of justice. Since the respondents were unable to show any of the above in the tribunal or in this court, their objection was frivolous..."

The Appellant, in the instant case, did not show or demonstrate the injustice or injury he suffered on the face of the records by reason of the said issue raised suo motu by the lower Court and it is not evident from the records that the said issue formed the fulcrum of the judgment entered by the lower Court in this matter. The Appellant thus failed to show that there was a miscarriage of justice brought about by the improper inference made by the lower Court. The first issue for determination must be resolved in favour of the Respondents.

On the second issue for determination, Counsel to the Appellant stated that what the lower court did in its judgment was to summarize or recount the evidence led at trial and then take umbrage under the worn out phrases of "I accept" and "I believe" without evaluating the evidence. Counsel submitted that the summary of evidence was not equivalent to evaluation of evidence and he referred to the case of Mini Lodge Ltd V. Ngei (2009) 12 SC (pt 1) 94 amongst others. Counsel reproduced the principles on evaluation of evidence enunciated by the courts in Ukaegbu v. Nwololo (2009) 1-2 SC (pt 1) 21 and in several other cases and submitted that the lower court did not comply with the said principles in its evaluation of the evidence led by the parties in this matter.

Counsel to the Respondents submitted, in response, that the lower court fully discharged the responsibility placed on it and it properly and dispassionately appraised the evidence led by the parties at trial and that it carried out the evaluation of the evidence in accordance with the laid down principles enunciated in the decided cases. Counsel stated that where it is shown that the lower Court satisfactorily carried out its function of evaluating the evidence of parties, the appellate Court will have no choice than to affirm the decision and he referred to the case of Osuji V. Ekeocha (2009) MJSC (Pt 11) 74.  
It is trite that a trial court has two duties in respect of the evidence led by parties in a trial. The first is to receive into its records all the relevant evidence, and this is called perception. The second is to thereafter weigh the evidence in the context of the surrounding circumstances, and this is evaluation. A finding of fact by a trial court involves both perception and evaluation. Guardian Newspapers Ltd v. Ajeh (2011) 10 NWLR (Pt 1256) 574, Nacenn Nigeria Ltd v. Bewac Automotive Producers Ltd (2011) 11 NWLR (pt 1257) 193, Wachukwu v. Owunwanne (2011) 14 NWLR (pt 1266) 1.

It is the primary responsibility of a trial court to hear the parties, watch and observe the demeanour of witnesses called to testify before it, admit or reject documents tendered, ascribe probative value to the evidence and then come up with a decision. This is regulated by time honoured procedure designed to mete out justice to both parties before the court. The procedure is crucial in its observance. The trial court is enjoined to place the totality of the testimonies of both parties on an imaginary scale. One side of the scale will contain the evidence of the plaintiff while the other side will harbor the evidence of the defendant. The court must then weigh them together to see which side is heavier than the other. This is in terms of quality, not quantity. To help the court in this regard, it should consider whether the evidence led by a party in its totality is relevant, admissible, credible, conclusive and more probable than that adduced by the other party. Once these considerations fall into line, the court will then apply the relevant laws to the facts or evidence adduced, in order to reach a decision. The observance of the procedure for evaluation of evidence is crucial to arriving at a just decision. Its breach will most likely lead to a perverse decision Mogaji vs. Odofin (1978) 4 SC 91, Adeleke v. Iyanda (2001) 13 NWLR (pt 729) 1, Okoko v. Dakolo (2006) 14 NWLR (pt 1000) 401, Tippi v. Notani (2011) 8 NWLR (pt 1249) 285.

Reading through the judgment, it is correct that the lower Court used the phrases, of accept the evidence" and "I believe the evidence" in several places but this was more as a matter of style of writing rather a lack of proper appraisal of the evidence led by the parties. A dispassionate review of the judgment shows that the lower court stated its reasons for accepting and/or believing the evidence led by the parties and that it complied substantially with the laid down principles on evaluation of evidence. Counsel to the Appellant did not point out in his brief of arguments the aspects of the evidence led by the parties that the lower Court failed to evaluate. It is apparent that the grouse of the Appellant is with the style of writing adopted by the lower court; the use of the phrases "I accept" and "I believe", which appeared in several places in the judgment.   
It is settled law that there is no specific format prescribed either by adjectival or substantive law for writing a judgment or ruling. Every Judge reserves the right as to his own style of writing whether sitting at the trial or appellate level of courts. What is most paramount is that a Judge must pronounce on the issues submitted by the parties for adjudication and state the reasons for his resolving the issues one way or the other Nwankudu V. Ibeto (2010 2 NWLR (pt 1231) 209, Aregbesola v. Oyinlola (2011) 9 NWLR (Pt 1253) 458 and Ovunwo V. Woko (2011) 17 NWLR (pt 1277) 522. The lower court in the instant case pronounced on the issues submitted by the parties and it stated the reasons for resolving the issues one way or the other.

