**A. AMEH A. AKPA DIGA**

**V.**

**ADAM TONY**

IN THE COURT OF APPEAL OF NIGERIA

THE 27TH DAY OF MARCH, 2013

CA/J/235/2007

**LEX (2013) - CA/J/235/2007**

OTHER CITATIONS

2PLR/2013/1 (CA)

(2013) LPELR-20768(CA)

**BEFORE THEIR LORDSHIPS**

ADZIRA GANA MSHELIA, JCA

SAMUEL C. OSEJI, JCA

MOHAMMED A. DANJUMA JCA

**BETWEEN**

A. AMEH A. AKPA DIGA - Appellant(s)

AND

ADAM TONY - Respondent(s)

**ORIGINATING COURT**

BENUE STATE HIGH COURT HOLDEN AT OTUKPO

**REPRESENTATION**

S. AYEGBA, Esq. - For Appellant

AND

ADAKOLE ABUTU, Esq. - For Respondent

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

COMMERCIAL LAW – CONTRACT:- Breach of contractual agreement – How treated

CONSTITUTIONAL LAW- FAIR HEARING:- Right to fair hearing – Whether entails more than physical hearing alone – Whether is satisfied where all reasonable opportunity has been afforded a litigant for the presentation of his case – Delay of court proceedings – Whether abuse of court processes disentitling its perpetrator of right to later claim he has not been heard

CONSTITUTIONAL LAW- FAIR HEARING:- S.33 of the 1979 Constitution – Need to ensure, in Civil Cases, that a balance is struck between the Plaintiff's right to have his case heard expeditiously and the Defendant's right to put across his defence to Plaintiff's suit

**PRACTICE AND PROCEDURE ISSUES**

ACTION:- Cause of action – What constitutes - How to discern same

ACTION **–** CAUSE OF ACTION:- How determined - Whether only discernable from the writ of summons and statement of claim or originating summons as the case may be

ACTION - HEARING NOTICE:- Whether hearing notice will not be issued or served on parties who already know or are reasonably presumed to have known of the date on which a matter is slated for hearing

COURT:- Rules of court - Discretion of court – Whether are mandatory -

COURT:- Record of appeal - Whether court is bound thereby

COURT - POWER OF COURT:- Adjudication of suit relating to a contract – Duty of court thereto - Whether court can make a new contract for parties to a contract

JUDGMENT AND ORDER - RELIEFS NOT SOUGHT:-Duty of court to limit itself to pleadings of parties – Implications for the granting of reliefs – Relief not sought – Whether court can grant same

SERVICE OF PROCESS:- Non service of hearing notice – Legal effect thereof

WORDS AND PHRASES- “Cause of action” - Meaning

**MAIN JUDGMENT**

MOHAMMED A. DANJUMA, J.C.A. (DELIVERING THE LEADING JUDGMENT):

This is an appeal against the decision of the High Court of Justice, Benue State sitting at Otukpo in Suit No.OHC/6/2007 wherein the learned trial court had entered Judgment for the Plaintiff now Respondent in the terms of his reliefs sought.

I shall, because of the deliberate conflicting versions of the statement of the facts of this case and the nature of the claim as set out by the respective counsels in this appeal, set straight the records by setting out the plaintiffs claim at the High Court so that the true perspective of the case could be appreciated. By paragraph 22 of the plaintiff's statement of claim, the plaintiff claimed as follows:-

a) "AN ORDER directing the Defendant to specifically comply with the terms of the Memorandum of Understanding dated 10th November, 2006 by surrendering his title document in respect of property or properties located at No.23 Old Otobi Road GRA, Otukpo, and Benue State to the plaintiff.

b) AN ORDER of perpetual injunction restraining the defendant, his privies, agents from parading himself or themselves as title holders of the properties located at No.23 Old Otobi Road GRA, Otukpo henceforth and/or doing anything to the properties detrimental to the plaintiff's interest.

ALTERNATIVELY

c) AN ORDER directing the defendant to pay the sum of Two Million, three hundred and fifteen thousand Naira (N2,315,000) in full satisfaction to the plaintiff.

d) One Million Naira (N1,000,000) general damages for breach of contract and expenses incurred in his effort to recover the contract sum".

Now to the facts of the case in summary as gleaned from the statement of claim and the evidence led:-

The Defendant, now Appellant who was resident in the United States of America had called the Plaintiff (now respondent) by phone and informed him that he had one Unit of Lincoln Navigator 2000 series Jeep to sell. Plaintiff indicated interest and they agreed on the purchase price of Two Million, seven hundred thousand Naira (N2,700,000) only.

The Defendant directed that an advance payment as deposit of Two Million Naira (N2,000,000) be made to him through PW1 - his relation and PW1, who was with the Plaintiff during the phone discussion on the contract was instructed through the same Telephone to collect the Two Million Naira (N2,000,000) from the plaintiff and to pay into the Defendant's Domiciliary Account in Lagos. This was done and PW1 received a confirmation from the Defendant the following day.

In their verbal agreement over the telephone, the Jeep was to be delivered within four (4) weeks. The contract was made in May 2008. In the month of August of the same year, plaintiff gave a further sum of Three Hundred thousand Naira (N300,000) to the Defendant in Nigeria on request to enable him clear and deliver the vehicle which was said to be at Cotonou, then, but all efforts at delivery having failed, the parties entered into an agreement, Exhibit 'A' in this suit to have the entire sums refunded on or about 31-12-2006 or to consider the Defendant's plot and building thereon at No.23 Old Otobi Road GRA, Makurdi as vested on the plaintiff automatically in default of the full payment as aforesaid. The Agreement which was called the "Memorandum of Agreement" was made on the 10th day of November, 2006.

Defaulting in paying at the agreed latest date of 31st December, 2006, the Plaintiff in reaction has then instituted this suit for breach of contract, wherefore he seeks the enforcement of the terms of the Memorandum of understanding signed by the parties.

