AKIN AKINYEMI :::::::::::::: APPELLANT
(Trading under the Name and Style of AKIN AKINYEMI & ASSOCIATES)

AND

ODU'A INVESTMENT CO. LTD. :::::: RESPONDENT

SC.85/2002

SUPREME COURT OF NIGERIA

Aloma Mariam MUKHTAR, JSC.
Francis Fedode TABAI, JSC.
Ibrahim Tanko MUHAMMAD, JSC *(Delivered Lead Judgment)*.
Suleiman GALADIMA, JSC.
Nwali Sylvester NGWUTA, JSC.

AT ABUJA, ON FRIDAY, 13TH JANUARY, 2012.

APPEAL - Exercise of judicial discretion by a trial court - When an appellate court will reverse it - The guiding principle in the exercise of it.

APPEAL - Ground of fact - When same can be laid on it - When it becomes incompetent.

APPEAL - Ground of law and mixed law and fact - Distinguishing principles between.

CONTRACT - Counter-offer - What doctrine of in same postulates - What it tantamounts to.

CONTRACT - Requirements of a valid contract - Failure of any of it - Whether renders same incompetent - Whether capable of enforcement.

CONTRACT - What is a valid contract - Basic essentials to the creation of same - Normal test for determining whether the parties have reached an agreement.

COURT - Where a trial court fails to evaluate evidence - Whether an appellate court can intervene.

EVIDENCE - Where a trial court fails to evaluate same - Whether an appellate court can intervene.

JUDGE - Judicial discretion - How same exercises it - What it should be based on to look judicial and judicious.

NOTABLE PRONOUNCEMENT - Right conferred on a person - Where he abdicates it - Whether the duty of court to restore it.

PRACTICE AND PROCEDURE - Counter-offer - What doctrine of in contract postulates - What it tantamounts to.

PRACTICE AND PROCEDURE - Exercise of judicial discretion by a trial court - When an appellate court will reverse it - The guiding principle in the exercise of it.

PRACTICE AND PROCEDURE - Ground of fact - When an Appeal can be laid on it - When the Ground of fact becomes incompetent.

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PRACTICE AND PROCEDURE - Where a trial court fails to evaluate evidence - Whether an appellate court can intervene.

ISSUES FOR DETERMINATION:

Appellant's Issues:-

i. *Whether the lower court could validly hold that there was no valid contract between the parties. GROUND 3.*

ii. *Whether Exhibit C was not a counter-offer accepted by Exhibit D and conduct of the respondent. GROUNDS 1 and 2.*

iii. *Whether on the pleadings and evidence before the court, Judgment ought not be given to the appellant instead of the respondent herein GROUND 4.*

iv. *Whether the lower court acted judicially and judiciously in setting aside the trial court's discretion in awarding the pre and post Judgment interests. GROUNDS 5 and 6.*

Respondent's Issues:-

1) *Whether the court below was right in re-evaluating the evidence before the trial court and eventually setting aside the order granting appellant's claims. (Grounds1, 2, 3 and 4).*

2) *Whether the court below acted judicially and judiciously in setting aside pre-judgment interests awarded by the trial court. (Grounds 5 and 6).*

FACTS:

The appellant, herein, as plaintiff, took a Writ of Summons from the High Court of Justice of Oyo State holden at Ibadan (trial court herein). In his Statement of Claim, the plaintiff averred that he is a Chartered Estate Surveyor and Valuer. He trades under the name and style of AKINYEMI & ASSOCIATES.

The respondent as defendant at the trial court is an Incorporated Private Limited Liability Company owned

exclusively by the then Government of Oyo, Ondo, Ogun and Osun States. By a letter dated 3rd May, 1993, the defendant offered the plaintiff the valuation of the assets of three of its subsidiary companies, viz:
Great Nigeria Insurance Co. Ltd; Grenic Nig. Ltd. and Lagos Airport Hotel Ltd.
With respect to the fees to be paid to the plaintiff for the job, the defendant offered to pay a simple fee or honorarium. The plaintiff, reacting to the offer, made a counter-offer on the fees to be paid. The plaintiff claimed that the defendant did not reject his counter-offer. Instead, the defendant wanted the reports to be ready by 21st June, 1993. The plaintiff averred further that he did the valuation as directed and submitted the reports and he later forwarded his bills for the three jobs. And, in settlement of the bills, the defendant forwarded to the plaintiff a total sum of ₦330,000.00 for the three jobs. The plaintiff averred that he accepted the ₦330,000.00 as part payment under protest and demanded for the balance of his fees as scaled down unilaterally by the plaintiff in his letter of 27th July, 1993. The plaintiff repeated his demand for the balance of his fees but still the defendant failed to pay the balance. The plaintiff was, in October, 1993, invited to a meeting with the Management of the defendant over his fees, but the meeting produced no useful result. The plaintiff claimed to have suffered loss and damages.
The matter proceeded to trial stage. Evidence was taken and final addresses were made by the respective learned Counsel for the parties. The trial court at the end of hearing, entered Judgment for the plaintiff with some different rates of interest.
The defendant was dissatisfied and it appealed to the Ibadan Division of the Court of Appeal (court below). After reviewing the whole case placed before it, including both oral and written submissions by the learned Counsel for the respective parties, the court below set aside the Judgment of the trial court and entered Judgment for the appellant.
Aggrieved by the court below's decision, the

plaintiff/respondent, now appellant herein, filed his appeal before this Court.

HELD: ***(Unanimously Dismissing Appeal)***

1. Per MUHAMMAD, JSC, at pages 196JJ, 197AJJ & 198AEE, on the distinguishing principles between a ground of law and mixed law and fact:

"I think the criteria for distinguishing a ground of law from that of mixed law and fact have, for quite long, been settled. For the purposes of elucidation, I consider it pertinent to summarise some of these principles as follows:

1) The first and foremost is for one to examine thoroughly the grounds of appeal in the case concerned to see whether they reveal a misunderstanding by the lower court of the law, or a misapplication of the law to the facts already proved or admitted.

2) Where a ground complains of a misunderstanding by the lower court of the law or a misapplication of the law to the facts already proved or admitted, it is a ground of law.

3) Where a ground of appeal questions the evaluation of facts before the application of the law, it is a ground of mixed law and fact.

4) A ground which raises a question of pure fact is certainly a ground of fact.

5) Where the lower court finds that particular events occurred although there is no admissible evidence before the court that the events did in fact occur, the ground is that of law.

6) Where admissible evidence has been led, the assessment of the evidence is entirely for that court. If there is a complaint about the assessment of the admissible evidence, the

ground is that of fact.

7) Where the lower court approached the construction of a legal term of art in a statute on the erroneous basis that the statutory wording bears its ordinary meaning, the ground is that of law.

8) Where the lower court or tribunal applying the law to the facts in a process which requires the skill of a trained lawyer, this is a question of law.

9) Where the lower court reaches a conclusion which cannot reasonably be drawn from the facts as found, the Appeal Court will assume that there has been a misconception of the law. This is a ground of law.

10) Where the conclusion of the lower court is one of possible resolution but one which the Appeal Court would not have reached if seized of the issue, that conclusion is not an error in law.

11) Where a trial court fails to apply the facts which it has found correctly to the circumstances of the case before it and there is an appeal to a Court of Appeal which alleges a misdirection in the exercise of the application by the trial court, the ground of appeal alleging the misdirection is a ground of law not of fact.

12) When the Court of Appeal finds such application to be wrong and decides to make its own findings such findings made by the Court of Appeal are issues of fact and not of law.

13) Where the Appeal Court interferes in such a case and there is a further appeal to a higher Court of Appeal on the application of the facts, the grounds of appeal alleging such misdirection by the lower Court of Appeal is a ground of law, not of fact.

14) A ground of appeal which complains that the

decision of the trial court is against evidence or weight of evidence or contains unresolved contradictions in the evidence of witnesses, it is purely a ground of fact (which requires leave for an appeal to a Court of Appeal or a further Court of Appeal)."

