**ELDER ESEME AKPAN**

**V.**

**EKANABASI ASIBONG UBONG**

IN THE COURT OF APPEAL OF NIGERIA

THE 27TH DAY OF MARCH, 2013

CA/C/97/2010

**LEX (2013) - CA/C/97/2010**

OTHER CITATIONS

2PLR/2013/53

(2013) LPELR-20418 (CA)

**BEFORE THEIR LORDSHIPS**

MOHAMMED LAWAL GARBA, JCA

JOSEPH TINE TUR, JCA

ONYEKACHI A. OTISI, JCA

**BETWEEN**

ELDER ESEME AKPAN - Appellant(s)

AND

EKANABASI ASIBONG UBONG - Respondent(s)

**ORIGINATING COURT**

AKWA IBOM STATEHIGH COURT

**REPRESENTATION**

ALEX UMOH, Esq. - For Appellant

AND

FIDELIS A. ITESHI with SEGUN AJOBEWE & P. I. ELESHI - For Respondent

**ISSUES FROM THE CAUSE9S) OF ACTION**

DEBTOR AND CREDITOR LAW:- Friendly loan agreement reduced into writing – How recovered via an undefended list procedure – Whether oral evidence can be admitted to vary the terms of the written agreement – Relevant considerations

DEBTOR AND CREDITOR LAW:- The undefended list procedure if the High Court – Use of in obtaining expedited decisions regarding liquidated money claims

COMMERCIAL LAW – CONTRACT - AGREEMENT:- Definition of agreement – and contract – Whether every contract is an agreement but not every agreement is a contract - A conveyance of land or a gift of a chattel, though involving an agreement – Root of every contract in the creation of obligation - Whether not a contract because its primary legal operation is to effect a transfer of property, and not to create an obligation

COMMERCIAL LAW - CONTRACT – INTENTION OF PARTIES - WRITTEN CONTRACT:- Need for the express terms of the agreement to be construed to arrive at the intention of the parties – Whether no oral evidence ought to be admissible to vary or add to the clear terms of the contract

COMMERCIAL LAW – CONTRACT - CONSIDERATION:- Meaning of consideration - Rule that unless an agreement is under seal it cannot constitute a contract and be enforceable by a party that has not furnished some consideration in support of it – Dictum: "consideration must move from the promise – Need for consideration to be something of value in the eye of the law which must be given for a promise in order to make it enforceable as a contract – Whether for a party to be entitled to bring an action on an agreement he must demonstrate that he contributed to the agreement otherwise known as consideration

COMMERCIAL LAW – CONTRACT - CONSIDERATION:- Forms - Whether consideration does not only consist of profit by one party but also exists where the other party abandons some legal right in the present, or limits his legal freedom of action in the future as an inducement for the promise of the first – Whether it is irrelevant whether one party benefits but enough that he accepts the consideration and that the party giving it does thereby undertake some burden, or lose something which in contemplation of law may be of value

COMMERCIAL LAW – CONTRACT - CONSIDERATION:- Failure of consideration - Where in a contract, the parties freely and clearly states that consideration not only existed but had been exchanged and acknowledged between and by them – Whether the existence or want or failure of consideration would not entitle a party to deny any obligation under the contract freely made – Exception

COMMERCIAL LAW – CONTRACT – TERMS AND CONDITIONS:- Rule that the terms and conditions of a written contract and indeed all its contents cannot be contradicted, altered added to or varied by oral or other extrinsic evidence outside and extraneous to it – Effect of applicable Statute

CONSTITUTIONAL LAW – FAIR HEARING - AUDI ALTERAM PARTEM RULE:- Rule of audi alteram partem – Duty of court to hear both sides at every material stage of the proceedings before handing down a decision – Where any of the parties is refused or denied a hearing or is not given an opportunity of being heard – How treated

CONSTITUTIONAL LAW - RIGHT TO FAIR HEARING:- Meaning under Section 36 (1) of the 1999 Constitution (as altered) - Trial conducted according to all the legal rules formulated to ensure that justice is done to the parties – Requirement of the observance of the twin pillars of natural justice, namely audi alter am per term and nemo judex in causa sua – Key attributes – Need for a court to hear both parties not only in the case but also on all material issues in the case before reaching a decision which may be prejudicial to a party – Duty of a court to give equal treatment, opportunity and consideration to all the parties in a case – Requirement that the proceedings be conducted in public and all parties be notified or informed of and have access to such public place – Requirement that having regard to all the peculiar circumstances, justice must not only be done but must manifestly and undoubtedly be seen to have done

CONSTITUTIONAL LAW – BREACH OF RIGHT TO FAIR HEARING:- Once the breach of the right of fair hearing in respect of a party to judicial proceeding is proved or established – Whether such proceedings and every decisions arrived therein by a court tribunal would be rendered null and void ab initio by the breach - Legal burden of prove – Whether is on the party alleging the breach of his right to fair hearing in the conduct of any judicial proceedings, to prove or establish in what manner the breach occurred

**PRACTICE AND PROCEDURE ISSUES**

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ACTION - UNDEFENDED LIST PROCEDURE:- In the determination of whether a suit entered under the undefended list procedure should be heard and decided thereunder – Need for the court to consider the facts disclosed or set out in the affidavit of the Defendant filed along with the notice of his intention to defend vis-a-vis the averments contained in the plaintiffs affidavit in support of his claims – Justification

ACTION - LEAVE TO DEFEND UNDER UNDEFENDED LIST: The mere fact that a defendant in an undefended list procedure had filed a notice of his intention to defend the action – Whether it would not automatically entitle him to the grant of leave to defend and the transfer of the case to the general cause list for determination – Whether the Rules of the High Court provides that it is only where that court is satisfied that the aggregate of the facts deposed in a defendant's affidavit disclose a defence on the merit – Duty of court to enter judgment in favour of a plaintiff where there is sham defence raised in order to gain time or for the elongation of litigation or where, assuming the facts are in favour of the Defendant, but they do not amount to a defence in law

ACTION - UNDEFENDED LIST PROCEDURE – DISCLOSURE OF TRIABLE ISSUE BY DEFENDANT:- Where the defendant’s affidavit contain verifiable facts such that a reasonable doubt is cast on the plaintiffs case and therefore is expected to offer further explanations on the facts supporting his claims - Where a dispute or triable issue is disclosed on the affidavit evidence of the defendant which would call for further facts or evidence on the part of the plaintiff – Duty of court thereto

ACTION - UNDEFENDED LIST PROCEDURE:- Meaning and General purpose - Unique and peculiar procedure in the determination of civil cases towards quick delivery of judgments by High Courts without going through the rigours of a normal or unusual trials by pleadings and calling for oral evidence in proof of claims made therein - Primary purpose of enabling expedited judgments relating to claims for liquidated money demands; ascertained or fixed amount of money determined and agreed to by the parties and which was due for payment by a defendant to a plaintiff – Need for the undefended list procedure to be used by parties and the courts in straight forward cases – Relevant considerations – Need for the procedure to guarantee that the defendants is not shut out in the procedure for the determination of cases placed under it by the High Court

APPEAL - ISSUES FOR DETERMINATION:- Resolution of real and main issues relevant to the grounds of an appeal - Whether the court can reframe, reformulate or even frame issues from the grounds of an appeal which would lead to a proper determination of the appeal - Whether the law permits an appellate court to ignore some or all issues raised in the briefs of argument and formulate its own issues, the way it deems fit to be material once they are distilled from the grounds of appeal

EVIDENCE - CONFLICTING AFFIDAVITS:- Rule that a court of law has no competence to suo motu reconcile conflicting affidavits without calling for oral evidence - Whether it is not every conflict in affidavit evidence that the trial court must call oral evidence to resolve – Recognised legal exceptions - evidence - Where there is satisfactory documentary evidence upon which the court can rely to resolve the conflict – Duty of court thereto

INTERPRETATION OF STATUTE - ORDER 11 RULES 8 & 10 OF THE HIGH COURT RULES 2009:- Interpretation of

WORDS AND PHRASES:- “Covenant” – “Consideration” –“Agreement” –“Consideration” – Interpretation of

**MAIN JUDGMENT**

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

The Appellant was the defendant in the suit of the Respondent placed under the undefended list by the High Court of Akwa Ibom State in a claim for money had and received. The endorsement on the writ of the Respondent was in the following terms:-

1. The sum of 2,100,000.00 (Two Million, One Thousand Naira) being amount of money lent to the defendant by the claimant as a friendly loan which sum the defendant has refused to refund to the plaintiff despite repeated demands.