It should be stated that after the service of the Writ of Summons and Statement of Claim on the Defendant/Appellant and in the default of the entry of Appearance, the matter proceed to trial and on the date fixed for Judgment, the Defendant/Appellant who then was present sought to move the court by his motion to arrest or suspend the delivery of the Judgment fixed for that date, and extension of time and leave for the Defendant to enter a Memorandum of Conditional Appearance and to file his Statement of Defence and to be allowed to recall and to cross examine the plaintiff's witnesses in evidence. After taking arguments based on Briefs of argument filed by the respective counsels, the trial court refused all the prayers as made and proceeded to sign Judgment for the plaintiff (now respondent)

Dissatisfied, the plaintiff expeditiously filed the instant Appeal on the 12th day of July 2007.

The said Notice of Appeal dated 12th July 2006 together with its particulars is herein under reproduced as follows:-

GROUNDS OF APPEAL

The learned trial Judge erred in law when he set down for hearing the respondent suit No.OHC/6/2007 when the statutory period for the exchange of pleadings by the parties were yet to elapse thereby denied the appellant adequate time to put in his defence as required by law.

PARTICULARS OF ERRORS

i) The suit was filed on the 1-2-2007.

ii) The Appellant was served with the suit only on the 18-4-2007.

iii) Suit set down for hearing on 5-6-2007 when the statutory period for exchange of pleadings by the Appellant was un-exhausted.

iv) Appellant was entitled to 60 days from the time of service of the suit on 18-4-2007 to file and serve his statement of defence.

v) The subject matter of the claim bothers on land and monetary damages.

2. The learned trial Judge erred in law in proceeding with the hearing of the Respondent's case, on the 25th day of June 2007 without satisfying himself of the requirement of proof of service of date of hearing on the appellant thereby denying Appellant fair hearing.

PARTICULARS OF ERRORS

...Upon the transmission of the record of this appeal on the 8th of August, 2007, the Appellant filed the Appellant's Brief of Argument on 9th August, 2007, whilst the Respondent on its part filed the Respondent's Brief of Argument dated 23rd October, 2007 on 25th October, 2007.

In his Brief of Argument as settled by his learned Counsel, S. Ayegba, Esq. the Appellant has formulated six (6) issues for the determination of this Appeal. Whilst the Respondent has equally by his Counsel, Adakole Abutu, Esq. also formulated six (6) issues for consideration by this court. The issues shall be re-stated as I proceed to consider the submission relating thereto each of them as may have been made by the parties:-

Starting with the Appellant issue No.1, which poses the question whether or not the Appellant was denied equal treatment, opportunity and/or adequate statutory period within which to prepare and file his pleadings before the matter was set down for hearing his learned counsel referred this court to pages 2, 6 and 7 of the record and pointed out that the suit was served on the Appellant on the 18th day of April, 2007 and the suit was set down for hearing for 5th June, 2007 when the period for exchange was yet to lapse. That suit was prematurely set down for hearing. That by order 25 rule 2 sub r. 1 of the Benue State High (Civil Procedure) Rules Edict 1988 then applicable, the appellant was entitled to 60 days from the service of the statement of claim on him to serve his statement of Defence, the claim according to learned counsel, being a land case. It was learned counsel's submission that the case was not ripe for hearing, when it was so set down. In consequence, is contended that the Appellant has been denied his constitutional right of fair hearing under S. 36(1) of the 1999 Constitution.

It is contended that the provisions of Order 25 r. 2 of the Benue State High Court (Civil Procedure) Rules, Edict 1988 is mandatory and leaves no room for discretion. It is contended further that the trial proceedings resulting in the Judgment appealed did not comply with the condition precedent to the exercise of discretion and due process of law.

GABRIEL MADUKOLU & ORS. v. JOHNSON NKEMDILIM (1962)1 ALL NLR PAGE 587 AT PAGE 589 was referred to. In support on this issue, it was submitted that any Judgment or Ruling based on breach of the constitutional provision of fair hearing will not be allowed on stand on appeal, and that this is so in this case where he contended that no equal treatment opportunity to present his defence at the trial was afforded the Appellant.

ADEBAYO OGUNDOYIM & 2 ORS. v. DAVID ADEYEMI (2001) 89 LRCN PAGE 2585 AT 2596 was referred to in aid.

On issue No. 2, learned Appellant's counsel referring to page 7 of the record submitted that the trial court erred in not ensuring that there was a hearing notice served on the Appellant against the hearing date of 25th June, 2007 as the hearing date served against the 5th June, 2007 could not cure the defect since the Appellant was absent on that 5th June, 2007 and move so that the court did not sit on that date.

The case of DR. FELIX NWANZE OBI v. STEPHEN YOUNG OBI & 1 ORS (2004) PT. 224 ALL FWLR PAGE 2081 AT 2083 AND 2089 was referred to in the submission that it was the duty of the court to verify and establish that a party has been served a hearing notice before it could make any order against such a party. In further reliance was the case of PRINCE COLLINS ESELEMO v. HON SOLOMON FUNKEKEME & 5 OTHERS (2004) 1 ALL FWLR PT. 223 PAGE 2092 AT 2102: WEMA BANK NIG. LTD, & 2005 v. S. O. ODULAJA (2000) 76 LRCN PAGE 561 AT 569, MAMUDAH WAPPAH v. DAYIMA MOURAH (2006) 18 NWLR PT. 1010, PAGE 18, AT 45-47.

That Appellant was not aware of the date of 25-6- 2007 and the hearing done on that date to conclusion was ex-parte. It was submitted that this case is on all fours with MAMUDA WAPPAH'S case supra. Learned counsel, contends that the excuse by the trial Judge in the Judgment to the effect that the clerk of court gave the hearing date to Appellant was not true and was not borne out of the record of the 25th day of June, 2007; that what was in the record of 25-6-2007 is that the Defendant was absent. That the trial Judge did not inquire as to service on the Defendant and that it was a defect that was so fundamental that it robbed the trial court of Jurisdiction.

The Appellants 3rd issue which challenges the award of the main relief claimed and also indicating the alternative claim as an alternative successful claim, it is submitted that it was wrong to award both the main relief and that claimed in the alternative.

The cases of CHIEF F. S. YESUFU & I OR. v. KUPPER INTERNATIONAL N V (1996) 4 SCNJ. page 40 at 50 ratio 15 - 20 referred. M. V. CAROLINE MAERSK & 2 ORS. v. NOKEY INVESTMENT LIMITED (2002) 101 LRCN 1853 at 1855 - 1867 and IBRAHIM JIMOH AJAO v. MICHAEL ADEMOLA AND 2 ORS. (2004) 10 FWLR p.1 at 20 ratio were referred to in finally submitting on this issue that since both the parties and the court are bound by the pleadings, the court was not to grant cumulatively, reliefs claimed in the pleadings in the alternative form.