2. On when an appeal can be laid on a ground of fact:

Thus, grounds 3 and 4 appear to be grounds of fact. The position of law is that before an appeal can be laid on such grounds, the party wishing to appeal must seek the leave of the court below or this Court. No such leave is shown to have been sought or obtained by the appellant. They are incompetent grounds and are hereby struck out. See:

(i) Tilbury Construction Ltd. v. Ogunniyi (1988) 2 NWLR (Pt.74) 64;

(ii) Idika v. Erisi (1988) 2 NWLR (Pt.78) 563.

Any issue covering these grounds and arguments thereof are liable to be discountenanced.

At page 200KP.

3. On what a valid contract is and the basic essentials to creating it:

What then is a valid contract? The Black's Law Dictionary, Eighth Edition, defines a valid or binding contract to mean an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.

It is elementary to state that there are three basic essentials to the creation of a contract: agreement, contractual intention and consideration. And, the normal test for determining whether the parties have reached agreement is to ask whether an offer has been made by one party and accepted by the other. *At page 203KU.*

4. On what the doctrine of counter-offer postulates in a contract:

The doctrine of a counter-offer in a contract postulates an outright rejection of the original offer by the Offeror to the Offeree. It indeed destroys that offer, making it non-existent, as it were, and not capable, anymore, of any acceptance. See *Tinn v. Hoffman & Co. (1973) 29 L. T. 271; 278*. It, in fact, tantamounts to a new offer, by the new Offeror which may or may not be acceptable to the new Offeree. *At page 207EEJJ.*

5. On whether a failure of any requirement of a valid contract renders the contract incompetent:

Where there is failure of any of the requirements of a valid contract such as intention to create legal relation and where the contract is not a unilateral or gratuitous one, then, there is a failure of contract as it is incompetent. It is not capable of any enforcement as it is not legally binding. See:

(i) Butcher v. R (1934) 2 K.B. 17;

(ii) Courteny & Fairbrain Ltd. v. Tokuni Bros. Hotel Ltd. (1975) 1 WLR 297.

At page 208AK.

6. NOTABLE PRONOUNCEMENT Per MUHAMMAD, JSC, at page 208KP, on how a court treats a conferred right which a person has abdicated:

"I think it needs to be made very clear that where the law has conferred a right on a person and the person, for some reasons, decides to abdicate or abandon or relinquish that right, it is not the duty of a court and of course the court has no power to restore that right on such a person as one cannot force an unwilling horse to drink the water."

7. On whether an appellate court can intervene to evaluate evidence when the trial court fails to so do:

The court below, rightly too, stated the principle of the law where a trial court failed to evaluate the evidence properly an appellate court can intervene and itself evaluate such evidence. The court below, accordingly stepped into the shoes of the trial court and performed that duty. I think the court below did the right thing. See:

(i) Atolagbe v. Shorun (1985) 1 NWLR (Pt.2) 360;
(ii) Abisi v. Ekwealor (1993) 6 NWLR (Pt.302) 643;
(iii) Brown v. Nzirim (1995) 1 NWLR (Pt.370) 221;
(iv) Wolechem v. Gudi (1981) 5 SC 219;
(v) Incar (Nig.) Plc v. Bolex Ent. Nig. Ltd. (1996) 6 NWLR (Pt.454) 318 at 347-348.

At pages 208JJ & 209A.

8. On what the exercise of judicial discretion should be based on to look judicial and judicious:

A judicial discretion however, is the exercise of Judgment by a Judge or court based on what is fair under the circumstances and guided by the rules and principles of law. In other words, it is a court's power to act or not to act when a litigant is not entitled to demand the act as a matter of right. To make such a discretion look judicial and judicious, it has to be based on prudence, rationality, sagacity, astuteness, considerateness and reasonableness. The principles established by our courts on the attitude of appellate courts towards the exercise of judicial discretion have been enunciated in several cases such as the case of *University of Lagos v. Aigoro & Anor. (1985) 1 NWLR (Pt.1) 143* where this Court held as follows:

> ***"A declaratory Judgment is discretionary. It is a form of Judgment which should be granted only in circumstances in which the court is of the opinion that the party seeking it is, when all the facts are taken into account, fully entitled to the exercise of the court's discretion in his favour."***

See further:
(i) Onuoha v. Okafor (1985) 2 SCNLR 244;
(ii) Ekwurum v. Ifejika (1960) SCNLR 320;
(iii) Egbunike v. Muonweokwu (1962) 1 SCNLR 97.
At page 210FZ.

9. On when an Appellate Court will reverse the exercise of judicial discretion by a trial court:

The settled law and practice is that except on grounds of law, an appellate court will not reverse a discretionary order of a trial court merely because it would have exercised the discretion differently. But, if on other grounds, the order will result in injustice being done or if the discretion was wrongly exercised in that due weight was not given to relevant consideration, the order may be reversed. See:
(i) Saffieddine v. COP (1965) 1 All NLR 54;
(ii) Enekebe v. Enekebe (1964) 1 All NLR 102;
(iii) Awani v. Erejuwa II (1976) 11 SC 307;
(iv) Odusote v. Odusote (1971) 1 All NLR 219.
Thus, the guiding principle is that discretion being judicial must at all times be exercised not only judicially but also judiciously on sufficient materials. See *University of Lagos & Anor v. Aigoro (1985) 1 NWLR (Pt.1) 143.* *At pages 210EEJJ & 211A.*

NIGERIAN CASES REFERRED TO:

1. Abisi v. Ekwealor (1993) 6 NWLR (Pt.302) 643
2. ACME Builders Ltd. v. KSWB (1999) 2 NWLR (Pt.590) 288; (1999) 66 LRCN 218

3. A-G, Ekiti State v. Daramola (2003) FWLR (Pt.169) 1121; (2003) 108 LRCN 1078
4. Arbucle Smith & Co. Ltd. v. A-G, (1952) 20 NLR 68
5. Atolagbe v. Shorun (1985) 1 NWLR (Pt.2) 360
6. Awani v. Erejuwa II (1976) 11 SC 307
7. Bank of Baroda v. Merchants Bank Ltd. (1987) 3 NWLR (Pt.60) 233
8. Board of Customs and Excise v. Barau (1982) 10 SC 48
9. Brown v. Nzirim (1995) 1 NWLR (Pt.370) 221
10. Bushwell Properties Ltd. v. Vortell Properties Ltd. (1976) 1 WLR 591
11. Courteny & Fairbrain Ltd. v. Tokuni Bros. Hotel Ltd. (1975) 1 WLR 297
12. Egbunike v. Muonweokwu (1962) 1 SCNLR 97
13. Ekwenife v. Wayne (W.A) Ltd. (1985) 5 NWLR (Pt.122) 422
14. Ekwurum v. Ifejika (1960) SCNLR 320
15. Elendu v. Ekowaba (1995) 3 NWLR (Pt.386) 704
16. Enekebe v. Enekebe (1964) 1 All NLR 102
17. Guder v. Kitta (1998) 12 NWLR (Pt.629) 21
18. Idika v. Erisi (1988) 2 NWLR (Pt.78) 563
19. Incar (Nig.) Plc v. Bolex Ent. Nig. Ltd. (1996) 6 NWLR (Pt.454) 318
20. Iragunira v. Rivers State Housing and Property Development Authority & Ors. (2003) FWLR (169) 1233; (2003) 111 LRCN 1834
21. Jackies v. Lloyds Partners (1968) 1 WLR 695
22. NGSC Ltd. v. NPA (1990) 1 NWLR (Pt .129) 741
23. Obechie v. Onochie (1980) 2 NWLR (Pt.23) 484
24. Odusote v. Odusote (1971) 1 All NLR 219
25. Olarewaju v. Governor Oyo State (1992) 9 NWLR (Pt.265) 335
26. Onuoha v. Okafor (1985) 2 SCNLR 244
27. Saffieddine v. COP (1965) 1 All NLR 54
28. Tilbury Construction Ltd. v. Ogunniyi (1988) 2 NWLR (Pt.74) 64
29. University of Lagos & Anor. v. Aigoro (1985) 1 NWLR (Pt.1) 143
30. Usman v. Garke (2003) FWLR (Pt.177) 815; (2003) 110 LRCN 1549