The complaint of the Appellant on this issue for determination was not well founded and the issue is hereby resolved in favour of the Respondents.

On third issue for determination, Counsel to the Appellant stated that the lower Court found in its judgment thus:

"I also believe the Defendant's evidence that they agreed to waive Part of the loan or interest on conditions that the plaintiffs paid N1.7 Million as full and final settlement of their debt and withdraw all the cases he filed against the Defendant such as the suit in Exht D 1 which the plaintiffs filed to stop the Defendant from exercising its right to sell the mortgaged properties under the deed of legal mortgage and the instant one or suit. I also believe the evidence of the Defendant that the plaintiffs paid the N1.7 Million and withdrew the suit in Exhibit D 1 but refused to withdraw the instant suit."

Counsel stated that the lower Court failed to act on this finding of fact and that if the lower court had acted thereon, its decision would have been different as the Respondents would have been caught by the doctrine of promissory/equitable estoppel or estoppel in pais. Counsel submitted that the continuation of this matter by the Respondents was in clear breach of the agreement as found by the lower Court after the Appellant had honored their part of the bargain and altered their position. Counsel cited several authorities on the principle of estoppel by conduct or estoppel in pais and he urged this court to hold that the Respondents are caught by the doctrine of estoppel in pais and to strike out this suit accordingly. Alternatively, and in case this court finds that the Respondents were not caught by estoppel in pais, Counsel urged that this Court finds that the Appellant was entitled to its claims on the counter-claim.

In the response, Counsel to the Respondents stated that there was no breach of any agreement on the part of the Respondents because by the letter dated 26th of August, 1998, Exhibit D4, the agreement that the Respondent should pay the sum of N1.7 Million in full and final settlement of their indebtedness had no condition attached to it. Counsel submitted that it is trite that where there are oral and documentary evidence before a court, the latter should be used to evaluate the oral testimony. Counsel referred to the submission of counsel to the Appellant in the brief of argument and submitted that the Respondents cannot be said to be caught by the doctrine of estoppel in pais because it was clear from the evidence before the Court that the agreement between the parties was that the Respondents were to withdraw all the other suits except this present one and that there was no documentary evidence presented by the Appellant proving otherwise. Counsel urged this Court to resolve this issue in favor of the Respondent.

Reading through the judgment, the lower court indeed made the statements quoted above and the findings contained therein in the course of its evaluation of the evidence led by the parties (see page 191 of the records). The Respondents have not challenged or contested the said statements of the lower court on this appeal and they will be deemed to accept the findings therein contained as correct and binding - Inakoju v. Adeleke (2007) 4 NWLR (pt 1025) 423. The entire submission of counsel to the Respondents on this third issue for determination was thus completely off point. Counsel to the Appellant submitted that the lower court failed to act on the statements and findings and thus occasioned a miscarriage of justice because if the lower court had done so, its decision would have been different as the continuation of his matter by the Respondents would have been caught by the doctrine of promissory/equitable estoppel or estoppel in pais. The Appellant raised this issue in its better and further amended statement of defence before the lower court and the Respondents joined issues with the Appellant thereon in their amended reply to the statement of defence.

Estoppel is an admission or something that the law views as equivalent to an admission. By its very nature, it is so important, so conclusive, that the party whom it affects is not allowed to plead against it, or adduce evidence to contradict it. Estoppel prohibits a party from providing anything that contradicts his previous acts or declarations to the prejudice of a party who, relying upon them, has altered his position. It shuts the mouth of a party - Maya v. Oshuntokun (2001) 11 NWLR (pt.723) 62, Adone v. Ikebudu (2001) 14 NWLR (pt 733) 385, Nikagbatse v. Opuye (2010) 14 NWLR (pt 1213) 50. It is a liability whereby a party is precluded from alleging or proving in legal proceedings that a fact is otherwise than it has been made to appear by the matter giving rise to the disability; that is, he is not allowed to say a certain statement of fact or assertion he made is untrue, whether in reality it is true or not Omnia (Nig) Ltd V. Dyktrade Ltd (2007) 15 NWLR (pt 1058) 576, Agbogunleri v. Depo (2008) 3 NWLR (pt 1074) 217, Polyvalent (Nig) Ltd v. Akinbote (2010) 8 NWLR (Pt 1197) 506.