On issue No.4, learned counsel referring to pages 10 - 13 argued that the reliance on Exhibit 'A' to enter Judgment for the Plaintiff/Respondent was wrong. It was submitted that the Exhibit 'A' was a registrable instrument, which was inadmissible in evidence under S.15 of the Lands Instruments Registration Law of Northern Nigeria. Cap 58 of 1963 since if was not registered. That it could not be admissible to prove title nor can it be pleaded or given in evidence as affecting land. It was submitted that such a document which ought not to have been admitted in evidence should be expunged from the record. We were, therefore, called upon to expunge Exhibit 'A' from the record as being inadmissible and that it cannot be relied on to grant the main relief in paragraph 22 sub-paragraphs a, b of the claim.

On the alternative claim in paragraph 22 (c), it was contended that it did not confer any enforceable right of action on any party to it as it was subject to a condition precedent of an agreement being first drawn and executed between the parties. That the parties were not ad idem until the precondition in paragraph 4(c) of Exhibit 'A' is met.

The case of SPARKLING BREWERIES LTD. & 5 ORS. v. UNION BANK OF NIGERIA LTD. (2001) 89 LRCN 2564 at 2581 - 2584 was referred to.

That Exhibit 'A' should be expunged from the record and a dismissal of the plaintiff's case entered,

On issue No.5, it was submitted that the dismissal of the motion for leave to file and enter defence had ample reasons grounding same as contained on page 36 of the record. That the refusal to accede to the motion was in violation of order 22 rule 3 sub-rule 1 of the BENUE STATE HIGH COURT (CIVIL PROCEDURE) RULES, 1988 AND KANO TEXTILES PRINTERS PLC. V. GLOEDE AND HOFF NIG. LTD. (2002) 2 NWLR PT. 751, PAGE 420 AT 461 B - C. which allows the re-opening of a suit fixed for adjournment on the application of a defendant who desires to put in his defence on the ground that he was absent at the trial.

Finally on this issue, it was submitted that the trial court was under a duty to consider and decide the matter on the merit referring to SOLEYE V. SONIBARE (2002) 10 NWLR (pt. 775) page 380, was urged to, therefore allow this appeal and to set aside the Judgment.

On the issue No. 6, it was submitted that the decision based on Exhibit 'A' as it were had not been established and this court was urged to allow the appeal and to set aside the decision of the trial court and in its place to enter an order for the dismissal of the case or make whatever order(s) which this court deems fit in the interest of Justice.

On his part, the respondent who formulated six (6) issues for determination as stated earlier argued them in the following manner:

On his issue No.1, it was submitted that the contention of the Appellant on a right to minimum of 50 days to file a defence was baseless, as according to counsel, the claim was one bothering on contract executed between the parties and not one of declaration o title to land or recovery of land per se. It was submitted that the plaintiff's case can be gleaned from the writ of summons and statement of claim read as a whole. That it was simply a claim based on the failure on the part of the Defendant to comply with an agreement (Memorandum Understanding) executed between the parties.

It was further contended that the Rules of Court relied upon was inapplicable as it only applies where the person seeking to rely on same has filed his Memorandum of Appearance and Statement of Claim. It was contended that the Appellant as Defendant did not enter appearance, file his statement of Defence within time or obtain leave to do so until the matter was set down for hearing and a hearing date of 5th June, 2007 was served on him. That even after the service of the said hearing date on him (Appellant) he still failed to enter appearance or apply for leave to file same and his statement of defence until case was commenced and judgment reserved. That the submissions relating to fair hearing and its purported breach or violation of S.36(1) of the 1999 constitution should be discountenanced together with the cases referred to in aid of submission.

Learned counsel submits that the agreement exhibit "A" was freely entered into to the effect that the indebtedness be paid on or before a specified date, failing which the properties indicated in Exhibit 'A' shall be forfeited to the Respondent and then an alternative relief.

It was further contended that it was not the case of the Defendant at the trial that he was still within time; as by his motion he had sought for leave to file his Memorandum of Appearance and Statement of Defence, all, out of time. He had sought to show why he could not so file within time. That, parties are bound by their agreement freely entered into. That no party would be permitted to go outside it for remedy after the parties had agreed thus:

"Party 'A' possesses title documents to the said plots of land, but shall not surrender the said documents to party 'B' unless and until after 31st December, 2006 when he failed to redeem his mortgage to party 'B' wherein title to the said plots of land automatically vests in party 'B' being consideration for his money."

OSUN STATE GOVERNMENT v. DALAMI LTD. (2007) 5 MSCNJ 187 At 202 par. G AND IFETA v. SPDC (NIG) LTD. (2006) Vol. 142 LRCN 2554 at 268 par. EE. HH referred. That the Appellant's issue No.1, which is similar to this issue No.1 by the Respondent cannot be sustained on the authorities and arguments proffered. That the appeal be dismissed on this issue as argued and the Judgment of the lower court be affirmed.

On issue No.2, the Respondent submits that there was service of the hearing notice for the 25th June 2007 by the clerk of the court. That this fact was confirmed to the Judge's satisfaction. INAJOKU v. ADELEKE (2007) 2 MJSCI at 199 par. D - E referred.

That the Respondent filed a counter affidavit to the motion filed by the Appellant; that by paragraph 3(f) (g) (j) and (k) which has not been contradicted, the Appellant was sufficiently aware of the hearing date of 25th June, 2007, but failed to attend court or file his defence. It was therefore, submitted that it did not amount to denial of fair hearing when the trial Judge proceeded as he did on the 25th June, 2007 to hear the case. In NEWSWATCH COMMUNICATION LTD. v. ATTA (2006) 12 NWLR (PT. 993) p. 144 wherein the SUPREME COURT held at page 173 par. D - E, thus:

"The Court must hear the parties, both parties to the case but the court is not a slave of time that must wait indefinitely for a party to decide when to come to present its case. To delay hearing of a case deliberately is an abuse of court process which is turn defeats justice." was called in aid.