31. Wolechem v. Gudi (1981) 5 SC 219

NIGERIAN RULES OF COURTS REFERRED TO:

1. Oyo State High Court (Civil Procedure) Rules, 1988 - Order 25 Rules 4 (1) & 6 (1)
2. Supreme Court Rules - Order 1 Rule 2 (2), Order 8 Rule 2 (4)

FOREIGN CASES REFERRED TO:

1. Brodyen v. Metropolitan Railway Co. (1877) 2 AC 666
2. Butcher v. R (1934) 2 K.B.17
3. Scammel & Nephew v. Ouston (1941) AC 251
4. Tinn v. Hoffman & Co. (1973) 29 L. T. 271; 278

FOREIGN BOOKS REFERRED TO:

1. Black's Law Dictionary, Eighth Edition
2. Burton's Legal Thesaurus, (2007) 4th Edition, Mc Graw Hill, New York by William C. Burton

COUNSEL:

Mr. M. F. Lana, for the Appellant.

Mr. O. A. Onadele, for the Respondent.

MUHAMMAD, JSC *(Delivered Lead Judgment)*: The appellant, herein, as plaintiff, took a Writ of Summons from the High Court of Justice of Oyo State holden at Ibadan (trial court herein). In his Statement of Claim, the plaintiff averred that he is a chartered Estate Surveyor, and Valuer. He trades under the name and style of AKINYEMI & ASSOCIATES.

The respondent as defendant at the trial court is an Incorporated Private Limited Liability Company owned exclusively by the then Government of Oyo, Ondo, Ogun and Osun States. By a letter dated 3rd May, 1993, the defendant offered the plaintiff the valuation of the assets of three of its subsidiary companies, viz:

Great Nigeria Insurance Co. Ltd; Grenic Nig. Ltd. and Lagos Airport Hotel Ltd.

With respect to the fees to be paid to the plaintiff for the job, the defendant offered to pay a simple fee or honorarium.

The plaintiff, reacting to the offer, made a counter-offer on the fees to be paid. The plaintiff claimed that the defendant did not reject his counter-offer. Instead, the defendant wanted the reports to be ready by 21st June, 1993. The plaintiff averred further that he did the valuation as directed and submitted the reports and he later forwarded his bills for the three jobs. And, in settlement of the bills, the defendant forwarded to the plaintiff a total sum of ₦330,000.00 for the three jobs. The plaintiff averred that he accepted the ₦330,000.00 as part payment under protest and demanded for the balance of his fees as scaled down unilaterally by the plaintiff in his letter of 27th July, 1993. The plaintiff repeated his demand for the balance of his fees but still the defendant failed to pay the balance. The plaintiff was, in October, 1993, invited to a meeting with the Management of the defendant over his fees, but the meeting produced no useful result. The plaintiff claimed to have suffered loss and damages and made the following claims against the defendant:

"WHEREOF the plaintiff claims as follows:

i. DECLARATION that the total sum of ₦365,481.00 paid by the defendant to the plaintiff does not represent proper, adequate and fair remuneration due to the plaintiff for his professional services in carrying out a valuation of some assets of three subsidiary companies (sic) of the defendant on the instructions of the defendant.

ii. AN Order directing the defendant to pay to the plaintiff the sum of ₦1,119,899.40 or any other sum as upon a quantum meriut, representing the balance due and payable to him for his said professional services.

iii. Interest at the rate of 21% per annum on the sum awarded under claim (ii) above from February, 1994 until payment."

The defendant in its Statement of Defence denied each and every allegation of fact contained in plaintiff's Statement

of Claim except where same is expressly admitted by the defendant.

In answer to some new points in the Statement of Defence, the plaintiff filed a reply to the defendant's Statement of Defence.

The matter proceeded to trial stage. Evidence was taken and final addresses were made by the respective learned Counsel for the parties. The trial court at the end of hearing, entered Judgment for the plaintiff with some different rates of interest.

The defendant was dissatisfied and it appealed to the Ibadan Division of the Court of Appeal (court below). After reviewing the whole case placed before it including both oral and written submissions by the learned Counsel for the respective parties, the court below set aside the Judgment of the trial court and entered Judgment for the appellant.

Aggrieved by the court below's decision the plaintiff/respondent, now appellant herein, filed his appeal before this Court on six grounds of appeal praying this Court to allow the appeal and affirm the Judgment of the trial court.

Briefs of Arguments were settled by the parties to the appeal as per the requirement of our Court's Rules. The learned Counsel for the appellant set out the following issues for our determination, viz:

"*i. Whether the lower court could validly hold that there was no valid contract between the parties. GROUND 3.*

ii. Whether Exhibit C was not a counter-offer accepted by Exhibit D and conduct of the respondent. GROUNDS 1 and 2.

iii. Whether on the pleadings and evidence before the court, Judgment ought not be given to the appellant instead of the respondent herein GROUND 4.

iv. Whether the lower court acted judicially and judiciously in setting aside the trial court's discretion in awarding the pre and post Judgment interests. GROUNDS 5 and 6."

A Learned Counsel for the respondent incorporated in his Brief of Argument a preliminary objection and its arguments. He later set out issues for determining the appeal as follows:

> *"1) Whether the court below was right in re-*
> **F** *evaluating the evidence before the trial court and eventually setting aside the order granting appellant's claims. (Grounds1, 2, 3 and 4).*
> *2) Whether the court below acted judicially and judiciously in setting aside pre-judgment*
> **K** *interests awarded by the trial court. (Grounds 5 and 6)."*

On the hearing date, the learned Counsel for the appellant adopted and relied on his Brief of Argument, he
P urged us to allow the appeal. Learned Counsel for the respondent adopted and relied on the brief filed by him. He urged us to sustain his Preliminary Objection and that the appeal should be dismissed if his Preliminary Objection fails.

I will deal with the Preliminary Objection first.

U Learned Counsel for the respondent stated that Grounds 1 - 4 of the Grounds of Appeal are incompetent on the grounds that:

a) Grounds 1 - 4 are of mixed law and fact and no leave was sought or obtained.

Z b) Ground 1 offends Order 1 Rule 2 (2) of the Supreme Court Rules as it did not state the nature of the error of law.

ii. Grounds 1 & 3 are grounds on decision on disputed facts and are therefore of
EE mixed law and fact.

iii. Grounds 1 & 4 question the evaluation of facts by the court below. They are of mixed flaw and fact.

iv. The particulars of Ground 4 are of
JJ general nature. The ground is incompetent as it offends Order 8 Rule 2 (4).

c) Issues 1 - 3 are contaminated by incompetent Grounds of Appeal. The issues are as well

incompetent.

From the printed record of appeal before me, it appears that the appellant did not file any reply brief in reaction to the Preliminary Objection raised by the respondent. All the same, this will not stop me from considering the merit or otherwise of the Preliminary Objection raised by the respondent as the essence of law is to ensure compliance with the rules of substantial justice. The Grounds of Appeal attacked are 1 - 4. I reproduce them herein below as follows:

"1. The learned Appellate Justices erred in law when they held that Exhibit C did not amount to a counter-offer to Exhibit B.

Particulars of Errors of Law

i. Having held correctly that an acceptance must inter alia show no variance of any sort between it and the offer, the learned Justices ought on to have (sic) construed Exhibit C as a counter-offer.

ii. In construing the effect of a document, a court is bound to consider the document globally and not in bits as done by the Court of Appeal in arriving at its decision on Exhibit C.

2. The learned Appellate Justices erred in law when they failed to hold that the respondent had by conduct accepted the counter-offer in Exhibit C.