2. 10% interest on the judgment sum from the date judgment until the entire sum is fully liquidated.

In brief, the facts relied on for the claim, as set out in the affidavit in support of the ex-parte motion to place the suit under the undefended list, are that the Appellant and his friends, obtained a friendly loan of Two million, One hundred Thousand Naira Only (N2,100,000.00) from the Respondent vide an agreement entered into by the parties on the 14/11/2005. That the Appellant and his friends had failed or refused to pay back the loan in accordance with the terms of the agreement which was attached to the affidavit as Exhibit GB1. A letter of demand from the Respondent's solicitors to the Appellant was also attached to the affidavit as Exhibit GB2.

When served with the Respondent's suit, the Appellant in accordance with the rules of the High Court, filed a notice of intention to defend the action against him, along with a 30 paragraphs affidavit which was said to disclose a defence on the merit.

Eventually, when the case came up for hearing before the High Court on the 21/4/2010, judgment was entered in favour of the Respondent under the undefended list and being aggrieved by that decision, the Appellant caused a notice and four grounds of appeal to be filed against it, the following day, i.e. the 22/4/10. With the leave of this court granted on the 23/4/12, two (2) additional grounds were filed in the Amended Notice of Appeal filed on the 27/4/12.  
In line with the Rules of the Court, learned counsel for the parties filed briefs of argument in the appeal. The Appellant's Amended brief filed on 21/6/12 was deemed on the 25/6/12 and the following five (5) issues are said to arise for determination:

1. Whether having regard to the appellant's defence of want or failure of consideration under the loan agreement the subject matter of the suit, the learned trial Judge was not in error when she entered judgment against the appellant instead of transferring the suit to the general cause list for trial.

2. Whether the Appellant was not denied fair hearing when the learned trial judge entered judgment under the undefended list in favour of the respondent on the face of conflicting affidavits of the parties and self contradictory averments of the respondent.

3. Whether the learned trial judge was not in error when she decided that the appellant's affidavit in support of the Notice of Intention to defend was a "dexterously worded affidavit of counsel" and thus occasioned miscarriage of justice by shutting out appellant's defence.

4. Whether having regard to the appellant's uncontradicted averments, appellant had not set up a separate agreement, constituting a condition precedent to the enforcement of the friendly loan agreement consequent upon which the trial court ought to have transferred the action to the general cause list to enable the appellant adduce oral evidence under S.132(1)(c) of the Evidence Act.

The Respondent's brief was filed on 19/7/12 wherein, two (2) issues were submitted for decision in the appeal as follows:

1. Whether the learned trial judge was right to have relied on Exhibit GB1 in deciding in favour of the Respondent at the lower court?

2. Whether the Appellant was denied fair hearing by the lower court?

On the 6/2/13, at the oral hearing of the appeal, learned counsel for the parties adopted the briefs as their submissions in support of their respective positions and each urged us to uphold same in the determination of the appeal.

Looking at the grounds contained on the Appellant's amended notice of appeal calmly, the primary complaints of the Appeal against the decision by the High Court are that it was wrong to have entered judgment under the undefended list when there were conflicts in the affidavit evidence of the parties which called for oral evidence to resolve and that the Appellant was denied fair hearing when the judgment was entered in favour of the Respondent. The germane and crucial issues which therefore call for decision in the appeal are:

1) Whether the High Court was right on the face of the Appellant's averments in the affidavit in support of the notice of intention to defend, to have entered judgment under the undefended list.

2) Whether the High Court denied the Appellant the right to fair hearing by entering the judgment under the undefended list, in the circumstances of the case.

These are the real and main issues which are relevant to the grounds of the appeal and the law is now firmly established that the court can reframe, reformulate or even frame issues from the grounds of an appeal which would lead to a proper determination of the appeal. See Sha v Kwam (2000) FWLR (11) 1798 at 1815; Bankole v. Pelu (1991) 8 NWLR (211) 523; Nwana v FCDA (2004) 13 NWLR (889) 128; Lebile v Res. Trustee. Cher. & Serap (2003) 2 NWLR (804) 399; F. M. H. v C.S.A. Ltd. (2009) 9 NWLR (1145) 193 at 222 - 3. Recently, the law on the point was restated by the Supreme Court in the case of Chabayas v Anwasi (2010) 10 NWLR (1201) 165 at 181 where it said per Mukhtar, JSC (now CJN):

'In fact, the law permits an appellate court to ignore some or all issues raised in the briefs of argument and formulate its own issues, the way it deems fit to be material once they are distilled from the grounds of appeal. See Opera v D. S. (Nig) Ltd. (1995) 4 NWLR (390) 440; Bankole v Pelu (1991) 1 NWLR (Pt.211) page 523 and Ukpo v Mbaba (2001) 4 NWLR (Pt.704) page 460."

Learned counsel for the parties to the appeal have adequately addressed the above two (2) issues in their respective briefs of argument and so the need for the court to call for addresses or argument by them on the issues does not arise. For that reason, I intend to consider the issues in the determination of the appeal in line with the relevant submissions by the learned counsel for the parties and the law.

My position appears to be supported by the learned counsel for the Appellant who argued his issues 1, 4 and 5 above, together in the Appellant's brief. He also argued his issue 2 and 3 together.

ISSUE 1: Whether the High Court was right to have entered judgment under the undefended list.

The submissions by the learned counsel for the Appellant on the issue are that there are exceptions in the Evidence Act, 2011, to the general principle may be given to vary or contradict the terms of a written contract. After setting out the proviso, learned counsel argued that under it, a party to a contract may lead oral evidence to show want or failure of consideration in a written agreement sought to be enforced against him and the existence of any separate oral agreement constituting a condition precedent to the enforcement of the original contract. He then said the case of the Appellant as borne out by the averments in paragraphs 12 -21 of his affidavit in support of the notice of intention to defend, was that there was complete want or failure of consideration in respect of Exh. GB1 and that the Exhibit GB1 was signed by him and his friends because the learned counsel for the Respondent, Fidelis Iteshi, Esq. had told them that the respondent need to see the signed agreement before releasing the loan to them. Counsel said that by the fact of the Appellants' affidavit, there was a separate oral agreement with the Respondent constituting a condition precedent to the enforcement of GB1, which was in the circumstance, an escrow deed. He referred to and relied on the case of Dalfam Nig. Ltd. v Okaku Int'l Ltd.(2002) FWLR (96) 501 at 527 where it was held that:-

"If a document is delivered, either to a party to it or to a stranger, with the intention, express or implied that it is not to become effective until some condition has been performed, it is called escrow. In such a case, that deed in inoperative until the condition is performed," and Anambra State Housing v Emekwe (1996) 34 LRCN, 96 at 124.

According to learned counsel, Mr. Iteshi acted as an agent of the Respondent and agreed that Exh. GB1 shall not be effective until the said loan was disbursed to the Appellant and so the Appellants' averments have adequately shown grounds which would entitle him to lead evidence to show the existence of the separate oral agreement constituting a condition precedent to the enforcement of Exh. GB1 and so sufficient to warrant the transfer of the case to the general cause list for determination. It was the further submission by counsel that by paragraphs 12 - 23 of his affidavit, the Appellant had disclosed a defence on the merit, to wit, "a legal objection to the effect that no consideration exchanged hands under the loan agreement" and so had not only laid the foundation for the existence of a triable issue, but had also shown that there was a separate oral agreement which was a condition precedent to the enforcement of the agreement. The cases of Calvenply Ltd. v Pekab Int. Ltd. (2001) FWLR (61) 1655 at 1664; Nigeria Oil Mills Ltd. Allied Int. Ind. Ltd. (2003) FWLR (154) 545 at 553 and Ebong v Ikpe (2002) FWLR (135) 719 at 737 among others, were cited on the meaning of a defence on the merit and the case of Vincent Standard Steel Nig. Ltd. v Govt of Anambra State (2001) FWLR (66) 697 on the need for liberality on the part of the courts in the determination of whether or not such a defence was disclosed by a defendant's affidavit. Learned counsel urged us to resolve the issue in favour of the Appellant.