Learned counsel referred specifically to PAGE 171 PARAGRAPHS F - G OF THE REPORT IN NEWSWATCH COMMUNICATION LTD. v. ATTA Supra wherein the apex Court postulated thus:

"The principle of fair hearing is not available to a party who sets trap in the litigation process against the court and accuses the court of assumed wrong doing even when the so-called wrong doing was as matter of fact propelled or instigated by the party."

It was argued that the Appellant had after all admitted in his issue No.2 that he was served a hearing notice against the 5th of June, 2007 but was absent and that no reason was given for the absence.

On issue No.3, the Respondent contended that the parties were bound by their pleadings; and so the court. That the reliefs granted was in order.

In respect of the contention that the reliefs granted was wrong as it was made cumulatively and in excess of what was claimed, the Respondent's counsel contends that even it were, no miscarriage of Justice has been occasioned.  
On issue No.4, the Respondent submitted that there was a binding contract freely entered into by Exhibit 'A' and that it was the duty of the trial court to give effect to the agreement and grant the reliefs. OLADEJI LTD. v. NBPL (2007) 3 MJSC 29 at 43 par. A - B referred.

That even the Appellant did not deny the existence of the contract, but only argue that the contract was subject to a condition precedent.

That the Appellant had by Exhibit 'B' - the letter from his counsel admitted the existence of the agreement and Exhibit 'A'. That the admission constituted estoppel. That there was an enforceable contract which the Appellant rightly called upon the court to enforce. That the reliefs granted was therefore right.

On issue No.5, it was argued that there was a binding contract between the parties. See ARJAY LTD. v. AIRLINE MANAGEMENT LTD. (2003) 108 LRCN 1173 at 1233 AFK.

That the parties to Exhibit 'A' were entitled to rely on it and that it was admissible, that it was not tendered in evidence to prove title or interest in land but to prove the existence of the contract between the parties that it was relevant.

Issue 6:

On the question whether the court acted rightly in dismissing the motion that would have allowed the Appellant to be heard; it was argued that, in the circumstances the court was right.

NEWSWATCH COMMUNICATION LTD. v. ATTA SUPRA AND INAKOJU & ORS. v. ADELEKE & ORS. (Supra) were referred to in contending that the Appellant who had been given all the opportunities cannot complain of any denial as after all, he could not have been forced to defend the claim.

The Respondent therefore urged that the appeal be dismissed and the Judgment of the trial court be affirmed.

It should be appreciated that the parties have distilled and argued 6 issues respectively as arising from the Grounds of appeal; however a calm perusal of the issues and the arguments therein which overlap in some instances discloses in my view the existence of 3 issues which shall suffice for the determination of this appeal. I shall therefore, decide this appeal those issues, which I shall record as follows:-

Issue No.1: Whether there had been established an enforceable contract between the parties to warrant the Judgment of the trial court in favour of the Respondent. This covers the Appellant's issue No.4, 6 and the Respondent's Issues No. 1, 4, 5, 6.

Issue No.2: Whether there was no miscarriage of Justice warranting the setting aside of the Judgment of the trial court on the ground that the Appellant as Defendant was not accorded the right of fair hearing. (This covers Appellant's Issues No.1, 2, 5 and 6 and Respondent's Issues No.2, 6).

Issue No.3: Whether the trial court did not act in excess of jurisdiction when he granted the reliefs in the manner he did. (This covers Issues 3 and 6 of the Appellant and Issue 3) of the Respondent.

On the condensed and reformulated issues as above, I shall start with Issue No.1. The Appellant and the Respondent's counsel are all agreed that there was an agreement between the parties. The said agreement is Exhibit 'A'. The only question is - Does Exhibit 'A' constitute an enforceable contract or is an inadmissible registrable document relating to land which cannot confer any title or be used to prove interest or title to any land. I have perused the record of appeal and in particular, the evidence of PW1 and PW2 relating to the exhibit 'A'. The Respondent testifying as PW2 on page 8 of the record stated at paragraph 40 thereof and p. 9 par. 5. Thus:

"... I told him he should give me the assurance that he would refund my money then. The Defendant then brought an ides of a written agreement between us as to the date of payment. I accepted this. We then went to the Defendant's house at the Old Otobi Road, No. 23 GRA, Otukpo. The Defendant showed the house to me and told me that if he failed to pay me my money on or before the 31st day of December 2006, I should take the house, I accepted and we entered into a written agreement to that effect. I can recognize that written agreement if I see it because I signed it. This is the agreement. This is my signature on it."

Abutu: I apply to tender the Document entitled: "Memorandum of Understanding" in evidence

Court: The document entitled "Memorandum of Understanding" is hereby admitted in evidence as Exhibit 'A'.

Exhibit 'A' is the crux of this appeal and the bone of contention. The Appellant contends that it is a registrable instrument relating to land and was therefore inadmissible to prove title or interest in the land in this case presumably the plots/houses of the Defendant/Respondent mentioned in Exhibit 'A'.

Suffice it to state that a registrable instrument is not by that fact per se inadmissible if not registered. However, it is only inadmissible for the purpose of proving title or interest in land; or where it seeks to convey or confer or assign interest or title to land. In any case a Registrable instrument is only one that seeks to convey, assign or grant title in land. There is no such document in the entirety of the Record, let alone at the trial court. In this case, it is imperative to have a glean at the statement of claim of the plaintiff - now Appellant so as to discern what the cause of action was and what, therefore, Exhibit 'A' was intended to achieve.

The Respondent's statement of claim is contained at pages - 3 - 5 of the record, where at the plaintiff claims thus:

"22. Whereof the plaintiff claims against the Defendant the following relief(s).

a) AN ORDER directing the Defendant to specifically comply with the terms of the Memorandum of Understanding dated 10th November, 2006 by surrendering his title documents in respect of property or properties located at No.23, Old Otobi Road, GRA Otukpo, Benue State to the plaintiff.

b) AN ORDER of perpetual injunction restraining the Defendant, his privies, agents, agents from parading himself or themselves as title holder of the properties located at No.23, Old Otobi Road, GRA Otukpo henceforth and/or doing anything to the properties detrimental to the plaintiffs interest.