Particulars of Errors of Law

i. The undisputed evidence on record disclosed that following Exhibit C from the appellant, the respondent simply directed the appellant to proceed with the job and gave him a time limit to finish same.

ii. The court should have held as the trial court did that the respondent had by conduct accepted the counter-offer.

3. The learned appellate Justices erred in law when they held that there was no enforceable

contract between the appellant and the respondent because there was no agreement between the parties on the professional fees to be paid.

Particulars of Errors of Law

i. Exhibit C shows that the fees payable would be based on the professional scale of fees for Estate Surveyors and Valuers.

ii. With this evidence, the contract was complete notwithstanding that the appellant was prepared to discount the fees based on a negotiation by the respondent.

iii. There is evidence that the respondent did not take advantage of the offer of discount affordable through negotiation.

4. The learned appellate Justices erred in law when they resolved appellant's Issues number 2 and 4 in the appellant's favour when on a proper evaluation of the evidence and consideration of the case, they could not have done so.

Particulars of Errors of Law

i. The appellate court did not properly consider the issues raised by the appeal and to a large extent misconceived the issues and the evidence on record thereby occasioning a miscarriage of justice.

ii. Some of the findings and holdings of the lower court run contrary to the evidence on record; the arguments in the briefs and atoms are self-contradictory and even create doubt as to whether it was the appellant or the respondent the court intended to give Judgment."

I think the criteria for distinguishing a ground of law from that of mixed law and fact have, for quite long, been settled. For the purposes of elucidation, I consider it pertinent to summarise some of these principles as follows:

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1) The first and foremost is for one to examine thoroughly the grounds of appeal in the case concerned to see whether they reveal a misunderstanding by the lower court of the law, or a misapplication of the law to the facts already proved or admitted.

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2) Where a ground complains of a misunderstanding by the lower court of the law or a misapplication of the law to the facts already proved or admitted, it is a ground of law.

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3) Where a Ground of Appeal questions the evaluation of facts before the application of the law, it is a ground of mixed law and fact.

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5) Where the lower court finds that particular events occurred although there is no admissible evidence before the court that the events did in fact occur, the ground is that of law.

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7) Where the lower court approached the construction of a legal term of art in a statute on the erroneous basis that the statutory wording bears its ordinary meaning, the ground is that of law.

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8) Where the lower court or tribunal applying the law to the facts in a process which requires the skill of a trained lawyer, this is a question of law.

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9) Where the lower court reaches a conclusion which cannot reasonably be drawn from the facts as found, the appeal court will assume that there has been a misconception of the law. This is a ground of law.

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10) Where the conclusion of the lower court is one of possible resolution but one which the appeal court would not have reached if seized of the issue, that conclusion is not an error in law.

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11) Where a trial court fails to apply the facts which it has found correctly to the circumstances of the case before it and there is an appeal to a Court of Appeal which alleges a misdirection in the exercise of the

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application by the trial court, the Ground of Appeal alleging the misdirection is a ground of law, not of fact.

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14) A Ground of Appeal which complains that

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the decision of the trial court is against evidence or weight of evidence or contains unresolved contradictions in the evidence of witnesses, it is purely a ground of fact (which requires leave for an appeal to a Court of

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Appeal or a further Court of Appeal).

The above principles accord with the previous practice of this Court in considering the thorny and intricate issues of law and fact. See the cases of *Board of Customs and Excise v. Barau (1982) 10 SC 48; Obechie v. Onochie (1980) 2 NWLR*

JJ

(Pt.23) 484. Infact in a more concise form, Karibi-Whyte, JSC summarised these general principles as follows:

> "Question of law is capable of three different meanings. First it could mean a question the court is bound to

answer in accordance with a rule of law... Concisely stated, a question of law in this sense is one predetermined and authoritatively answered by the laws. The second meaning is as to what the law is. In this sense, an appeal on a question of law means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter...A question of the construction of statutory provision falls within this meaning. The third meaning is in respect of those questions which normally answers question which within the province of the Judge instead of the jury is called a question of law, even though in actual sense it is a question of fact. The cases which readily come to mind are the interpretation of documents. Often a question of fact, but is within the province of a Judge. Also, the determination of reasonable and probable cause for a prosecution in the tort of malicious prosecution, which is one of fact, but is a matter of law to be decided by the Judge."

On what a question of fact is, the learned Justice stated thus:

"Like of law, question of fact has more than one meaning:

The first meaning is that a question of fact is any question which is not determined by a rule of law. Secondly, it is any question except a question as to what the law is. Thirdly, any question that is to be answered by the Jury instead of by the Judge is a question of fact."

Placing the Ground of Appeal challenged by the respondent side by side with the above principles of law, it is clear to me that Ground One and its particulars relate to construction of terms of contract as contained in a document identified as Exh C. It is therefore a ground of law. Ground No. 2 and its particulars complained of failure of the lower court to hold that the respondent had by conduct accepted the courter-offer in Exhibit C. This ground, in my view, falls under

A complaints of misunderstanding by the lower court of the law or misapplication of the law to facts already proved or admitted. It is therefore a ground of law. Ground of Appeal No. 3 challenges the holding of the lower court that there was no enforceable contract between the parties as there was no **F** agreement between the parties. This, in my view, relates to assessment of evidence. That of course, is entirely the business of the trial court. The ground is that of fact. Ground No.4 complained about proper evaluation of the evidence and consideration of the case. It is also a ground of fact. **Thus,** **K** **grounds 3 and 4 appear to be grounds of fact. The position of law is that before an appeal can be laid on such grounds, the party wishing to appeal must seek the leave of the court below or this Court. No such leave is shown to have been sought or obtained by the appellant. They are incompetent** **P** **grounds and are hereby struck out. See *Tilbury Construction Ltd. v. Ogunniyi (1988) 2 NWLR (Pt.74) 64; Idika v. Erisi (1988) 2 NWLR (Pt.78) 563*. Any issue covering these grounds and arguments thereof are liable to be discountenanced.** However, as grounds 1, 2 and 5 are of law, **U** they can sustain the appeal and I shall proceed to consider the appeal accordingly. Now, on the main appeal, learned Counsel for the appellant argued Issues 1 and 3 together. He submitted that the question whether there was or there was not a valid contract between the parties was never raised by any of the **Z** parties either in their pleadings or evidence; not even in Counsel's address. He stated that it is trite law that where a court raises an issue *suo motu*, it must afford both parties an opportunity to address on it. It was further contained that the issue was not borne out by the pleadings. The appellant's **EE** contention was that there was a counter-offer in Exh. C which was accepted by Exh. D and by conduct of the parties. The respondent's contention was that there was a contract *vide* Exhs. B and C. Learned Counsel made reference to paragraphs 5 - 8 of the Statement of Claim. He contended that there was no **JJ** basis for the lower court to hold as it did that there was no valid contract when neither party canvassed such issue before it.

Learned Counsel for the appellant argued further that the effect of the plaintiff's and DW 2's evidence is that both parties agreed that Exh. C was a counter-offer which was

accepted by Exh. D and therefore formed the basis upon which the fees would be determined. He further stated that by Exh. B, the respondent was aware of the existence of professional scale of fees but did not wish, in making the offer, to make use of it in determining the fee. The appellant, it is contended, fully performed the contract.

In his issue No.4, the learned Counsel for the appellant submitted that the lower court did not show in what way the trial court was wrong in awarding interest for the appellant, rather it relied on evidence not placed before the court to set aside the trial court's discretion which is not permitted in law. On the delay in completion of the contract, none of the parties ever said anything about it either in the pleadings, evidence or final addresses. It was not an issue before the court. That a court cannot make a case for the parties and that an appellate court will not tamper with a lower court's exercise of its judicial and judicious discretion. Learned Counsel for the appellant urged this Court to allow this appeal and affirm the Judgment of the trial court.