For the Respondent, the relevant submissions on the issue are to the effect that the Appellant had signed Exhibit GB1 in the presence of witnesses and unequivocally acknowledged the receipt of the loan sum therein and so the decision by the High Court to enter judgment under the undefended list was in line with the law that parties are free to dictate the terms of their contract and the duty of the court to give effect to the intention as manifested in the contract. Learned counsel for the Respondent said because Exh. GB1 was in writing, ho extraneous or extrinsic evidence is permitted to vary or alter its provisions, relying on Nwaka v S.P.D.C.N. Ltd. (2003) 3 MJSC, 136 at 146 7 and Kaydee Vent. Ltd., v Hon. Ministry of FCT (2010) 7 NWLR (1192) 171 at 219, inter alia. It was also submitted that Exh. GB1 was made by the parties with the intention that it would not only bind them, but would be enforced against the Appellant in the event of default and where dispute arises out of the agreement, the court would only look at it, citing Agbareh v Mimra (2008) 1 KLR (246) 67 at 88 and Baliol Nig. Ltd. v Navcon Nig. Ltd. (2010) 16 NWLR (1220) 619 at 630. In further submissions, learned counsel said the Appellant cannot hide under the proviso to Section 128 of the Evidence Act to avoid the obligations under Exh. GB1 as it would clearly amount to approbating and reprobating for him to unequivocally sign the agreement acknowledging receipt of the sum from the Respondent only for him to turn round in the affidavit to deny ever receiving it. He said the law and the courts do not encourage such an attitude and referred to the case of Buhari v INEC (2008) 36 NSCQR (1) 475 at 587. It was his contention that the want or failure of consideration alluded to by the Appellant was unfounded and cannot be sustained and that the High Court was right that when a person of full age and discretion, signs a document with full knowledge of the nature, it will not avail him to complain that he did not know of the content of the document. Inter alia, Okoli v Morecab Finance Nig. Ltd. (2007) ALL FWLR (639) 1164 and Egbase v Oriareghan (1985) 10 SC. 80 were cited on the point. Furthermore, it was submitted that the Appellant did not in his affidavit contest the authenticity of his signature on the agreement or that he did not know its nature, but only that he signed it with the expectation that he would receive consideration on a later date. Learned counsel said the Appellant did not take steps to neutralize the effect of Exhibit GB1 before the Respondent sued him at the High Court and it is therefore too late to complain and he is stopped, on the authority of Buhari v INEC (supra) at 3572, from challenging the validity of Exhibit GB 2. We were urged to hold that the High Court was right in its decision.

I would decide the issue before a consideration of the second issue. As a foundation, the undefended list procedure that has been provided for in the Civil Procedure Rules of most of the State High Courts in the country, is a unique and peculiar procedure in the determination of civil cases which aims to fasten and quicken decisions by the High Court without going through the rigours of a normal or unusual trials by pleadings and calling for oral evidence in proof of claims made therein. Its general primary purpose is to enable the trial courts to decide expeditiously, claims for liquidated money demands; ascertained or fixed amount of money determined and agreed to by the parties and which was due for payment by a defendant to a plaintiff. It is meant to be employed and used by the parties and the courts in straight forward cases, the facts of which by the averments in the affidavits of the parties to be considered by the court, do not prima facie show that there is a reasonable defence to the claims made therein. The procedure is one by which a High Court can enter judgment in favour of a plaintiff as per the claims endorsed on the writ and supported by the averments contained in the plaintiffs' affidavit in any one of the following situations:-

a) Where a defendant did not file a notice of intention to defend accompanied by an affidavit disclosing a defence on the merit or

b) Where after a consideration of the notice of intention to defend along with the affidavit supporting it, the High Court finds or holds that a defence on the merit was not disclosed by the defendant.

Notably therefore, although the procedure enables a plaintiff to obtain judgments quickly without a full trial, yet it ensures that a defendant was given adequate opportunity of a hearing before such judgment is entered against him. Thus, the procedure guarantees and ensures that the defendant is not shut out in the procedure for the determination of cases placed under it by the High Court. See Fesco Nig. Ltd. N. R. & C.P. Co. Ltd. (1998) 11 NWLR (573) 227; UTC v. Pamotei (1989) 2 NWLR (103), 244; Dalko v. UBN Plc (2003) FWLR (180) 1500; Dala Air Services v. Sudan Airways (2004) ALL FWLR (238) 684.

The law is also settled that in the determination of whether a suit entered under the undefended list procedure should be heard and decided thereunder, the court would consider the facts disclosed or set out in the affidavit of the Defendant filed along with the notice of his intention to defend vis-a-vis the averments contained in the plaintiffs affidavit in support of his claims. Because the averments of the plaintiff's affidavit were considered by the court and formed the basis for the order placing the suit under the undefended list, the defendant's affidavit must show particulars and details of facts forming the grounds of the defence by the defendant and such grounds should not be frivolous, vague or craftily designed not only to delay, but in the end, frustrate the legitimate claims of the plaintiff. The affidavit must contain verifiable facts such that a reasonable doubt is cast on the plaintiffs case and therefore is expected to offer further explanations on the facts supporting his claims. Once a dispute is disclosed on the affidavit evidence of the defendant which would call for further facts or evidence on the part of the plaintiff, then a triable issue would have been raised therein which in turn would amount to a defence on the merit that would warrant the grant of leave to the defendant to defend and the subsequent transfer of the suit to the general cause list for determination by the High Court. See NBN Ltd. v. Weide & Co. Nig. Ltd. (1996) 1 NWLR (405) 150; Graham v Esumai (1984) 11 SC, 123; Chimare v Emhouyon (1985) 1 NWLR (2) 177; Adebisi Macgregor Asso. Ltd. v N.M.B. Ltd. (1996) 2 NWLR (431) 378; Okamba Ltd. v Sule (1990) 7 NWLR (160) 1.

The attitude of the courts in the consideration of whether a defendants affidavit discloses a defence on the merit is one of liberalism as enunciated by the Supreme Court in the case of Macgresor v N.M.B. (supra), also reported in (96) 2 SCN J,72 atS2where it stated that:

"As a general principle, where a defendant shows that he has a fair case for defence or reasonable grounds for setting us a defence, or even a fair probability that he has a bona fide defence, he ought to have leave to defend."

See also Jipreze v Okonkwo (1987) 3 NWLR (62) 737; Santory v Elaben (1998) 12 NWLR (579) 538 at 544.

Furthermore, the law is that in determining whether a defendant has a good defence or has disclosed such facts as would or may be deemed sufficient to entitle him to defend, it is not necessary for a trial court to decide at that stage whether the defence disclosed in the affidavit has been established. All that is required is simply to look at the facts deposed to and see if it can prima facie afford a defence to the action. See G.M.O.N. & S. Co. Ltd. v. Akputa (2010) 1 NWLR (1200) 443 at 478; Okamba Ltd. v. Sule (supra); Sam v FMG (1990) 4 NWLR (147) 688; Agro Millers Ltd. v. C.M.B. (1997) 10 NWLR (525) 469.   
I have restated enough general principles of law, applicable to the undefended list procedure. In the present appeal, the Respondent suit was placed and eventually decided by the High Court under the provisions of Order 11, Rules 8 and 10 of its Rules 2009, as an undefended suit. The Rules are as follows:

"Order 11, Rule 8

(1) Where a claimant in respect of a claim to recover a debt or liquidated money demand believes that there is no defence to his claim, he shall make an application to a court for the issue of a writ of summons in respect of the claim to recover such debt or liquidated money demand and shall support the application by an affidavit setting forth the grounds upon which the claim is based and stating that in the deponent's belief there was no defence thereto.

(2) The court shall, if satisfied that there are good grounds for believing that there is no defence thereto, enter the suit for hearing in what shall be called the "Undefended List", and mark the writ of summons accordingly, and enter thereon a date for hearing suitable to the circumstances of the particular case.

10(1)- If the party served with the writ of summons and affidavit delivers to the Registrar, before the day fixed for hearing, a notice in writing that he intends to defend the suit, together with an affidavit disclosing a defence on the merit, the court may give him leave to defend upon such terms as the court may think just.

(2) Where leave to defend is given under this Rule, the action shall be removed from the Undefended List and placed on the ordinary Cause List; and the claimant shall then comply with Order 3 Rule 2(i)(b)(c) within such time as the court may direct."