ALTERNATIVELY

c) AN ORDER directing the Defendant to pay the sum of Two Million three hundred and fifteen thousand Naira (N2,315,000) in full to the plaintiff

d) One million Naira (N1,000,000) general damages for breach of contract and expenses incurred in his effort to recover the contract sum."

There is no doubt that from our adjectival law, it is well settled that a cause of action is only discernable from the writ of summons and statement of claim or originating summons as the case may be. See KUSADA v. SNA (1968) 1 ALL NLR 377, 1958 SCN LR 522: BOLAJI v. REV. BAMGBOSE (1986) 4 NWLR (PT.37) 632, ADESOKAN v. ADEGOROLU (1991) 3 NWLR (PT. 179) 293 AND SEVEN-UP BOTTLING CO. v. ABIOLA & SONS BOTTLING CO. LTD. (2001) 13 NWLR (PT. 730) PAGE 469 at 495 C - F. The cause of action in this appeal is one relating to prayers for specific performance of contract evidence by Exhibit 'A', (ii) perpetual injunction and (iii) An alternative claim of a liquidated sum and (iv) Damages.

Those reliefs as enumerated above were the Plaintiff/Respondent's claim at the trial court. The law is that the cause of action of any suit filed is determined by the plaintiff's claim. SEE ADESOKAN v. ADEGOROLU (SUPRA) ADEYEMI v. OPEYORI (1976) 6 - 10 SC 31, EGBE v. ADEFORASIN. See the recent decision of this court in G. S. & D. IND. LTD. v. NAFDAC (2012) 5 NWLR. PART 1294. PAGE 511 AT 551 WHEREIN DENTON-WEST, JCA stated thus:

In EGBE V. ADEFARASIN (1987) 1 NWLR (PT. 47) 1, the erudite jurist Oputa, J.S.C., attempted a definition of a cause of action. His Lordship stated at page 20 thus:

"But it can safely be defined as the fact or facts which establish or give rise to a right of action. It is the factual situation which gives a person a right to judicial relief. A cause of action is to be distinguished from a right of action."

Encarta Dictionary defines cause of action as

"facts that gives a person a right to judicial relief."

See ADEKOYA v. FEDERAL HOUSING AUTHORITY (2008) 11 NWLR (PT 1099) 539.To determine these facts, the Appellant's claims will be reproduced thus:"

On the basis of the aforesaid authorities, it is crystal clear that the cause of action disclosed at the trial was one that centred on a contract between the parties and the desire to enforce same, and no more. There was, from the pleadings (cause of action) and the supporting Exhibit 'A', a contract.

Was it binding and enforceable? Yes it is. In P.M. LTD. v. THE "M.C. DANCING SISTERS" 2012 4 NWLR PT. 1289. PAGE 169 AT 197 PARAGRAPH D, the Supreme Court per Rhodes-Vivour, JSC held thus:

"By the terms of the Charter party, the parties have expressed clearly their intention and it is not the practice for the court to make o new contract for them. The court is to give effect to the terms of the contract. Clause 11 and 14 are exemption clauses. They exempt the 2nd Respondent from liability. Exemption clause 14 is a complete answer to any claim the Appellant might file for damages. Furthermore, the Charter party is binding on the parties to the contract in the Bills of Lading..."

On the aforesaid authority, I hold that there was an enforceable and binding contract between the parties evidenced by Exhibit 'A'. The trial court was therefore right in relying on it as he it.  
Issue No.1 is answered in the affirmative.

Issue No.2 raised the question of the breach of the right of fair hearing. This complaint as raised in the grounds of appeal and in the submissions of the Appellant's learned counsel is predicated on the complaint, firstly, that: the Appellant was not served a hearing Notice against the 25th May of June 2007 when the matter proceeded to hearing.

The Respondent argues to the contrary. I have perused the counter Affidavit filed by the Respondent against the Motion on Notice dated 22nd July 2007 - that was fifed by the Respondent as contained on page 16 of the record and find that the Appellant was aware of the date of the hearing in this matter being on 25th June 2007.

For one, in the Affidavit in support of his motion, one Ikwebe Michael Onwe, a litigation Secretary in the Chambers of P. A. Omengala Esq., representing the Appellant deposed thus:

"4. That I know as of fact that the Applicant again came on two other occasions but could not again meet counsel who was again at the Customary Court of Appeal on those two other occasions.

5. That on the 26th day of June 2007, at about 8.45a.m. the Applicant again came to chambers just shortly after P. A. Omengala, Esq. of counsel again taken off to Okpoga for a case at the High Court, Okpoga sitting on Appeal, but left the Writ of Summons and accompanying statement of claim and requested for his action in the defence of the case."

To strengthen the fact that the Appellant's presence at the chambers of his learned Counsel was to inform him of the hearing of that date which he was away, is the counter Affidavit which deposes at paragraphs K, L and M thus: -

"K) That on the 5th June 200, when the matter i.e. suit No.OHC/5/07 was fixed for hearing the Applicant was in court personally, but the court did not sit which date the matter was adjourned to the 25th June, 2007 in his presence upon the Clerk of the court informing them of the court not sitting.

L) That the Applicant was aware of the 2sth June, 2007, but deliberately failed to communicate the date to his counsel.

M) That the Applicant deliberately went to P. A. Omengalo, Esq. on the 26th June, 2007 after the close of the Respondent's case on the 2sth June, 2007 to cause P. A. Omengola, Esq. to file the court processes now served on his including the motion to fulfill his earlier boasting and threat or warning, vide Exhibit '1' annexed hereto."

This piece of evidence relating to the notice of the hearing date of 25th June, 2007 has not been controverted by any further Affidavit by the Appellant. Indeed, it is on record that the Appellant had been served. See the proceedings of 25th June, 2007 contained at page 7 wherein it is recorded, thus:-

"Plaintiff present

Defendant absent

Abutu: The matter is for hearing on our part, we are ready to go on. The Defendant has been served."

The record of Appeal has been held to be the Bible of the proceedings. It is sacrosanct and deemed to be the true and correct version of what transpired in court.

It is a presumed authentic unless otherwise proved. The record has not been impugned or challenged in the manner allowed for by law. It is, therefore, a solemn presumption that it is authentic and that the Appellant was served a hearing Notice against that date of 25th June, 2007 as recorded.