On its part, the respondent, through its learned Counsel, made submissions on the issues formulated by them. On Issue No.1, it is the learned Counsel's submission that the learned trial Judge evaluated the documentary evidence before him and held that Exh. C was a counter-offer to Exh. B. The court below, he stated, meticulously considered the documentary evidence and held that the trial court was in error in misconstruing the document. For the Supreme Court to interfere with the decision of the court below, the appellant has to show by his grounds of appeal that the lower court committed errors which are likely to occasion miscarriage of justice. Learned Counsel argued that the appellant's grounds of appeal are deficient in that regard and no basis has been shown for intervention by the Supreme Court. He cited and relied on the cases of *Usman v. Garke (2003) FWLR (Pt.177) p. 815 at 829 A-D; (2003) 110 LRCN 1549; A-G, Ekiti State v. Daramola (2003) FWLR (Pt.169) 1121 at pp, 1158 - 1159; (2003) 108 LRCN 1078; Iragunira v. Rivers State Housing and Property Development Authority & Ors. (2003) FWLR (169) 1233 at p.1244 E; (2003) 111 LRCN 1834*. Further, the learned Counsel for the respondent stated that it is uncharitable for the

appellant to argue as to whether there was a valid contract arising from Exhs. B and C was not raised by the parties but by the court below and that counsel were not invited to address the issue.

On the issue of Exhibit C whether it amounted to counter-offer, learned Counsel for the respondent stated that the court below appropriately reversed the finding that it was a counter-offer. The parties, it is obvious, stated the learned Counsel, agreed to negotiate fees upon the contemplation of the contract, although it was yet to be agreed upon what mode or data was to be used during the negotiation. Thus, the respondent countered by paying what it considered to be a reasonable fee. Learned Counsel for the respondent made a submission that the appellant cannot complain after receiving payment in full and final settlement. The trial court, he said, made a finding in respect of this final settlement and the appellant did not appeal against that finding and it thus, become binding on him. He relied on the cases of *Usman v. Garke (2003) FWLR (Pt.177) 815; (2003) 110 LRCN 1549; Olanrewaju v. Governor of Oyo State (1992) 9 NWLR (Pt.265) 335*.

It is the contention of learned Counsel for the respondent that the trial court's Judgment is confusing and unenforceable. The learned trial Judge granted two conflicting claims; one in contract and another in *Quauntum Meruit*. The appellant, it is argued, did not appeal on that and is deemed to have accepted and remained bound by that. Learned Counsel urged us to resolve issue one against the appellant.

On respondent's Issue 2, it was submitted that although a relief for interest was asked at 21% per annum from February, 1994 until payment on whatever amount the court awarded, there was no averment in the body of the Statement of Claim. Learned Counsel for the respondent cited the provisions of Order 25 Rule 4 (1) and Rule 6 (1) of the Oyo State High Court (Civil Procedure) Rules, 1988 which require that material facts being relied for a claim must be specifically pleaded. The case of *Ekwenife v. Wayne (W.A) Ltd. (1985) 5 NWLR (Pt.122) 422 at 452-454* was among others, cited in support. Further, the pre and post Judgment rates of interest awarded at 10% and 3% *suo motu* by the trial court were based

on grounds not proved in evidence. Learned Counsel contended that the submission of the appellant that compensation for delayed payment must be pleaded as special damages is misconceived. The correct position of the law, he stated, is that such must be pleaded and proved as special damages not as an interest *per se*. The appellant, he argued, did not do that in this case. Learned Counsel for the respondent urged this Court to resolve issue two against the appellant and to finally dismiss the appeal.

I will take issues (i) and (iii) together as has been done by the learned Counsel for the appellant in his Brief of Argument. Issue (i) questions whether there was a valid contract between the parties. **What then is a valid contract? The Black's Law Dictionary, Eighth Edition, defines a valid or binding contract to mean an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.**

It is elementary to state that there are three basic essentials to the creation of a contract: agreement, contractual intention and consideration. And, the normal test for determining whether the parties have reached agreement is to ask whether an offer has been made by one party and accepted by the other. The contention of the learned Counsel for the appellant is that although there was never raised by any of the parties, either in their pleadings or evidence, there was a counter-offer in Exh. C which was accepted by Exh. D and by conduct of the parties. Learned Counsel for the respondent on the other hand, contended that there was a contract between the parties *vide* Exhs. "B" and "C".

Now, in relation to the binding nature of the contract, the trial court, held, *inter alia*:

> *"There is no doubt and I hold that there is in this case as per Exhibit B, a valid offer from the defendant to the plaintiff. The terms of the offer is (sic) as I have underlined above. The question is; is Exhibit C an acceptance? From the above I hold Exhibit C cannot and is in no way, qualify as an acceptance as defined above. It is not plain neither is it unequivocal or*

unconditional and it contains variance between it and the offer. What then is Exhibit C? Since Exhibit C in my considered view has introduced fresh terms and is conditional, its expression.... to a counter-offer which in turn requires to be accepted by the defendant. This leads us to another question thus: Has the defendant accepted to be bound to the terms of the counter-offer as contained in Exhibit C?... In the instant case there is evidence which I believe that the defendant got Exhibit C from the plaintiff. If defendant did not intend to accept same equivocally and unconditionally it has the option of rejecting same. In the circumstance I hold and infer from Exhibit D that the defendant accepted the terms of Exhibit C which is a counter-offer. Plaintiff duly completed the assignment. He submitted same. There is no complaint."

Thus, the trial court found that there was a valid and binding contract between the parties.

However, the court below made the following findings in respect of the validity and binding nature of the contract between the parties:

"I have to remark here that this issue is fundamental to this appeal as this Court is called upon to decide whether there is a valid enforceable contract by the parties based on the communication between them.

The pertinent question to be answered is whether there was an offer and acceptance between the appellant (sic) - which undoubtedly forms the basis or fundamental to any contractual agreement. It is a question of construction for the court to decide. In order to do this, I have to interpret the contents of Exhibits B and C.

Exhibit B is a letter from the appellant Odu'a Investment Company Limited to Akin Akinyemi & Associates, a firm of Chartered Estate Surveyors and Valuers. The letter reads as follows ... in the acceptance of the respondent, the first paragraph of the letter of acceptance, Exhibit C, is an acceptance of the offer in

Exhibit B, plain, unequivocal and unconditional; the first sentence of the middle or second paragraph is equally plain, unequivocal and unconditional. The second part of the paragraph is the controversial portion. The respondent refers to this as counter-offer... A counter-offer is a rejection of the offer and destroys the offer so that it cannot subsequently be accepted. The portion of Exhibit C meant to be a counter-offer flows from the preceding section of the contract which talked about fees being subject to negotiation in effect laying emphasis on this suggestion and that the professional scale should be used as the basis for the negotiations. The statement to my mind and particularly because of the words "However drawing from our experience" used in my interpretation, makes the entire statement a suggestion or even advice to the appellant to guide it on future negotiation for the fees from his experience as a professional in the field of valuation ... in this instant appeal there is no evidence of consensus ad idem between the parties on a fundamental aspect in their contract - that is the issue of professional fees to be paid on execution of the valuation executed by the respondent - whereupon the appellant agreed to pay a simple fee or honorarium not related to professional fee - but the appellant insisted that the payments must be based on the Federal Government Approved Scale of Fees for Consultant Estate Surveyors and Valuers. The respondent ought to have rejected the offer on Exhibit B outright instead of accepting to do the job on Exhibit C."

So, that in short are the stands of the parties and the two courts below. In my own humble attempt, I find it expedient to cast a very hard look at the documents relied upon by the parties in the course of their contractual transactions. Firstly, and as found by the two courts below, it was the respondent who made an offer (Exhibit B) to the appellant. Exhibit B reads in part:

" Dear Sir,
Great Nigeria Insurance Co. Ltd./Gremic 7 Lagos

Airport Hotel Limited - Valuation of Assets
The Board of Directors of Odu'a Investment Company Limited has approved that your Company should carry out the valuation of the Assets of the above Companies. (The Valuation should include Land and Buildings).
The value obtained is to be used as a basis for the determination/calculation of the price of the Shares of the Company.
Your appointment will be subject to the payment of a simple fee or honorarium. This fee will be negotiable but will not be related to the professional scale of fees or the value of the Assets."