The basis of the decision by the High Court to enter judgment in favour of the Respondent even though the Appellant had filed a notice of intention to defend the action against him along with an affidavit as required under the Rules, was that having signed the agreement for the loan in which he acknowledged receipt of the sum from the Respondent, he could not alter that position by evidence outside the agreement. The High Court had relied on the provisions of Section 132 (1) of the Evidence Act 2004 for the decision. The Section provides that:-

"132 (1) - No person producing any document which upon its face appears to have been altered in a material part can claim under it the enforcement of any right created by it, unless the alteration was made before the completion of the document or with the consent of the party to be charged under it or his representative in interest, the provisions of this subsection shall extend to cases in which the alteration was made by a stranger, whilst the document was in the custody of the person producing it, but without his knowledge or leave."

This was the reasoning of the High Court for the decision:-

"I have studied meticulously the content of the friendly loan being claimants Exhibit GB1. The agreement provides in part-

"...In consideration of the sum of N2,100,000.00 advanced by the owner to the Borrowers (the receipt of which Sum of money the Borrowers even now acknowledge) the owner and the borrowers covenant as follows..."

This clearly shows that the money was given by the claimant to the borrowers, one of whom is the defendant. How then can the defendant hope to alter this position by the tall story he is now telling the court?

Whenever a man of full age and competent understanding signs a legal document, he cannot thereafter complain that his mind did not go with the pen.

He is certainly bound by the content of the document. This Honorable Court has a duty to give effect to a voluntary agreement to contract entered into by the parties.

As it stands, this Honourable Court is precluded from accepting or acceding to any evidence which seeks to alter, add to, vary or contradict the contents of Exhibit GB1 which was voluntarily entered into by the parties with their eyes wide open. No judge worth his salt should allow his judicial orientation to be blind folded with the most dexterously worded affidavit of counsel.

In spite of the copious and beautiful affidavit by the defendant this court must refuse and I hereby refuse to be invited or drawn into looking at the tall stories now being paraded by the defendants.

Those averments filled to place in the exhibit before me. How can a man acknowledge receiving money so emphatically and later turn around to say he just signed the document but was not given the money?

I think it is too late in the day to bring stories that deviate and are inconsistent with the terms of a written agreement. Had the defendant alleged that his signature or the entire document (Exhibit GB1) was forged, this would have been a substantial defence on the merit but to say he signed the document acknowledging receipt of the amount and turn round to allege that he only signed expecting the money later, then the law cannot aid such indolence."

It is apparent from the above reasoning by the High Court that it embarked on the assessment or evaluation of the facts deposed to by the Appellant in his affidavit of the notice of intention to defend to find that the contract for the loan, Exh. GB1 could not be challenged by such facts under section 132 (1) above. However, the High Court did not even mention the exceptions contained in the provisio to the sub section and consider whether any of them was applicable to the Appellants case. Relevant for consideration in the case were the exceptions provided in paragraphs (a) and (c) above.

Under paragraph (a), it is clear that inter alia, the "existence or want or failure, of consideration", in respect of a written contract between the parties, may be proved by other fact and evidence outside the terms of the said contract. However, this exception, in my view, applies only when the terms of the contract did not make or contain express provisions on the existence and acknowledgement of the consideration under the contract by the parties themselves.

Where in a contract, the parties freely and clearly states that consideration not only existed but had been exchanged and acknowledged between and by them, then except one of the parties alleges that he was not a party to the contract and that he did not sign it, then the existence or want or failure of consideration would not be an exception which, may be proved under the proviso. In such a situation, the terms of the contract having expressly provided for the consideration, would regulate and the transaction and bind the parties,, who cannot be heard to deny any obligation under the contract which they freely made. The terms and conditions of the written contract and indeed all its contents cannot be contradicted, altered added to or varied by oral or other evidence outside and extraneous to it under the provisions of section 132 (1) above. The general rule of the law is that where parties have embodied the terms of their agreement or contract in a written document, no extrinsic evidence to add to alter, subtract from, very or contradict the terms freely agreed to by them would be permitted. Their rights and obligations under the said contract would be determined by such terms specifically set out in the agreement itself and not evidence outside it. See UBN v Ozigi (1994) 3 NWLR (333) 385; Koiki v. Magnusson (1999) 8 NWLR (615) 492; Ojoh v Kamalu (2006) ALL FWLR (297) 988; Binge v. Govt of Rivers State (2006) ALL FWLR (325) 1; Olubodun v. Lawal (2008) 9 MJSC 1; Agbareh v. Minra (supra) also reported in (08) 2 MJSC, 134.

In the case of Colony Dev. Board v Kamson (1955) 21 NLR 75, an action was brought up by a mortgagee to recover sums due under the mortgage and the defendants applied to adduce evidence to show:-

a) That they never received the mortgaged money of which they had acknowledged receipt in the mortgage deed, and

b) That the repayment was contingent only on the borrowers making adequate profits, there being no term to this effect in the mortgage deed.

It was held that such evidence was inadmissible under Section 132 (1) of the Evidence Act. Also in Da Rocha v Hussain (1958) 3 FSC, 89 at 92; Adunola, FCJ had emphasized that:-

'Now, prima facie, oral evidence will not be admitted to prove, vary, alter or add to the terms of any contract which has been reduced into writing when the document is in existence except the document itself."

Since exhibit GB1 has made or contains express and clear terms on the existence and acknowledgement of consideration for the contract, extrinsic evidence is not admissible to alter, vary or contradict the contents thereof. See also SCOA (Nig) Ltd. v Bourdex Ltd. (1990) 3 NWLR (138) 380 at 389; Gbajabiamula v Nidolo Ltd . (2004) FWLR (196) 844 at 860.

Under paragraph (c), the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under a written contract, may be proved by any of the parties thereto by way of facts and evidence which of course would be outside the terms in the written contract since it is oral. In the case of Osu v Igiri (1988) 1 NWLR (69) 221, this court had held that under Section 132(1) of the Evidence Act, an agreement between the parties was binding and that extrinsic evidence could not be admitted to prove what was not contained in that agreement. But the Supreme Court in reversing that decision, held that this court lost sight of the proviso (c) to the effect that there was to be a fulfillment of a condition precedent before the agreement could take effect and that the evidence to alter or explain the agreement was admissible in the circumstance.

In the present appeal, the Appellant had averred that although he signed Exh. GB1, there was an agreement orally that the loan sum was to be given to him and the others later after the "Owner" and his counsel had signed the agreement. However, the Appellant had in the written agreement left the issue of the receipt by him of the loan sum at the time he freely signed it, in no doubt or equivocation. Rather, by the unambiguous terms of Exhibit GB1, the Appellant had acknowledged that he in fact and for all purposes of the agreement was given by the Respondent and had received or collected the sum of money stated and set out in the agreement. The agreement had therefore fully and effectively provided for and contains the terms agreed to by the parties in relation to the receipt of the loan sum by the Appellant and the others thereby excluding suggestion that there was any subsequent oral agreement that the agreement was to become effective and binding on the fulfillment any condition precedent. The agreement between the Appellant and the Respondent that is Exhibit GB1 in respect of the friendly loan was precise and express in its terms. It was as follows:-

"FRIENDLY LOAN AGREEMENT

THIS FRIENDLY LOAN AGREEMENT is made this 14th day of Nov., 2005

BETWEEN:

MR. EKANABASI ASIBONG UBONG of No. 19 Silas Udo Street, Uyo, hereinafter referred simply to as "The Owner" of the one part.

AND  
ELDER ESEME AKPAN, GORDON ISAAC, WELLINGTON ODIONG, ABASIAMA EMA INYANG, BROWNSON JOHN ABRAHAM, OBONGANWAN REGINA UDOMA c/o No 74 Ikot Ekpene Road, Uyo, Akwa Ibom State hereinafter referred simply to as the "Borrowers" of the other part.

WHEREAS:

1. The Owner owns and is willing to advance as friendly loan in the sum of N2,000,000.00 to the Borrowers.

2. The Borrowers are also willing to accept the said friendly loan from the Owner and to refund same as specified hereunder.

NOW THIS FRIENDLY LOAN AGREEMENT WITNESSETH AS FOLLOWS:

In consideration of the sum of N2,100,000.00 (Two Million, One Hundred Thousand Naira) advanced by the Owner to the Borrowers (the receipt of which sum of money the Borrowers even now acknowledges) the Owner and the Borrowers covenant as follows:-

1. That the sum of N2,100,000.00 (Two Million, One Hundred Thousand Naira) advanced by the Owner to the Borrowers shall be refunded on 14th January, 2006.