I must agree, therefore, with the Respondent's counsel when he submitted that the Judge must have been satisfied about the service of the hearing Notice before he proceeded. S. 150 of the Evidence Act regarding presumption of regularity of official Act would appear to cover this case where there is the indication of service.

The Appellant had no right to hold either the court or the other party to ransom by keeping away from the court when he was aware of the date fixed for the hearing of the matter under the guise of a claim of fair hearing. Fair hearing does not entail physical hearing alone; it also entails and is satisfied where all reasonable opportunity has been afforded a litigant for the presentation of his case. See the cases of EGWUCHE v. BENUE STATE CIVIL SERVICE COMMISSION AND 3 ORS. CA/J/169/2006 DELIVERED 25TH FEBRUARY 2013.

If a litigant seized of the date for the hearing of his case abstains or does not send a representative and his absence is otherwise not excused by the adjudicating Tribunal or court he cannot be heard to complain. For after all a litigant cannot be compelled to defend a suit or action. That is the essence of liberty. If it is a gamble, it is sanctioned by the tenets of freedom and liberty and this is a constitutional right of choice or decision.

A court of law will not abdicate its statutory or constitutional duty on account of such absence of a party on the fanciful claim that it has no jurisdiction, as learned Appellant's counsel sought to convey in his address in this regard.

There was also a second limb to the challenge to the hearing of the case and judgment resulting there from. It was contended that there was no compliance with order 25, rule 2 sub rule I of the Benue State High Court Civil Procedure Rules. It was contended that the hearing of this case was premature as according to counsel, it took place before the effluxion of 60 days allowed for the filing of defence in a land matter.

A calm perusal of the Rules, does not, at all, bring the suit subject of this appeal within the contemplation of the order 25, r (2) (i).

It is only where the matter relates to land matters that that argument may hold sway; even then, the court still has discretion in the matter.

The matter was a contractual claim and not a land matter. The setting down of the case for hearing on 25th June, 2007 after service on April 2007 was in order.

The learned counsel for the Respondent had submitted that the provisions of Order 25, r 2(i) of the High Court Civil Procedure Rules will only be applicable and invocable where after the service of the Writ of Summons, the Defendant enters appearance; and that thereafter an application for setting down the case for hearing may be brought. I am of the view, too, that in this matter, at the trial, there was no memorandum of Appearance filed. The Application to set down was not premature. The Applicant cannot be allowed to hold the court and his opponent to ransom.

See NEWSWATCH COMMUNICATION LTD. v. ATTAH (2006) 12 NWLR PT. 993. PG. 144 wherein the Supreme Court had this to say -

"The Courts must hear the parties, both parties to the case but the Court is not a slave of time that must wait indefinitely for a party to decide when to come to present his case. To delay hearing of a case deliberately is an abuse of court process which is in turn defeats justice."

Indeed, as stated by the apex Court, the complaint of denial of fair hearing cannot avail a party who has set up a trap for the court or its opponent and then tries to reap there from. No! The Appellant who had all the processes served on him but chose to go to his counsel only at 8.45a.m. on the date of hearing (25-6-07) as deposed to in their affidavit in support of motion, and who was aware of 25-6-07 cannot lay any claim to the violation of his right to fair hearing.

It must be emphasized that a counsel's address does not take the place of evidence. See FATOBA v. DONSI 14 NWLR PT. 840 PAGE 323.In this wise, the address of Appellant's counsel that the Appellant was not present in court on 5-6-07 being the first date of hearing (that did not hold), can be assailed, in the face of the paragraph K of the uncontroverted counter Affidavit and the Judgment. Appellant's learned counsel, had also argued that the dismissing of the motion to file memorandum of appearance and statement of defence out of time and for leave to recall and cross examine the Plaintiff/Respondents' witnesses when the matter had been adjourned for Judgment was also a notable and damnable specie of act in violation of his client's right of fair hearing.

I do not agree. Apart from the peculiar nature of the proceedings giving rise to this appeal, generally speaking and by the decision of the Supreme Court in NEWSWATCH COMMUNICATIONS LTD. v. ATTAH (SUPRA) THE RULES OF COURT have no provision for arrest of judgments about to be delivered by a Court, except where the matter was filed in abuse of process as it is the duty of every court to prevent abuse of its process or the process of the court. See SHETTIMA & 3 ORS. v. GONI & 6 ORS. (2011) 10 SC AT 126 PARAGRAPHS 5 - 15.

The learned trial Judge correctly and rightly disallowed that attempt more so that it was not sanctioned in our adjectival law but was also unsupported by the Applicant. That head of complaint was not only assailable but unavailable. I must also restate that the complaint could not even be proceeded with before this court. It is in this respect that I agree with the Respondent's counsel when he raised a point of objection against grounds L, 2 and 5 and submitted specifically that the complaint against the Ruling in motion No.OHC/79M/2007 was incompetent as being an interlocutory Ruling; the Appellant was obliged to appeal within 14 days or failing which should seek extension of time to appeal and leave to appeal on the interlocutory Judgment. Grounds 1, 2 and 5 are therefore incompetent on the authority of OSUN GOVERNMENT v. DALAMI LTD. (2007) 6 M JSC 187 AT 206 - 207 PAR. G - 45. So also is the issue(s) distilled by the Appellant from those grounds.

In any case, even on the merit, the complaints on those grounds 1, 2 and 5 have no merit as earlier on discussed above.

Issue 2 is resolved against the Appellant and in favour of the Respondent.

Now, the 3rd Issue. I have perused the entirety of the record of appeal and in particular the claims and the supporting exhibits, particularly Exhibit 'A' tendered.

I do find the claims as made, being the replica of the Judgment and order of the trial court complained against. The court awarded what was claimed in the form it was claimed except that it exercised its discretion in not awarding the One Million Naira (N1,000,000) only claimed as general damages. Rather the court awarded Two Hundred Thousand Naira (N200,000) only as general damages.

In P.M. LTD. v. THE "M.V. DANCING SISTERS" (2012) 4 NWLR (PT.1289) 1289, PAGE 169 AT 197, Mukhtar, JSC (Now CJN) had this to say -

"A very careful perusal of the claim of the Appellant and its particulars (which is the foundation of the suit) discloses that the damages complained of occurred on the high seas ... The courts are bound by the claims before them and in this case the claims on page(1) of the printed record of appeal."