In Ukaegbu v. Ugoji (1991) 6 NWLR (Pt 196) 127 at page 157, Karibi-whyte, JSC defined estoppel by quoting with approval the statement of Denning MR in Moorgate Mercantile Co. Ltd v. Twitching (1976) 1 QB 225 thus:  
"Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and equity. It comes to this: when a man, by his words or conduct, led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust and inequitable for him to do so."

I. T. Muhammad, JCA (as he then was) in Opara V. Omolu (2002) 10 NWLR (pt 774) 177 at page 190 defined estoppel thus:

"An estoppel simplicita is that phenomenon where a man either in express terms or by conduct, makes a representation to another of the existence of a state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts to the detriment of him who so believes and acts, then the first is estopped from denying the existence of such a state of facts."

Estoppel has many variants and the variant canvassed by the Counsel to the Appellant in this matter is the doctrine of estoppel by representation, also known as estoppel by conduct and as estoppel in pais.

This doctrine of estoppel arises in three situations. Firstly, if a man by his own words or conduct willfully endeavours to cause another to believe in a certain state of things which the first knows to be false and if the second believes in such state of things and acts upon the belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things does not exist at the time.

Secondly, if a man, either in express terms or by conduct, makes representation to another of the existence of a state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such state of facts.

Thirdly, if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean certain representation and that it was a true representation and that the latter was intended to act upon it and in a particular way and he, with such belief, does act in that way to his damage, the first is estopped from denying the facts as represented - Ige v. Amakiri (1976) 11 SC 1, Oyeyemi v. Commissioner for Local Government, Kwara State (1992) 2 NWLR (pt 266) 661, Olalekan v. Wema Bank Plc (2006) 13 NWLR (pt 998) 617, University of Ilorin v. Adesina (2010) 9 NWLR (Pt 1199) 331, Afribank Nig Plc v. Anuebunwa (2012) 4 NWLR (pt 1291) 560.

In Kpansanagi v. Shabako (1993) 5 NWLR (Pt 291) 67, Musdapher, JCA (as he then was) stated the doctrine at page 79 thus:

"It is a rule of universal law that if a man either by word or conduct has intimated that he consents to an act which has been done and that he will offer no opposition to it although it could not have been lawfully done without his consent and he thereby induces that other to do that from which the other party otherwise might have abstained, he cannot question the legality of the act he has so sanctioned to the prejudice of that other who has give faith to his word or the fair inference to be drawn from his conduct. In such cases proof of positive assent or concurrence is unnecessary. It is enough that the party had full notice of what was being done and the position of the other party altered."

Similarly, in Chukwuma v. Ifeloye (2008) 18 NWLR (Pt 1118) 204, Ogbuagu, JSC said of the doctrine at pages 237 thus:

"Where a person or one by words and/or deed or conduct made to another a clear and unequivocal representation of a fact either with knowledge of its falsehood or with the intention that it should be acted upon, or has conducted himself that another would, as a reasonable man with his full faculties, understand that a certain representation of fact was intended to be acted upon, and that other person in fact acted upon the representation whereby his position was thereby altered to his detriment, an estoppel arises against that Person who made it and he will not be allowed to say that the representation is not what he presented it to be. This is known as estoppel by conduct or estoppel in pais. In other words, where one by his words or conduct willfully causes another to believe the existence of certain state of things and induces him to act on the belief so as to alter his previous position, the former is precluded from asserting against the latter a different state of things as existing at the same time."

The principle upon which estoppel by representation is founded is that the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt for the purpose of their legal relations: First Bank of Nigeria Plc V. Sangonuga (2007) 3 NWLR (pt 1021) 230, Afribank Nig Plc. V. Anuebunwa (2012) 4 NWLR (pt 1291) 560. The doctrine of estoppel by representation is a defective doctrine preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way: Chukwuma v. Ifeloye (2008) 18 NWLR (pt 1118) 204. Thus, where a party by his words or actions ignites a deserving response from the other party, that party will be estopped from denying the truth or otherwise of his words or actions and from complaining about the response of the other party - Iloabachie V. Iloabachie (2005) 13 NWLR (Pt 943) 695.