2. That the Borrowers shall not default in repayment, rather, the Borrowers shall (if need be) abridge period of payment where they are put into funds from any venture other than expected to enable refund as stated above.

3. That where the Borrowers defaults in payment, the Owner shall be entitled to same on demand.

4. That should the Borrowers fail and/or refuse to abide by the terms of this agreement, the Owner reserves the power to exercise his legal rights at the Court of competent jurisdiction by instituting legal action at the court of competent jurisdiction for the recovery of the amount outstanding and unpaid.

SIGNED, SEALED AND DELIVERED

SGD:

BY THE WITHIN NAMED OWNER

MR. EKANABASIASIBONG UBONG

IN THE PRESENGE OF:

Beatrice E. Ubup (NAME)

19 Silag Udo Street (ADDRESS)

Civil Servant (OCCUPATION)

SGD:

SIGNED, SEALED AND DELIVERED

SGD:

BY THE WITHIN NAMED'BORROWER'     Elder Eseme Akpan

SGD:  SGD:

Gordon Isaac Wellington Odiong

SGD: SGD:

Abasiama Ema Inyang Brownson John Abraham

SGD:

Obonganwan Regina Udoma

In the presence of:

Prof. R. O. Eyo (NAME)

Barroll- Okon (ADDRESS

Preaching (OCCUPATION)

SGD:

Prepared By:

A. A. Asuquo, Esq.,

The Sanctuary,

164 Nwaniba Road,

Uyo."

Undoubtedly, these terms which the Appellant did agree to voluntarily with the Respondent, leave no doubt whatsoever that the respondent had given the loan sum set out therein, as "Owner" and that the Appellant and the persons whose names appear along with his, as "borrowers" have received the loan sum at the time the agreement was made on the 14th day of Nov., 2005. The terms therefore have expressly excluded any notion of giving the loan sum latter let alone an oral agreement that the agreement signed, sealed and delivered by the parties on the 14/11/2005, was to come into effect at any later date.

For that reason, the exception in paragraph (c) of the proviso to Section 132 (1) of the Evidence Act, is not applicable to Exh.GB1 and no extrinsic evidence can in law be admitted to vary, alter, add to, subtract from or contradict the express term provided therein that the agreement between the parties became effective and binding on the partiers from the date they signed, sealed and delivered it by and to themselves.

Because the pith of the averments by the Appellant in the affidavit in support of his notice of intention to defend the suit of the Respondent is that he did not receive the loan sum, I am in agreement with the High Court that the affidavit does not disclose facts which prima facie, show viable grounds for a defence on the merit. Although the Appellant has strenuously disputed receiving the loan sum, Exhibited GB1 has clearly resolved that dispute in the averments of the parties and so there was no need to call for further evidence oral or otherwise to resolve the dispute. The High Court was right to have used the said Exhibit GB1 to resolve the dispute in the parties affidavit as to whether or not the Appellant had in fact, deed and law received the loan sum from the Respondent. The Appellant had not even suggested that he did not have full knowledge of terms and conditions of Exh.GB1 before or at the time he decided to sign it at his discretion, scaled and delivered it to the Respondent's counsel. By that action, the Appellant had held himself bound and responsible for all obligation which by the terms set out in the agreement, he undertook to fulfill. The High Court was right to have held him liable for the loan sum which he received along with the others by entering judgment under the undefended list procedure, against him. His affidavit did not disclose a defence on the merit to warrant the transfer of the case to the general cause list for determination by the High Court. In the result, I resolve the issue against the Appellant.

The second issue is whether in the circumstances of his case, the Appellant was denied the right to fair hearing when the High Court entered judgment against him under the defended list procedure. The submissions by the learned counsel for the Appellant on the issue are that there were conflicts in the affidavits of the parties and the High Court should have transferred the case to the general cause list for oral evidence to resolve the conflicts. Relying on the cases of Falobi v. Falobi (1976) 1 - 10, SC. 1 at 15 and Jipreze v. Okonkwo (supra), it was submitted that by the averments in paragraphs 11 - 15 of the Appellant's affidavit, his case was that there was a complete want or failure of consideration in respect of Exh. GB1 while the Respondent's case was that the Appellant had received the loan sum set out in the exhibit. According to learned counsel, the High Court should have transferred the case to the general cause list as the only way to afford the Appellant a fair hearing whereby witnesses could be cross-examined, especially Fidelis Iteshi, Esq. He said the High Court shut the Appellant out by failure to apply the law on how to resolve the conflict in affidavit evidence and branding the Appellant's affidavit as the "dexterously worded affidavit of counsel" and .tall stories", placing reliance on Ebonq v Ike (supra). Counsel argued that it was an error for the High Court to discredit the Appellant's affidavit on the basis that it was that of counsel and it led to a serious miscarriage of justice since the High Court did not consider the Appellant's affidavit. It was said that in the case of Globe Fishing Ind. Ltd. v. Coker (1990) 7 NWLR (162) 265, it was held that conflicts in affidavit support rather than derogate from the fact that there are substantial issues to be tried. Counsel insisted that there was irreconcilable conflict in the affidavits of the parties which should have necessitated the transfer of the case to the general cause list.

Furthermore, it was the contention of counsel that the Respondent's averments are self contradictory, referring to Exh. GB2, which is said to contradict Exhibit GB1 on the amount claimed and the rate of interest. He said when considered along with the Appellant's averment that the Respondent did not advance any amount as loan to him, the need for oral evidence would not have been in doubt. We were urged to intervene by allowing the appeal on the grounds.

For the Respondent, it was submitted that there was no feature in the proceedings before the High Court to suggest that the Appellant was denied fair hearing the, principle of which was stated in the case of Ejeka v. The State (2003) 6 MJSC, 83 at 92. According to counsel for the Respondent, the record of the High Court shows that the parties were given equal opportunities and the Appellant was even granted an adjournment to file his notice of intention to defend contrary to the undefended list procedure under which the only duty of a trial court on the return date was to enter judgment in the absence of a notice of intention to defend. He cited the case of G.M.O.N. v Akputa (supra) and said that the High Court had considered the Appellant's affidavit at page 28 of the record of appeal and so satisfied all the legal prescriptions of a fair hearing and the its Rules. It was also submitted that the burden of proving the alleged breach of fair hearing was on the Appellant who made the allegation, on the authority of INEC v Musa (supra) at 67 and that he had failed to discharge the burden. In further argument, counsel said it is not in all cases that conflicts in affidavits must be resolved by oral evidence and that an exception is where the conflict can be resolved by law, citing inter alia, Re-Otuedon (1995)4 NWLR (392) 65 and Nwosu v. Imo State Env. Sanitation Authority (1990) 2 NWLR (135) 688. We were urged to uphold the decision by the High Court.

I would begin a consideration of the issue by saying that fair hearing in a given case and within the meaning of Section 36 (1) of the 1999 Constitution (as altered), means simply, a trial conducted according to all the legal rules formulated to ensure that justice is done to the parties. The principle of fair hearing requires the observance of or compliance with the twin pillars of natural justice, namely audi alter am per term and nomo judex in causa sua and its attributes include:-

a) That a court shall hear both parties not only in the case but also on all material issues in the case before reaching a decision which may be prejudicial to a party,

b) That a court shall give equal treatment, opportunity and consideration to all the parties in a case,

c) The proceedings be conducted in public and all parties be notified or informed of and have access to such public place,

d) That having regard to all the peculiar circumstances, justice must not only be done but must manifestly and undoubtedly be seen to have done.

Olatunbosun v N.I.S.E.R.C. (1988) 6 SCNJ, 38; Baba v N.C.A.T.C (1991) 1 NWLR (192) 388; Ogboh v FRN (2002) 10 NWLR (774) 21; Fagbule v Rodriques (2002) 7 NWLR (765) 188; Ndukauba v Kolomo (2005) 1 SC (1) 80; Esherinake v. Gbinije (2006) 1 NWLR (961) 228; P.P.I. Incorp. V. S. L. Ltd. (2010) 6 NWLR (1186) 98.