It is my view, from the above excerpt that Exhibit B has in no uncertain terms and unequivocally spelt out the terms of the offer, especially in paragraph 3 thereof.

It has made clear that:

a. The appellant's Company should carry out valuation of the Assets of the respondent's companies as therein named;
b. That the appointment of the appellant will be subject to payment of a simple fee or honorarium;
c. The fee will be negotiable;
d. The fee will not be related to the professional scale of fees or the value of the Assets.

In a document sent to the appellant by the respondent which was admitted at the trial as Exhibit C, the respondent stated, *inter alia* as follows:

"We hereby acknowledge the receipt of your letter Ref. No.OP/78/Vol.2/63 of 3rd May, 1993 on the above subject-matter. WE WHOLEHEARTEDLY ACCEPT.....LETTER under reference and pledge to provide excellent service in this regard. Your willingness to negotiate the fee payable to us for our service is quite appreciated and ACCEPTABLE.
However, drawing from our experience we wish to state that you base the fees payable on the Federal Government Approved Professional Scale of Fees for

Estate Management and Valuation Services. Moreso, that the approved scale of fees is statutory and tidy too. This negotiation can be related to this statutory (sic) approved scale of fees as a base or datum, i.e. the total fees obtained through the use of this scale can then be used as the basis for negotiation." (emphasis supplied by me).

The above reply from the respondent to the appellant to me, make the following very clear:

i. Respondent acknowledged receipt of Exhibit B;

ii. Respondent, wholeheartedly, in other words unreservedly accepted the terms contained in Exh. B;

iii. Respondent accepted appellant's willingness to enter into negotiation on matters of fee payable to the respondent;

vi. From the accumulated experience garnered by the respondent, the respondent offered gratuitous advice to the appellant on how to go about basing payment of fees statutorily regulated by the Federal Government Approved Professional Scale of Fees for Estate Management and Valuation Services.

From the above therefore, it is clear that the respondent had accepted the original offer made to him by the appellant. He is therefore bound by those terms as spelt out by Exhibit B. There is nothing to indicate, as found by the trial court, that the respondent did not agree to a simple fee or honorarium as offered in Exhibit B. Secondly, it does not stand to reason to say that the "ADVICE" offered by the appellant to the respondent was in the form of a counter-offer. **The doctrine of a counter-offer in a contract postulates an outright rejection of the original offer by the Offeror to the Offeree. It indeed destroys that offer, making it non-existent, as it were, and not capable, anymore, of any acceptance. See *Tinn v. Hoffman & Co. (1973) 29 L. T. 271; 278*. It, in fact, tantamounts to a new offer, by the new Offeror which may or may not be acceptable to the new Offeree.** In the instant appeal, there is nothing to indicate any direct, positive or

unqualified acceptance of the said counter-offer by the appellant. So, as to the effect of the counter-offer, it can safely be concluded that it does not create any legal relationship between the appellant and the respondent. **Where there is failure of any of the requirements of a valid contract such as intention to create legal relation and where the contract is not a unilateral or gratuitous one, then, there is a failure of contract as it is incompetent. It is not capable of any enforcement as it is not legally binding. See *Butcher v. R (1934) 2 K.B.17; Courteny & Fairbrain Ltd. v. Tokuni Bros. Hotel Ltd. (1975) 1 WLR 297*.**

I think it needs to be made very clear that where the law has conferred a right on a person and the person, for some reason, decides to abdicate or abandon or relinquish that right, it is not the duty of a court and of course the court has no power to restore that right on such a person as one cannot force an unwilling horse to drink the water. The law has given the right to the appellant of an outright rejection of the original offer, but the appellant decided to beat around the bush by blowing both hot and cold. He thus, neither rejected the original offer, nor got a corresponding acceptance to what he regarded as his counter-offer.

Issue No. 3 is whether on the pleadings and evidence before the court, Judgment ought not to be given to the appellant instead of the respondent. After having reviewed the decision of the trial court and the court below, I agree with the finding of the court below that the learned trial Judge took an erroneous view of the evidence adduced before him e.g. by misconstruing Exh. C, by holding that payment should be made based on the computation of Exhibit L, while there is evidence that other consultants were paid not strictly guided by this document.

He therefore drew a wrong conclusion from the evidence of the parties. **The court below, rightly too, stated the principle of the law where a trial court failed to evaluate the evidence properly an appellate court can intervene and itself evaluate such evidence. The court below, accordingly stepped into the shoes of the trial court and performed that duty. I think the court below did the**

right thing. See *Atolagbe v. Shorun (1985) 1 NWLR (Pt.2) 360; Abisi v. Ekwealor (1993) 6 NWLR (Pt.302) 643; Brown v. Nzirim (1995) 1 NWLR (Pt.370) 221; Wolechem v. Gudi (1981) 5 SC 219; Incar (Nig.) Plc v. Bolex Ent. Nig. Ltd. (1996) 6 NWLR (Pt.454) 318 at 347-348*.

Accordingly, I hereby resolve Issues 1, 2 and 3 of the appellant's issues against the appellant and in favour of the respondent.

Appellant's issue No. 4 is on whether the lower court acted judicially and judiciously in setting aside the trial court's discretion in awarding the pre and post-Judgment interests. Learned Counsel for the appellant submitted that the issue of delay in completion of the contract was never raised either in the pleadings, evidence or address of Counsel. It was never an issue and the finding of fact on same by the court below is not borne by the records. It is trite law, he argued, that a court cannot make a case for the parties. He cited the case of *Bank of Baroda v. Merchants Bank Ltd. (1987) 3 NWLR (Pt.60) 233 at 240*. On the award of interest, it is submitted that the trite position of the law that a party deprived of money which he is entitled to interest on the money as compensation for the delay in payment. He cited several authorities among which is *NGSC Ltd. v. NPA (1990) 1 NWLR (Pt .129) 741 at 745*. Reacting on these points, learned Counsel for the respondent submitted on pre and post-Judgment interest that the court below is right when it held that the claim is not maintainable because the basis for the claim was not pleaded as necessary. The trial court made the award on grounds not proved in evidence.

"Discretion", they say, "knows no bound". In its general usage, it is that freedom or power to decide what should be done in a particular situation. William C. Burton, in his "Burton's Legal Thesaurus, (2007) 4th Edition, McGraw Hill, New York, assigned the general meaning of the word to include:

> *"analysis, appraisal, assessment, choice, consideration, contemplation, decision, designation, determination, discrimination, distinction, election, evaluation, examination, free decision, free will, freedom of choice, liberty of choosing, liberty of Judgment, license, option,*

optionality, permission, pick, power of choosing, review, right of choice, sanction, selection, self-determination, suffrage etc."

A judicial discretion however, is the exercise of Judgment by a Judge or court based on what is fair under the circumstances and guided by the rules and principles of law. In other words, it is a court's power to act or not to act when a litigant is not entitled to demand the act as a matter of right. To make such a discretion look judicial and judicious it has to be based on prudence, rationality, sagacity, astuteness, considerateness and reasonableness. The principles established by our courts on the attitude of appellate courts towards the exercise of judicial discretion have been enunciated in several cases such as the case of *University of Lagos & Anor. v. Aigoro (1985) 1 NWLR (Pt.1) 143* where this Court held as follows:

"A declaratory Judgment is discretionary. It is a form of Judgment which should be granted only in circumstances in which the court is of the opinion that the party seeking it is, when all the facts are taken into account fully entitled to the exercise of the court's discretion in his favour."