The facts as proved and accepted by the lower Court were that at a point in time, the Respondents had pending actions against the Appellant, including this present matter, and that the indebtedness of the Respondents to the Appellant at the time stood at N4.6 Million; that as a compromise of all the pending matters, the Appellant and the Respondents agreed that the Respondents should pay the sum of N1.7 Million in full and final settlement of the said outstanding indebtedness and that the Appellant should accept the said sum in return for which the Respondents would discontinue all the pending actions, including this present one; that the Respondents paid the sum of N1.7 Million and the Appellant accepted it in full settlement of the said indebtedness but the Respondents failed to discontinue this present matter and continued with its prosecution till judgment.

Applying the above stated principles of estoppel by representation to these proved facts, it is clear that the continued prosecution of this matter by the Respondents was caught by the doctrine of estoppel by representation. It is unconscionable and it amounts to a fraud on the part of the Respondents to take advantage of the waiver of the sum of N2.9 Million made by the Appellant in the belief that this action would be discontinued, only to turn back thereafter to continue the matter. It is trite that estoppel is a complete defence to an action and that the proper order to make in an action caught by the doctrine of estoppel is an order of dismissal - Lamina v. Ikeja Local Government (1993) 8 NWLR (Pt 314) 758. It is apparent from the records of appeal that the lower court did not act on these proved facts and did not offer any reasons for failing to do so. The lower court, having accepted and believed the facts of these representations as proved, ought to have acted on them and applied the law accordingly. This Court agrees with the Counsel to the Appellant that failure of the lower Court to act on the proved facts led to miscarriage of justice in the circumstances of this case. The third issue for determination is resolved in favour of the Appellant.

The resolution of the third issue for determination provides the merits in this appeal. The appeal is hereby allowed. The judgment of the High Court of Kaduna State in suit No KDH/Z/45/98 delivered by Honorable Justice Dogara Mallam on the 28th of September, 2010 is hereby set aside. The continued prosecution of the suit, suit No KDH/Z/45/98, having been caught by the doctrine of estoppel by representation, the suit, ought to have been dismissed and it is hereby dismissed. The parties shall bear their respective costs in this appeal. These shall be the orders of this court.

**ABDU ABOKI, J.C.A**:

I agree.

**ITA G. MBABA, J.C.A:**

I had the advantage of reading the draft of the judgment just delivered by my learned brother, HABEEB A. ABIRU JCA. As is usual with him, my Lord has carefully and admirably engaged all the issues raised for consideration and I agree with all his reasoning and conclusions.

I think the lead judgment has said all that needed be said on the point of triumph of the appeal, being the valid findings of the trial court, that the Respondents reneged on the agreement which the parties had, that on payment of 1.7 million naira by the plaintiffs to the Defendant, in full and final settlement of their debt and withdrawal of all the cases against the Defendant, the Defendant would waive part of the loan or interest. The plaintiffs (Respondents) had paid the amount, but failed to withdraw this suit (which was one of the cases they had a duty, under the agreement, to withdraw).

Having made that valid finding, the trial court had a duty to hold the Respondents to live up to their promise or declaration, having made the Appellant to believe and adjust to the expectations in the promise/declaration.

It is the law that:

"Where parties have entered into a contract or an agreement voluntarily and there is nothing to show that same was obtained by fraud, mistake, deception or misrepresentation, they are bound by the provisions or terms of the contract or agreement. This is because a party cannot ordinarily resile from a contract or agreement, just because he later found that the conditions of the contract or agreement are not favourable to him. This is the whole essence of the doctrine of sanctity of contract or agreement."

See the case of A.G. RIVERS v. A.G. AKWA IBOM (2011) 8 NWLR (Pt. 1248) 31, ratio 1.

See also section 169 of the Evidence Act, 2011 which says –

"When one person has, either by virtue of an existing Court judgment, deed or agreement, or by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he or his representative in interest shall be allowed in any proceeding between himself and such person or such person's representative in interest, to deny the truth of that thing.

The Respondents were therefore estopped to go against their promise and representation.

With this and more elaborate reasons in the lead judgment I too allow the appeal and abide by the consequential orders therein.