The law is also trite now that once the breach of the right of fair hearing in respect of a party to judicial proceeding is proved or established, then such proceedings and every decisions arrived therein by a court tribunal would be rendered null and void ab initio by the breach. Okafor v Attorney-General. Anambra State (1991) 6 NWLR (200) 659; A.P.P. v Ogunsola (2005) 5 NWLR (761) 484; FRN v Akubueze (2010) 17 NWLR (1223) 525; Eze v Sprinq Bank Plc (2011) 12 MJSC (1) 1.

Perhaps I should also say that the issue or principle of fair in judicial proceedings does not lie on the correctness or otherwise of the decision handed down by the court, but it lies and relates entirely in the procedure followed or adopted by the court in the determination of a case. See UBA v. Achoru (1990) 10 SCNJ, 17; Ceekay Traders Ltd. v General Motors Co. Ltd. (1992) 2 NWLR (222) 132; Orugbo v Una (2002) FWLR (127) 1024 at 1037.

It is good law that the legal burden is on the party alleging the breach of his right to fair hearing in the conduct of any judicial proceedings, to prove or establish in what manner the breach occurred. See S. & D. Const. Co. Ltd. v Ayoku (2011) 6 MJSC (II), 132; Duzu v Vumisa (2010) 10 NWLR (1201) 80; Nwosu v Imo State Environmental Sanitation Authority (supra); L.S.D. & P.C. v Adolo (1994) 7 NWLR (385) 545.

It would appear that the allegation of the denial of the Appellant's right to fair hearing by the learned counsel is restricted to the fact that the fact he said there were conflicts in the affidavits of the parties which the High Court resolved without giving him the opportunity to cross examine witnesses that would have been called if the case was transferred to the general cause list.

I would agree with the learned counsel that the general position of the law is that where there is an irreconcilable conflict in the affidavits of parties in cases that are determined entirely on affidavit evidence, then a court should call for oral evidence in order to resolve such a conflict before relying on any of the affidavits to decide the case. However, the law is now known that it is not in all cases where such a conflict arises that the need to call oral evidence for the resolution of the conflict would exist. For instance where in addition to the depositions in the affidavits, there are documents attached to the affidavits which are capable of resolving the conflict in the depositions one or the other, the duty to call for oral evidence to resolve such a conflict would abate and the need to do so would not arise. In such a situation, the court can suo motu use the relevant documents to resolve the conflict in the depositions contained in the affidavits... See Eunskip Ltd. v. Exquisite Ind. Ltd. (2003) 4 NWLR (809) 88; Dana Impex Ltd v. Awukam (2006) 3 NWLR (968) 544; Bawa v Phemas (2007) 4 NWLR (1024) 251; Garba v Unimaid (1986) 1 NWLR (18) 550.

The conflict said by the leaned counsel for the Appellant to exist in the parties' affidavit was on the deposition by the Respondent in paragraph 5 of the affidavit in support of the application for the writ that he had given the loan sum to the Appellant and his friends, on the one hand, and the averment in paragraph 4 of the Appellant's affidavit in support of his notice of intention to defend, that he did not receive any such money from the Respondent, on the other hand. These averments in the affidavits of the parties are without doubt, materially contradictory and inconsistent in their assertions since each asserts or affirms the opposite of what the other asserts or affirms. Both assertions cannot be correct or true at the same time and so repugnant to and are in irreconcilable conflict with each other such that one must be correct or true and the other, wrong or false. As a result, for the conflict to be resolved by the High Court, it had to have recourse to some other evidence within the affidavits or call for it from outside the affidavits. From the record of the appeal, in particular the judgment appealed against, the High Court resorted to Exh. GB1, attached to the Respondent's affidavit and therefore part of it, See S.E.S.N.C v.  Anwara (1975) 91 1 SC, 55, to resolve the conflict. As shown in the portion of the judgment set out earlier on, the High Court used Exh.GB1 in the resolution of the issue of whether the Appellant in fact and law, received the loan sum from the Respondent. As demonstrated in the cases cited on the point before now, the High Court was entitled to suo motu resolve the conflict by reference to and use of documents attached to the parties affidavit which would be used as the hanger from which to assess the affidavit evidence. Since the said document, i.e. Exh. GB1 was attached to the Respondent's affidavit in support of the application for the issuance of the writ under the undefended list procedure, was served on the Appellant and in reaction to which he filed his notice of intention to defend the action accompanied by his affidavit, the Appellant was afforded the opportunity to see and react to it in the way he deemed fit. He cannot in the circumstance, seriously contend that he was denied a fair hearing if the High Court used the said document in resolving the conflict in the affidavit evidence of the parties before it.

Let me point out that the mere fact that a defendant in an undefended list procedure had filed a notice of his intention to defend the action would not automatically entitle him to the grant of leave to defend and the transfer of the case to the general cause list for determination. No, that cannot be, because the Rules of the High Court, provided that it is only where that court is satisfied that the aggregate of the facts deposed in a defendant's affidavit disclose a defence on the merit that leave may be granted to defend the action and the suit transferred accordingly to the general cause list for determination. This was the position restated by the Supreme Court in the case of G.M.O.N. & S. Co. Ltd. v Akputa (supra) at 475 - 6 when it said:-

'The court can refuse to let in a defendant to defend a suit once it is satisfied that the defendant's affidavit does not disclose a good defence on the merit or where the ground of defence is not clear and reasonable or it is flimsy or vague. In other words, the court will enter judgment in favour of a plaintiff where there is sham defence raised in order to gain time or for the elongation of litigation or where, assuming the facts are in favour of the Defendant, but they do not amount to a defence in law ..."

See also UBA Plc v Jargaba (2007)11 NWLR (1045) 247; Dyeris v Mobil Oil (Nig) Plc. (2010) l NWLR (1175') 309 at 334; Global Bank Ltd. v. S.A. Ins. (2010) 13 NWLR (1210) 1at 15; N.P.A. v A. I. Co.(2010) 3 NWLR (1192) 497 at 50 1 - 2. Thus the fact that the Appellant had filed a notice of intention to defend the action against him did not mean that the High Court should as a matter of course, have granted him leave to defend and transferred the suit to the general cause list. The only line of defence disclosed in the Appellant's affidavit and which was in material dispute and conflict with the averments in the Respondent's affidavit was that he did not receive the loan in respect of which he and the others signed Exhibit GB1. However, the exhibit which was not disputed by the Appellant had emphatically and decidedly resolved that dispute and conflict, leaving the averments of the Respondent on the claim against the Appellant unchallenged.

From the record of the proceedings by the High Court, there was no step taken by that court in the conduct of the Appellant's case which shows that the Appellant was shut out or not given or provided the opportunity to present his own side of the case as required by the procedure under the undefended list of the High Court. The Appellant has not established that he was in fact and deed denied the right to fair hearing in the proceedings by the High Court from the beginning to the judgment appealed against. If anything, the learned counsel for the Respondent was right that from the record of the appeal, the Appellant was even given an opportunity of a hearing not provided for under the undefended list procedure when he was granted an adjournment to file his notice to defend on the return date of the writ served on him. Under the Rules of the High Court and established principles of practice enunciated by the Supreme Court, oh the return date of the writ placed under the undefended list procedure, where a defendant failed, neglected and therefore did not file a notice of his intention to defend the action against him, the only duty of the trial High Court was to enter judgment in favour of the plaintiff. In the recent case of G.M.O. N & S. Co. Ltd. v Akputa (supra) the position of the law was emphasized by the apex court at 474 - 5 when it stated inter alia that:-

"When a case entered on the undefended list comes up for hearing on the return date, the court has one and only one duty, namely: to see whether the defendant has filed a notice of intention to defend the suit with a supporting affidavit and if no notice is filed within five days before the return date, the court has no choice in the matter but to proceed to judgment, that is, enter judgment for the plaintiff."

See also Maley v Isah (2000) 5 NWLR (658) 657 at 667; Atakulu v Fanibe (2001) 9 NWLR (717) 179 at 186 -7; Ben Thomas Hotels Ltd. v. Sebi Furniture Ltd. (1989) 5 NWLR (123) 523.

So rather than being denied a fair hearing, the record of the proceedings of the High Court shows that the Appellant was gratuitously indulged by that court in order to state his own side of the suit and for it to be decided on the merit. In the result, the issue is resolved against the Appellant for failure to prove that he was denied fair hearing by the High Court in the proceedings leading to the judgment appealed against.