The award of those claims as made in the instant appeal at the trial was in order as the court was so bound by the claim, more so that it had been established by evidence. The court did not exceed its jurisdiction.

The non-traverse of the claim of the Respondent as Plaintiff at the trial court by pleadings or evidence means that the facts were deemed to have been admitted and need no longer to be proved. The non-traverse of the claim with specific reference to Exhibit 'A' meant clearly an admission. By virtue of S.75 of the Evidence Act, 1990 Laws of the Federation of Nigeria 2004 as amended 2011; the claim did not need further proof, as admitted facts cease to be facts in issue.

It is trite that a party gets from the court only what he has claimed and proved. See SPDCN LTD. v. ORUAMBO (2012) 5 NWLR Pt. 1294, page 59, at 617 par. 14. The trial court has not in its judgment, given the Plaintiff/Respondent more than he claimed in his suit. It is apparent that the suit by the Respondent was anchored on Exhibit 'A' and Exhibit 'B' which were relied on to show the admission of the Defendant/Appellant of the fact of the existence of the indebtedness and purported resistance to legal action on Exhibit 'A'. As this court per Eko, JCA pointed out in SPDCN LTD. v. ORUAMBO (Supra), thus:-

"The suit was contrived to hold the defendants to their declaration in Exhibits 'A - A8'. From the established facts, the Defendants, particularly the Appellant, are estopped from denying that the Plaintiffs/Respondents are entitled to be paid compensation as assessed in Exhibit 'A - A8' for the operation of this class of estoppel, the beneficial party must not only rely on the said admission, he must have acted on it to his prejudice or he has altered his position..."

The suit, the subject of this appeal was contrived to hold the Appellant to his undertaking in Exhibit 'A'.

The Appellant sought to argue that the Respondent was awarded more than he claimed. The Judgment, however states in part thus:-

"In the case at hand, it is not a matter of the mortgagee exercising his right of sale but the title vesting in the plaintiff automatically in consideration for his money. By the foregoing the expiration of 31st December 2006 and thereafter without the payment of the debt entitles the Plaintiff to demand for the transfer of title to the plots to him. Plaintiffs claim succeeds and Judgment is entered in his favour.

Reliefs (a) and (b) in paragraph 22 of the statement of claim are granted as prayed.

In the alternative, Reliefs (c) of the same paragraph is granted as prayed and in addition to relief (c) the defendant shall pay a general damages of N200,000 for breach of contract and detention of the plaintiff's money."

There is nowhere in the Judgment that the trial Judge awarded more than was claimed. That the Judge did not grant a specific relief but cumulative in spite of the alternative claims is not true.

Claims (a) and (b) of par. 22 of the claim was granted and in the alternative claim 'c' thereof.

Although the trial court would have been safer on the traditional track of the mode of making an Order for award in an alternative claim by specifying which of the claims it was awarded, to the exclusion of the other, it is my view, however, that in this case there is no ambiguity in the relief granted. The successful party may choose to enforce either and I do not think it is embarrassing, vague or in excess. The Plaintiff had established his claim as in Exhibit 'A'.

In G. S. & D IND. LTD. v. NAFDAC (Supra), this court per Denton-West had this to say in respect of a court granting the relief sought.

"On a court granting an order that was never solicited for by a litigant before a court, it is trite law that a court is not a Father Christmas however, a court has discretion to grant or make orders that will justify the case before it." Gone are the days when Judges were zombies. A Judge can use his discretion for a good course (SIC), the lower court never granted what was not asked for by the parties."

A court of law has the discretion to look at all the documents at its possession to come to a judicious and reasonable conclusion. That is why a court will only have the search for Justice as its priority. If an error in the Judgment has not affected the Justice of the case, such error shall not be a ground for setting aside the decision. See OSAMWONYI v. OSAMWOYI (2011) 8 NWLR PT. 1249. 329 AT 341 wherein this court per Danjuma, JCA at paragraph G had this to say -

"It is in this respect that the issue of licence arose. Appellant did not consent to the completion of the two bedroom flat and the expression in the Judgment that the (SIC) consent to complete the building was given in error. But has this error in the Jugedment affected the Justice of the case? I think not."

In PROF. BUBA GAKEGY BAJOGA v. GOVERNMENT OF THE FEDERAL REPUBLIC OF NIGERIA (2008) 1 NWLR (Pt. 1067) PAGE 85 AT 115-  
It was held thus –

"where the person complaining of the irregularity is able to show that a miscarriage of Justice had occurred by reason of the irregularity, he would be allowed to rely on the alleged irregularity to set aside the proceedings."

The point of relevance is that there must be proof of miscarriage of Justice shown in all such circumstances. I fail to see such in the trial proceedings in the face of the facts and circumstances.

The case of INAKOJU AND ORS. v. ADELEKE & ORS. referred to by the learned counsel to the Respondent is apt and fits into this matter. It is to the effect that a court's duty is to create the environment for a fair hearing of a case. It is not the business of the court to make sure that a party takes advantage of the environment or atmosphere by involving himself in the fair hearing of the case. A party who refuses or neglects to take advantage of the atmosphere of fair hearing process cannot turn around to accuse the court of denying him fair hearing. This is not fair to the court and counsel must not instigate his client to accuse the court of denying him fair hearing. Indeed a counsel should not be a willing tool in this regard, too. A client may at his peril play the blame game. The parties in litigation have contending right to Justice and the right of fair hearing. In NEWSWATCH COMMUNICATIONS LTD. v. ATTAH the Supreme Court held thus:-

"A party complaining that he has been denied the right of fair hearing under S.33 of the 1979 Constitution ought to remember that in Civil Cases, a balance has to be struck between the Plaintiff's right to have his case heard expeditiously and the Defendant's right to put across his defence to Plaintiff's suit. Where a party has been afforded the opportunity to put across his defence and he foils to take advantage of such opportunity, he cannot later turn around to complain that he was denied a right to fair hearing."

The totality of the work of the trial court in this case was its duty of ensuring that as the Judex, it performed its statutory obligation of ensuring that Justice prevailed in all circumstances. This, it did by interpreting and giving effect to the agreement between the parties. For an agreement is sacrosanct. To "look the other way" by a court of conscience when seized of it would have been sacrilegious.