See further: *Onuoha v. Okafor (1985) 2 SCNLR 244; Ekwurum v. Ifejika (1960) SCNLR 320; Egbunike v. Muonweokwu (1962) 1 SCNLR 97.*

The settled law and practice is that except on grounds of law an appellate court will not reverse a discretionary order of a trial court merely because it would have exercised the discretion differently. But, if on other grounds, the order will result in injustice being done or if the discretion was wrongly exercised in that due weight was not given to relevant consideration, the order may be reversed. See: Saffieddine v. COP (1965) 1 All NLR 54; Enekebe v. Enekebe (1964) 1 All NLR 102; Awani v. Erejuwa II (1976) 11 SC 307; Odusote v. Odusote (1971) 1 All NLR 219. Thus, the guiding principle is that discretion being judicial must at all times be exercised

not only judicially but also judiciously on sufficient materials. See University of Lagos & Anor v. Aigoro (supra).

On this issue of exercise of discretion by the trial court, the court below observed as follows:

> *"The trial court had to exercise a discretion in granting the declaratory reliefs sought. It is equally trite that an appellate court may interfere with the exercise of judicial discretion if it is shown that there has been a wrongful exercise of the discretion:-*
>
> *a. Where the discretion was exercised based on wrong insufficient material; or*
>
> *b. Where no weight or insufficient weight was given to relevant consideration; or*
>
> *c. Where the tribunal acted under misconception of law or under misapprehension of fact; and*
>
> *d. In all other cases where if is in the interest of justice to interfere .*
>
> *It is apparent that any discretion exercised in this case based on the computation of Exhibit L and interpretation of Exhibit C will obviously amount to a wrongful exercise of discretion - which should not be allowed to stand in the interest of justice vide cases of University of Lagos & Anor. v. Aigoro (1985) 1 NWLR (Pt. 1) pg. 143; Elendu v. Ekowaba (1995) 3 NWLR (Pt.386) pg. 704; Awani v. Erejuwa II (1976) 11 SC pg. 307; Guder v. Kitta (1998) 12 NWLR (Pt.629) pg. 21; ACME Builders Ltd. v. KSWB (1999) 2 NWLR (Pt.590) pg. 288; (1999) 66 LRCN 218."*

I agree with the court below's observation as above. It is true that the trial court granted the plaintiff's/appellant's claim as per paragraph 21 of the Statement of Claim. Exhibit L portrays the professional scale. This exhibit according to the findings of the lower court did not form the basis of the contract between the parties (p.151 of the record). There is also a finding that the trial Judge found that Exhibit B was the offer and Exh. C a counter-offer. The appellant performed the contract bound by his acceptance in Exh. C. Where the trial court went wrong is the erroneous view held by it on the

A contents of Exh. C by practically misconstruing the document and that payment should be made based on the computation of Exh. L while there is evidence that other consultants were paid not strictly guided by Exh. L. The learned trial Judge, thus, drew a wrong conclusion from the evidence of the parties. I am **F** in agreement with the court below that any discretion exercised in this case based on the computation of Exh. L and interpretation of Exh. C will obviously amount to a wrongful exercise of discretion which should not be allowed to stand in the interest of justice. See: *University of Lagos & Anor. v. Aigoro (supra)*. **K** I am satisfied that the decision taken by the court below is quite in order and sound. I affirm it.

Finally, I find no merit in this appeal. The appeal is hereby dismissed by me. The appellant shall pay ₦50,000.00 costs in this appeal to the respondent.

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MUKHTAR, JSC: I have read in advance the lead Judgment delivered by my learned brother, Muhammad, JSC. I am in agreement that the appeal completely lacks merit, and ought to be dismissed. I also dismiss the appeal, as there is no justifiable **U** reason either in law or fact to interfere with the decision of the court below which allowed the appeal before it. I abide by the consequential orders made in the lead Judgment.

TABAI, JSC: *[Concurred]*.

Z

GALADIMA, JSC: I have been afforded the opportunity of reading the draft copy of the Judgment of my brother, I. T. Muhammad, JSC. I agree entirely with his well articulated reasoning that leads to his conclusion that this appeal is lacking **EE** in merit and ought to be dismissed.

The facts of this case have been carefully set out in the lead Judgment in a commendable manner. It is needless to repeat them here.

I have carefully perused the 4 grounds of appeal **JJ** contained in the Appellant's Notice of Appeal. The only grounds that appear to be grounds of fact are grounds 3 and 4. It is trite law that where the ground of Appeal is of fact or mixed law and fact, leave of the court below or this Court must be sought before an appeal is lodged on those grounds. Where

A no such leave is shown to have been sought and granted, the ground shall be declared incompetent and struck out. For this reason, Grounds 3 and 4 are incompetent and are struck out. I shall as well discountenance the appellant's issues 1 and 3, covering the two grounds clearly; Grounds 1, 2 and 5 are of **F** law. They can sustain the appellant's appeal.

These three issues and the respondent's second issue are those salvaged and now placed before us for the determination of this appeal. Learned Counsel for the appellant had argued Issues 1 and 3 together. From what I can gather from this, his **K** submission is that the question whether or not there was a valid contract between the parties either in their pleadings or evidence was never raised by any of the parties either in their pleadings or evidence; not even in the addresses. He contended that there was no basis for the lower court to hold as it did, that **P** there was no valid contract when neither party canvassed such issue before it.

Learned Counsel has argued that the effect of the plaintiff's and DW2's evidence is that both parties agreed that Exhibit 'C' was a counter-offer which was accepted by Exhibit **U** 'D' and therefore form the basis upon which the fees would be determined. It is finally contended that the appellant fully performed his own terms of the contract.

On appellant's issue No. 4, the learned Counsel for the appellant has submitted that the lower court did not show in **Z** what way the trial court was wrong in awarding interest for the appellant, rather that it relied on evidence not placed before the court to set aside the trial court's discretion which is not permitted in law. On the delay in completion of the contract it is submitted that none of the parties had mentioned anything **EE** about it, either in the pleadings, evidence or final address. That it was not an issue before the court, and therefore the court cannot make a case for the parties and the lower court cannot tamper with the judicial discretion of the lower court.

On the part of the respondent, his Counsel submitted on **JJ** issue No. 1, that the learned trial Judge evaluated the documentary evidence before him and held that Exhibit 'C' was a counter-offer to Exhibit 'B'. That the lower court meticulously considered the documentary evidence and held that the trial court was in error in misconstruing the document. That the

lower court will only interfere with the decision of the court below if it can be shown by the appellant in his grounds of appeal that the lower court committed errors which have occasioned miscarriage of justice. He relied on a number of authorities, such as *Attorney-General of Ekiti State v. Daramola (2003) FWLR (Pt.169) 1121 at 1159; (2003) 108 LRCN 1078* and *Usman v. Garke (2003) FWLR (Pt.177) p.829; (2003) 110 LRCN 1549*. On the issue of Exhibit 'C' whether this amounted to a counter-offer, learned Counsel for the appellant contended that the court rightly reversed the finding that it was a counter-offer. That the parties agreed to negotiate the fees upon the contemplation of the contract, although it was yet to be agreed upon, what mode or manner of data to be used during such negotiation. It is submitted that the trial court had made a finding in respect of this final settlement and the appellant did not appeal against that finding and therefore it must be binding on the appellant. Reliance was placed on *Usman v. Garke (supra); Olarewaju v. Governor Oyo State (1992) 9 NWLR (Pt.265) 335*. That since the appellant did not appeal on the trial court's conflicting decisions (one in contract and the other on *quantum meruit*) he is deemed to have accepted the decision and remained bound by it.

On issue No. 2 of the respondent, its learned Counsel has submitted that although a relief or interest was prayed for at 21% per annum from February, 1994, till the payment of the Judgment sum awarded by the court, but there was no averment to that effect in the body of the Statement of Claim.

It is contended that the pre and post Judgment rates of interest of 10% and 3% raised *suo motu* respectively by the trial court were based on grounds not proved in evidence on the submission of the Counsel for the appellant that the delay in payment must be pleaded as special damages, the learned Counsel for the respondent has contended that the submission is misconceived. He stated that the correct position of the law is that such compensation must be pleaded and proved only as special damages not as an interest *per se*.