Since the issues in the appeal have been resolved against the Appellant, the grounds and the appeal fail for lacking in merit. For that reason, the appeal is dismissed and the decision of the High Court hereby affirmed. I order that parties bear their respective costs of prosecuting the appeal.

**JOSEPH TINE TUR, J.C.A.:**

I read in advance the judgment just delivered by my Lord Mohammed Lawal Garba, JCA, and I concur that this appeal lacks merit and should be dismissed. I shall add the following comments of mine.

The Friendly Loan Agreement of 14th day of November, 2005 has already been reproduced in the lead judgment of my Lord. That is what the lower Court had to interpret to arrive at a just decision.

The express terms of the agreement has to be construed to arrive at the intention of the parties. See Ihezukwu vs. University of Jos (1990) 7 SCNJ 95. In Mandilas & Karabaris Ltd. vs. Otikiti (1963) 1 All NLR 22 Bairamian F.J., held at 26 that:

"...When a contract is reduced into writing, the writing gives the terms agreed upon."

See also Olaniyan & Ors. vs. Unilag (1985) 1 All NLR 314. No oral evidence ought to be admissible to vary or add to the clear terms of the Friendly Loan Agreement. See Union Bank of Nigeria Ltd. vs. Sax Nig. Ltd. (1994) 9 SCNJ 1; Wayne (W.A.) Ltd. vs. Ekwunife (1989) 12 SCNJ 99; Din vs. African Newspapers of Nigeria Ltd. (1990) 5 SCNJ 209 and Ajuwon vs. Adeoti (1990) 3 SCNJ 159 and Madumere vs. Okafor (1996) 4 SCNJ 71. The appellant did not deny obtaining the loan in dispute from the respondent on the condition same shall be refunded on 14th day of January, 2006. The appellant also undertook not to default in repayment but rather, the time for refund shall be abridged to enable refund as stated above. Where there is default the respondent shall make a demand. If the appellant fails to abide by the terms of the agreement the Respondent reserves the discretion to exercise his right to institute legal proceedings in a Court of competent jurisdiction to recover the outstanding and unpaid sums.

The learned authors of Black's Law Dictionary, 9th edition page 78 defines "an agreement":

"The term "agreement" although frequently used as synonymous with the word "contract", is really an expression of greater breadth of meaning and less technicality. Every contract is an agreement; but not every agreement is a contract. In its colloquial sense, the term "agreement" would include any arrangement between two or more persons intended to affect their relations (whether legal or otherwise) to each other. An accepted invitation to dinner, for example, would be an agreement which is intended to affect the legal relations of the parties does not necessarily amount to a contract in the strict sense of the term. For instance, a conveyance of land or a gift of a chattel, though involving an agreement, is... not a contract; because its primary legal operation is to effect a transfer of property, and not to create an obligation. 2 Stephen's Commentaries on the Laws of England 5 (L. Crispin Warmington ed. 21st ed. 1950).

An agreement, as the Courts have said, 'is nothing more than a manifestation of mutual assent' by two or more parties legally competent persons to one another. Agreement is in some respects a broader term than contract, or even than bargain or promise. It covers executed sales, gifts, and other transfers of property." Samuel Williston, A Treaties on the Law of Contracts, 2 at 6 (Walter H.E. Jaeger ed., 3rd ed. 1957).

The "Friendly Loan Agreement" set out in clear terms the rights and obligations of the parties to the extent it provided that where there is a default by the borrowers the agreement shall be enforceable by action in a Court of law. Legal consequences were to follow a breach of the agreement notwithstanding its being headed "Friendly Loan Agreement". Part of the Agreement reads as follows:

"In consideration of the sum of N2,100,000.00 (Two million, One hundred thou sand Naira) only advanced by the Owner to the Borrowers (the receipt of which sum of money the Borrowers even now acknowledges) the Owner and the Borrowers covenant as follows:

'WHEREAS;

(1) The Owner owns and is willing to advance as friendly loan in the sum of N2,000,000.00 to the Borrowers.

(2) The Borrowers are also willing to accept the said friendly loan from the Owner and to refund same as specified hereunder..."

A covenant is inserted in the agreement. "A covenant is an agreement creating an obligation contained in a deed. It may be positive, stipulating the performance of some act or the payment of money, or negative or restrictive, forbidding the commission of some act. Covenants may he used to serve the purpose of a bond (q.v)", writes the learned authors of Osborn's Goncise Law Dictionary, edited by Sheila Bone, 9th edition, page 114.

In Duff Development Co. Ltd. vs. Kelantan Government & Anor. (1924) All E.R. Rep. 1 Viscount Cave in the House of the Lords made the following observation at page 6:

"...I do not forget the cases in which it has been held that a person, not otherwise liable to the jurisdiction of a Court, may make it a term of a contract that questions arising under it shall be decided by that Court, or those cases - such as Montgomery, Jones & Co. vs. Liebenthal & Co. (6) - in which it has been held that a person outside the jurisdiction may agree that seruice of process upon a person within the jurisdiction shall be good service upon himself.."

I have drawn attention to this decision to show that parties can enter into an agreement with the express stipulation that where a breach occurs it shall be enforceable in a Court of competent jurisdiction. That constitutes sufficient consideration to warrant the enforcement of the agreement contrary to the argument of the learned Counsel to the appellant. After all, what is "consideration" in the law of contract?

In Sagay: Nigerian Law of Contract, 2nd edition by I. E. Sagay page 59 the learned author wrote that:

"...unless an agreement is under seal it cannot be enforceable by a party that has not furnished some consideration in support of it. Hence the dictum, ‘consideration must move from the promise.’ There must be an exchange, either of promises or of a promise for an act. The basic feature of the doctrine is reciprocity.

Something of value in the eye of the law must be given for a promise in order to make it enforceable as a contract. Thus for a party to be entitled to bring an action on an agreement he must demonstrate that he contributed to the agreement. It is this contribution that is called consideration; a gratuitous promise not made under seal cannot constitute a contract. The plaintiff must show that the defendant's promise was part of a bargain to which he contributed."

In Currie vs. Misa (1875) L.R. 10 Exch.153 at 162 Lush J., defined "consideration" as follows:

"A valuable consideration in the eye of the law may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other. Thus, consideration does not only consist of profit by one party but also exists where the other party abandons some legal right in the present, or limits his legal freedom of action in the future as an inducement for the promise of the first. So it is irrelevant whether one party benefits but enough that he accepts the consideration and that the party giving it does thereby undertake some burden, or lose something which in contemplation of law may be of value."

Taking into consideration the above definitions Prof. Sagay concluded at page 60 of his book as follows:

"Thus, in order to be able to sustain an action, the plaintiff must prove either a benefit conferred by him on the defendant or an someone else at the instance of the defendant, or a detriment suffered by him (the plaintiff) in the implementation or fulfillment of the terms of the bargain. In as simple agreement for the sale of goods for instance, the seller's consideration is the promise of transfer or the actual transfer of his title to the goods or possession. The buyer's consideration is the money he pays or promise to pay for the goods: the transfer of title to the goods or possession of them to the buyer represents a benefit to him, moving from the seller. Conversely, the promise to pay money or actual payment represents a benefit to the seller, moving from the buyer."

My humble view is that where the appellant borrowed money from the respondent and agreed that a breach of the agreement to refund the money within the stipulated time shall be enforceable in a Court of competent jurisdiction, and the breach occurred, there was adequate consideration which entitled the respondent to enforce the agreement. The parties intended to fulfill legal obligation by the express and clear terms of their agreement. It would have been otherwise if the Respondent had instituted legal proceedings to recover the sums in question, prior to 14th day of January, 2000 as stipulated in the agreement. For example in Mortgage transactions if the suit was instituted before the date the mortgage sums were due and unpaid the action would be dismissed. I find support in the judgment of the Privy Council in Banque Genevoise De Commeice Et De Credit vs. Compania Maritima De lsola Spetsai Limitada, Privy Council Judgments by Olisa Chukura, SAN 1980 edition p.1008 where Lord Reid held at page 1011 that:

"So the first question which their Lordships must consider is to what extent, if at all, the 1958 Mortgage Deed remained operative in 1962. It is now admitted that that must depend on the intention of the parties to the 1961 agreement as determined by a proper construction of its terms..."