In EWAOCHE OGWUCHE & 1. BENUE STATE CIVIL SERVICE COMMISSION & 3 ORS. APPEAL NO.CA/169/2006 DELIVERED ON 26TH FEBRUARY 2013, this court per Ja'afaru Mika'ilu, JCA stated thus:-

"The conditions of service and its terms constitute the binding terms of contract between the parties. The business of the court is to interpret it and give meaning to its ordinary and grammatical meaning and not to rewrite the contract or agreement for the parties. Authorities in this regard and in support are legion and bear no multiple reproduction."

In the same spirit, I had in AKUBUIRO v. MOBIL OIL (NIG) PLC. (2012) 14 NWLR (Pt. 1319) PAGE 79 stated thus:-

"I have myself also examined Exhibit 'A' - the agreement between the parties herein as admitted by the Appellant himself as binding between them. This agreement has been reduced into writing. The trial court rightly held that it is the business of the court to interpret it and give meaning to its ordinary and grammatical meaning and not to re-write the contract or agreement for the parties..."

See ALSO AGBAREH v. MIMRA (2008) VOL. 158 LRCN, (2008) 2 NWLR (Pt. 1071) 378.He that asserts must prove. The Respondent, as Plaintiff had established his claim.

The Appellant's complaint draws a hanger on an alleged breach of the right of fair hearing.

It must be stated, loud and clear that the principle of fair hearing should be applied having regard to the facts of each case. It is not a cut and paste issue; nor is it a magic ward. IN ADEBAYO v. TSG (NIG.) LTD. (2011) 4 NWLR (PT. 1238) PAGE 493 AT 509 PAR. A. Quoting NIKI TOBI, J.S.C. IN ORUGBO v. UNA, it was held thus:

"It has become a fashion for litigants to resort to their right of fair hearing on appeal as if it is a Magic Ward to cure all their inadequacies at the trial court. But is not so, and it cannot be so. The fair hearing constitutional provision is designed for both parties in the litigation and the court as on umpire, so to say, has a duty to apply it in the litigation, in the interest of fair play and justice."

This court will not give a burden to the Rules of Court which it cannot carry. It cannot be applied to the comfort and convenience of only one side to litigation. It must be based on facts of the case before the court as it is only the facts that can influence and determine the applicability of the principle. It is helpless or completely dead outside the facts of the case.

It is in this perspective that this court per MSHELIA, JCA stated in JVC PROFESSIONAL PRODUCTS (U.K.) LTD. v. FAMUYIDE & 2 ORS. (2011) 4 NWLR (Pt. 1238) PAGE 572 AT 593 'D' thus:-

"It has to be borne in mind that every case has to be treated according to its given set of facts and circumstances."

The evidence given by the Respondent at the trial court is clear, so also that of his witness and the Exhibits tendered. Those un-challenged and highly probative evidence are such that the trial court rightly acted on them.

See ODULAJA v. HADADDA (1973) 11 SC P. 357; NWABUOKU v. OTTI (1962) 2 SC NLR 232, CAMEROON AIRLINES v. OTUTUIZU 2011 4 NWLR (Pt. 1238) PAGE 512 AT 545.

On the basis of the views expressed above, I resolve all the three (3) issues against the Appellant and hold that there is no merit whatsoever in the Appeal.

Before I conclude, I find it pertinent to recall my admonition to learned counsel for litigants in a situation where there appears to be no merit in their clients' case, to avoid resort to technicality and to ameliorate the hardship of their clients.

In KARIMU v. LAGOS STATE GOVERNMENT (2012) 5 NWLR (PT. 1294) 620 AT 652. PARAGRAPH 'F'. I stated thus:-

"I must say that this is an avoidable appeal in respect of which a calm and dispassionate review of the trial court's Judgment vis-a-vis the evidence led would have disclosed the futility of increasing the financial burden and physical strains on the Appellant herein. Be that as it may, I shall and do enter the inevitable order of dismissal of this Appeal as some is bereft of any merit."

Appeal dismissed. Judgment in Suit No.OHC/6/2007 of 06-7-2007 delivered by S. J. Ogwiji, J is affirmed.

Costs: I award a cost of N50,000 to the Respondent.

**ADZIRA GANA MSHELIA, J.C.A.:**

**I** had the privilege of reading in draft the lead judgment of my learned brother Danjuma, JCA just delivered. I agree with the reasoning and conclusion arrived thereat. My learned brother had considered all the issues raised in this appeal. I only wish to add few words of mine for the purpose of emphasis.

On the issue of service of hearing notice appellant's counsel contended that it was the duty of the court to verify and establish that a party has been served a hearing notice before it would make any order against such a party. In the instant case it is in evidence that appellant had been served with hearing notice against the date of 25th June 2007 as recorded. On the 5th day of June 2007, the court did not sit but the clerk of court gave next hearing date to the appellant who was in court. The learned trial judge was coming up for hearing on 25th June 2007. It is trite law that hearing notice will not be issued or served on parties who already know or are reasonably presumed to have known of the date on which a matter is slated for hearing. See S & D Construction Co. Ltd v. Chief Bayo Ajoku & Anor. (2011) LPELR-2965 (SC) pg 24 - 25 paras G - A for Adekeye, J.S.C.

It is not the duty of a court or tribunal to wait for a party who is duly served with the process of court but is absent in court. The court is free to commence hearing if satisfied that the parties to the case were duly served. See Nyamati Enterprises Ltd. v. NDIC (2006) All FWLR (Pt. 293) 399. The appellant had all the processes served on him but chose to go his counsel only at 8.45a.m. on the date of hearing (25-6-07) as deposed to in their affidavit in support of motion. Appellant who was aware of the date of hearing being 25-6-07 cannot lay any claim to the violation of his right to fair hearing. See Newswatch Communication Ltd v. Attah (2006) 12 NWLR (Pt. 993) 144.

From the foregoing and the fuller reasons given in the lead judgment, I too find the appeal unmeritorious and same accordingly dismissed. I abide by the consequential orders including that of costs.

**SAMUEL CHUKWUDUMEBI OSEJI, J.C.A.:**

I agree