On issues (ii) and (iii) taken together by the appellant herein, I must state that it is elementary law of contract that the basic essentials of the law of contract must include; the mutual agreement and intention to create contractual relationship and

A the consideration. Learned Counsel for the respondent has contended that there was a contract between the parties vides Exhibits 'B' and 'C'. In relation to the binding nature of the contract, the trial court found that there was a valid, binding and enforceable contract between the parties. It held:

F

> *"In the circumstance, I hold and infer from Exhibit 'D' that the defendant accepted the terms in Exhibit 'C' which is a counter-offer. Plaintiff duly completed the assignment. He submitted same. There is no complaint."*

K

However, the court below in respect of the validity and binding nature of the contract between the parties, held:

> *"...In this instant appeal there was no evidence of* **P** *consensus ad idem between the parties on a fundamental aspect of their contract, that is the issue of professional fees to be paid on execution of the valuation created by the respondent, where the appellant agreed to pay a simple fee or honorarium not* **U** *related to professional fee, but the appellant insisted that the payment must be based on the Federal Government Approved Scale of Fees for Consultant Estate Surveyors and Valuers. The respondent ought to have rejected the offer on Exhibit 'B' outright instead of* **Z** *accepting to do the job on Exhibit 'C'."*

From these findings above, I have decided to give the relevant Exhibits very careful consideration. In Exhibit 'B' the respondent herein made an offer to the appellant. The essential **EE** part of that Exhibit is to the effect that the appellant's company should carry out the valuation of the Assets of the respondent's companies which will be subject to payment of a simple fee or honorarium, which fee will be negotiable and must not be related to the professional scale of fees or the value of the Assets.

JJ In its reply in Exhibit 'C', the appellant acknowledge Exhibit 'B' and accepted whole-heartedly its forms and therefore bound by those terms as spelt out by Exhibit 'B'. I do not find in the circumstance, that the respondent did not agree to a simple fee or honorarium as offered in the said Exhibit 'B'.

A I cannot as well fathom the contention of the appellant that the advice he offered to the respondent was in form of a counter-offer. A counter-offer is an express and unequivocal rejection of the original offer by the Offeror to the Offeree. It cancels or destroys the original. It provides a clean slate, so to say, for the **F** parties to renegotiate their forms of contract. In the case at hand, I do not see how the respondent accepted the appellant's new offer. Nothing to indicate that. The appellant did not utilise the opportunity for the outright rejection of the original offer. He cannot impose his own terms of contract on an unwilling **K** respondent.

On issue 3, I have carefully reviewed the decision of both trial court and the lower court, particularly the latter. The question is whether on the pleadings and evidence before the court, Judgment ought not to be given to the appellant instead **P** of the respondent. The findings of the lower court is that the learned trial Judge took an erroneous view of the evidence adduced before him, by misconstruing Exhibit 'C' and held that payment should be based on the computation of Exhibit 'L' while there is evidence that other consultants were paid, not **U** strictly guided by the said document. The lower court rightly acted on the correct principle of law to have evaluated the evidence which the trial court failed to do. It is for the foregoing reasons that I resolve issues 1, 2 and 3 of the appellant in favour of the respondent.

Z Issue 4 of the appellant is on whether the lower court acted judiciously and judicially when it set aside the trial court's discretion in awarding the pre and post Judgment interest. On this issue, the appellant's complaint is that issue of delay in completion of the contract was never raised either in **EE** the pleadings, evidence or address of Counsel. It is argued that a court cannot make a case for the parties since this is not an issue and finding of fact on same by the court below borne by the records. The exercise of judicial discretion by a Judge is based on what is just and fair in the circumstances of the case. **JJ** However, the court must be guided by rules and principles of law. The court will only grant a party's claim when he is found to be entitled to such claims. It is settled law and practice that an appellate court will not reverse a discretionary exercise of a court in arriving at a decision unless the discretion was

exercised wrongly. See: *University of Lagos & Anor. v. Aigoro (1985) 1 NWLR (Pt.1) 143; Elendu v. Ekowaba (1995) 3 NWLR (Pt.386) 704*. According to the findings of the lower court, Exhibit 'C' which portrays the professional scale of charges did not form the basis of the contract between the parties. The trial court also found that Exhibit 'L' was the offer and Exhibit 'C' a counter offer. The appellant herein performed the contract based on his acceptance of Exhibit 'C'. The trial court was wrong in misconstruing Exhibit 'C' and that payment should be made based on computation of Exhibit 'L' while the evidence shows that other consultants were paid, not strictly guided by Exhibit 'L'. The court below correctly held that any discretion exercised in this case which is based on the computation of Exhibit 'L' and interpretation of Exhibit 'C' is tantamount to a wrongful exercise of discretion which must definitely not be allowed to stand.

In the light of the foregoing and the detailed reasoning and conclusion set out in lead Judgment, I too dismiss this appeal and abide by all consequential orders made by my brother, Muhammad, JSC in the lead Judgment.

NGWUTA, JSC: I read before now the lead Judgment just delivered by my learned brother, Muhammad, JSC and I agree with the reasoning and conclusion therein. The preliminary objection to some grounds of appeal was exhaustively dealt with and disposed of.

The issues canvassed in this appeal revolve around the question: Was there an enforceable contract between the party in pursuit and the party in defence?

Exhibit B is the letter Ref. No. OP/78/Vol.2/63 addressed by the respondent to the appellant. Apart from the offer therein conveyed, it also stated:

> *"Your appointment will be subject to the payment of a simple fee or honorarium. This fee will be negotiable but will not be related to the professional scale of fees or the value of the assets."*

In Exhibit C, headed *"Acceptance of the offer..."* the appellant said: *"We wholeheartedly accept..."*

A The appellant accepted the respondent's willingness to negotiate the fees but preferred that the Federal Government Approved Professional Scale of Fees for Estate Management and Valuation Services be used as the basis of negotiation. Both parties are *ad idem* on negotiation but in my view there **F** was no agreement on the basis of the agreed negotiation.

Acceptance of an offer is the agreement of the Offeree to enter into a legally binding contract with the Offeror in the terms of the Offeror's offer. See *Arbucle Smith & Co. Ltd. v. Attorney-General (1952) 20 NLR 68; Brodyen v. Metropolitan* **K** *Railway Co. (1877) 2 AC 666*. The fees to be paid for the contract is an essential term of the contract but the fees in both Exhibit B - the offer and Exhibit C - the purported acceptance, were not definite or certain, but made subject to negotiation.

There was no agreement on the basis of negotiation of **P** the fees payable by the respondent to the applicant. Since the term of the contract with reference to the payable fees is not certain but subject to negotiation, the basis of which was not agreed upon, there can be no enforceable contract. See *Bushwell Properties Ltd. v. Vortell Properties Ltd. (1976) 1* **U** *WLR 591; Scammel & Nephew v. Ouston (1941) AC 251; Jackies v. Lloyds Partners (1968) 1 WLR 695*.

In the claim before the trial court, the appellant sought a declaration that the sum of ₦305,481.00 paid to him by the respondent *"does not represent proper, acceptable and fair* **Z** *remuneration due to the plaintiff. This was followed by the claim of ₦1,119,899.40k or any other sum as upon a quantum meriut..."*. If the parties had come to an agreement on a specific contract sum, the appellant would have sued for the balance of the contract sum rather than for a declaration that the sum paid **EE** was not a fair or adequate remuneration for his services and he would not have claimed on a *quantum meruit*.

In my view, Exhibits B & C did not constitute an enforceable contract between the parties. For the above and the fuller reasons in the lead Judgment, I also dismiss the appeal as **JJ** devoid of merit. I affirm the Judgment of the court below. I also abide by the order for costs in the lead Judgment.

(Appeal Dismissed).