Then at page 1012 his Lordship concluded that:

"Normally a mortgage is granted to secure payment of a specified sum. The date of payment is merely postponed and if by reason of a breach of a condition in the mortgage, the mortgage becomes entitled to immediate payment he can sue for payment of that sum. But in this case there was no ascertainable sum secured by the mortgage and no sum due until the year had elapsed and it was seen by how much the sums realized from the other assets fell short of 300,000 pounds. So when the vessel was arrested on 30th June, 1962, and the present action was raised a few days later no sum had become ascertainable or due. Nothing would have been recoverable if the new mortgage had been granted under Article 2(d) and nothing was recoverable by virtue of the old mortgage. As the present action is an action to recover a sum of money and no sum had become due or ascertainable when it was raised it must fail. That was the ground of decision set out in the last two paragraphs of the judgment under appeal and in their Lordships' judgment it is correct. It therefore becomes unnecessary to decide any of the other issues raised in argument. Their Lordships have already tendered their advice that this appeal should be dismissed. The appellants must pay the costs of the respondents."

In this appeal, the sums borrowed were due but unrefunded when the respondent instituted the suit under the Undefended List Procedure. There is no substance in the argument of learned Counsel to the appellant. The appeal is dismissed. The judgment of the learned trial Judge is affirmed. I abide by the orders made in the lead judgment by my Lord.

**ONYEKACHI A. OTISI, J.C.A.:**

I have had the opportunity of reading in draft the judgment just delivered by my learned Brother, Mohammed Lawal Garba JCA. The issues raised for determination have been comprehensively addressed; and, I agree with the reasoning and conclusion. I will only make few comments in support.

The suit that occasioned in this appeal was conducted under the undefended list procedure as provided for under Order 11 Rules 8 - 12 of the Akwa Ibom State High Court (Civil Procedure) Rules 2009. The undefended list procedure is a Special Procedure whereby the High Court is empowered to give judgment in a suit based solely on affidavit evidence of the parties without recourse to the necessity of a formal hearing, if the requirements of the rules are satisfied. The case is heard and determined based on the affidavit evidence presented before the court as such there is no room for formal hearing of evidence and tendering of exhibits.

Under this procedure, the plaintiff deposes to an affidavit in support of his claim. After service of the writ, a defendant who has a defence to the claim is required to file a notice of intention to defend the action together with an affidavit disclosing a defence on the merit. This affidavit must not contain merely a general statement that the defendant has a good defence to the action. Rather, such general statement must be supported by particulars which if proved would constitute a defence. The defendant's affidavit must condescend to particulars and should as far as possible, deal specifically with the plaintiff's claim and affidavit and state clearly and concisely what the defence is and what facts are relied on to support it.

It should also state whether the defence goes to the whole or part of the claim, and in the latter case it should specify the part. It is when the court goes through the affidavit and comes to the conclusion that it discloses a defence on the merit that it would give leave to the defendant to defend the action and remove the suit from the undefended list to the general cause list to be dealt with according to the rules of court. See: Bendel Construction Co. Ltd. v. Anglocan Development Co. (Nig) Ltd. (1972) ALL N.L.R. (Pt.1) 153; Peter Tiwell (Niger) v. Inland Bank (1997) CLR 4(1); John Holt & Co. (Liverpool) Ltd. v. Fajemirokun (1961) All N.L.R. 492.

It is sufficient to transfer the matter to the general cause list if the defendant's affidavit discloses a triable issue or there is a difficult point of law involved; that there is a dispute as to the facts which ought to be tried, that there is a real dispute as to the amount due which requires the taking of an account to determine or any other circumstances showing reasonable grounds of a bona fide defence: See: Ataguba v. Gura (Nig.) Ltd. (2005) 6 MJSC 156.

Where the defendant fails or neglects to file a notice of intention to defend with an affidavit in support, or where the affidavit in support of the notice of intention to defend discloses no defence, the case shall not be transferred to the general cause list. See: Pan Atlantic Shipping v. Rhein Mass GMBH (1997) 3 NWLR (Pt.493) 248; Okunriboye v. Skye Bank (2009) 2 - 3 MJSC 42.

In some instances, as in the present appeal, the affidavit evidence of the parties conflict. What is the trial court required to do in that instance?

The law is firmly settled that a court of law has no competence to suo motu reconcile conflicting affidavits without calling for oral evidence. See: National Bank v. Are Brothers (1977) 6 SC 97: Falobi v. (1976) 9 & 10 SC 1 at Page 15; Eboh v. Oki (1974) 1 5C 179; Olu-Ibukun v. Olu-Ibukun (1974) 2 SC 4I: Nwosu v. Imo State Environmental Sanitation Authority (1990) 2 NWLR (pt.135) 688; Nigerian Arab Bank Ltd. v. Ogueri (1990) 6 NWLR (Pt.59) 751 of 760. But, it is not every conflict in affidavit evidence that the trial court must call oral evidence to resolve. The law has made some exceptions. Such exceptional circumstances include inter alia a situation where there is sufficient documentary evidence upon which the court shall rely to resolve the conflict. See: Nwosu v. Imo State Environmental Sanitation Authority (1990) 2 NWLR (Pt.135) 688 at 718; Ezegbu v. First African Trust Bank Ltd. (1992) 1 NWLR (Pt.220) 699 at 720; Kanno v. Kanno (1986) 5 NWLR (Pt.40) 138; Lijadu v. Lijadu (1991) 1 NWLR (Pt.169) 627 at 649. Magnusson v. Koiki (1991) 4 NWLR (Pt.183) 119 at 129.

The Appellant and the Respondent had a Friendly Loan Agreement executed on 14/11/2005. The said Agreement was Exhibit GB1, and it is reproduced in the lead Judgment. Five person, including the Appellant, as borrowers, signed the said Agreement, wherein they duly acknowledged receipt of the sum of N2,100,000.00 advanced to them by the Respondent as Owner. The affidavit evidence of the parties was conflicting as to whether or not the sum was received by the Appellant. The main defence of the Appellant was that he did not receive the loan sum in Exhibit GB1, but that there was a separate oral agreement to the effect that Exhibit GB1 needed to be signed before the money would be released. But, the Appellant, did not dispute that he had full know ledge of the terms of Exhibit GB1, and did not deny he had signed the Agreement. The Respondent, oh the other hand, denied that there was any other oral agreement. The trial court had relied on Exhibit GB1 to resolve conflicts in the affidavits of the parties and enter Judgment in favour of the Respondent.

I agree with my learned Brother in the lead Judgment that the trial court was right to have resolved the conflicts in the affidavit evidence by relying on Exhibit GB1. An acknowledged exception to the general rule that a court cannot resolve conflicting affidavits without recourse to oral evidence is where there is satisfactory documentary evidence upon which the court con rely to resolve the conflict. See; Nwosu v. Imo State Environmental Sanitation Authority (supra) of 718. This is what the trial Judge has done and I agree that he acted within the law.

There was no need to transfer the matter to the general cause list. It is not enough for a defendant under this procedure to put up some fanciful defence. His affidavit must disclose facts that will throw some doubt on the plaintiff's case. See: Aikabeli vs African Petroleum Plc. (2001) 6 NWLR (PT.708) 93. In my view, he no doubt was thrown on the Respondent's case.

The rule of audi alteram partem demands that the court must hear both sides at every material stage of the proceedings before handing down a decision. If any of the parties is refused or denied a hearing or is not given an opportunity of being heard, such hearing cannot qualify as fair hearing under the audi alteram parfem rule: See OLUMESAN v. OGUNDEPO (1996) 2 NWLR (PT.433) 628 AT 644, GUKAS v. JOE INTERNATIONAL BREWERIES LTD (1991) 6 NWLR (PT.199) 614 AT 623, AGWARANGBO v. NAKANDE (2000) 9 NWLR (PT.672) 341.

The Appellant herein was given adequate opportunity to be heard in his defence. He filed a notice of intention to defend the suit with the affidavit in support. The trial court considered both the affidavit in support of the claim deposed to by the Respondent as plaintiff; and the affidavit in support of the notice of intention to defend, deposed to by the Appellant as defendant, before arriving of its decision. The record of Proceedings before the lower court thus does confirm that the Appellant was heard and the matter decided on the merit. The Appellant was therefore accorded fair hearing.

I also dismiss this appeal, being unmeritorious. I abide by the Orders made in the lead Judgment.