TULIP NIGERIA LIMITED v. NOLEGGIOE TRANSPORT MARITIME S.A.S

COURT OF APPEAL
(LAGOS DIVISION)

CA/L/744/2007
WEDNESDAY 30TH JUNE, 2010

(*OGUNBIYI; MSHELIA; MUKHTAR, JJ.CA*)

ARBITRATION – Foreign Arbitral award – provision of the Reciprocal Enforcement of Judgment Ordinance, Cap. 175, Laws of the Federation of Nigeria, 1958 & the Foreign Judgments (Reciprocal Enforcement) Act 1990 will apply in the enforcement of a foreign arbitral award where same has been elevated to the status of a judgment by leave of the High court been sought and obtained– would become binding on parties concerned irrespective of the country in which it was made and as such the court before whom an application is brought for enforcement is duty bound to enforce same- enforceable in Nigeria directly pursuant to the New York Convention to which Nigeria is signatory– the words 'recognition' & 'registration' are not synonyms for the purpose of enforcement of an arbitral award by court – Section 8 Limitation Law of Lagos State – an arbitral award would be enforceable within six years from the date on which the cause of action arose, however, the arbitration agreement in respect of which the arbitral award was made must not be under seal or must not have been made in pursuance of any enactment

COMMERCIAL LITIGATION – Issues raised suo motu – parties must be given an opportunity to address the court thereon before it reaches any decision on the issue so raised– Court - duty bound to take judicial notice of all laws, enactments and subsidiary legislation having the force of law

STATUTES – Limitation law of Lagos State – not restricted to actions commenced in Lagos State High Court only but applies to any action filed in any court operating within territorial area of Lagos State without an regard as to who the parties in the action are

Facts:

The respondent by an originating summons sought leave of the Federal High Court to recognize and enforce the Arbitral Award of the sum of US $103,982.39 made by Bruce David I. Mackenzie in the United Kingdom on sometime in 1998 against the appellant. The appellant reacted to the said originating summons by filing a notice of preliminary objection on the ground that the respondent's action of filling an originating summons seeking the court's leave to recognize and enforce the arbitral award was statute barred as same was not brought within the limitation period. The said preliminary objection was supported by a six paragraph affidavit

The trial Judge held that the action was not time barred and also held that the outstanding sum due to the respondent from the appellant from the arbitral award is USD18.671 .84 as at 30/6/99 with interest rate at 8% compounded at quarterly rate from that same date.

Being dissatisfied with the said judgment, the appellant filed an appeal at the Court of Appeal.

Held: (Unanimously dismissing the appeal)

[1] ***Arbitration – Foreign Arbitral award – provision of the Reciprocal Enforcement of Judgment Ordinance, Cap. 175, Laws of the Federation of Nigeria, 1958 & the Foreign Judgments (Reciprocal Enforcement) Act 1990 will apply in the enforcement of a foreign arbitral award where same has been elevated to the status of a judgment by leave of the High court been sought and obtained***

It is pertinent at this stage to note the interpretation of the word "judgment" provided under S. 2(I) of the Foreign Judgments (Reciprocal Enforcement) Act, 1990. Section 2(1) provides:

> "In this Act, unless the context otherwise requires "judgment" means a judgment or order given or made by a court in any civil proceedings and shall include an award in proceedings on an arbitration if the award has in pursuance of the law in force in the place where it was made become enforceable in the same manner as a judgment given by a court in that place, or a judgment or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party."

As rightly submitted by respondent's counsel by the above interpretation, an award can only be elevated to the status of a judgment if the respondent had applied before the English High Court for leave to enforce the arbitral award in the same manner as a judgment and once the High Court in England grants such an order it then becomes a judgment of the English High Court. It is only then that the Reciprocal Enforcement of Judgment Ordinance, Cap. 175, Laws of the Federation of Nigeria, 1958 and Foreign Judgments (Reciprocal Enforcement) Act. 1990 will apply .. As far as the appellant is concerned the award was statute barred since same was not filed within 12 months in accordance with the applicable laws. The contention of appellant's counsel was that section 10 (a) of the Foreign Judgments (Reciprocal Enforcement) Act of 1961 which limits the period of registration of a foreign judgment or award to 12 months is applicable to the award under consideration. The said provision applied by virtue of

S. 2(1) of the said Act which states that "judgment"

> " ... shall include an award in proceedings on an arbitration if the award has in pursuance of the law, in force in the place where it was made become enforceable in the same manner as a judgment given by a court in that place."

My own understanding of the above provision is that for an award to fall within the purview of S. 2(1) reproduced (supra) same must be elevated to a status of a judgment of High Court. In other words respondent must seek leave of High Court of England to enforce the award in the same manner as a judgment. See Section 66 of the English Arbitration Act 1996 (referred to in White Book, 2002 (vol. 2) page 277 cited by respondent in its brief of argument. For clarity section 66(1) provides thus:

> "An award made by the Tribunal pursuant to an Arbitration agreement may by leave of the court be enforced in the same manner as a judgment or order of the court to the same effect"

A similar provision under our law is section 31(3) of the Arbitration and Conciliation Act, Cap. 19, Laws of the Federation 1990. See also the case of *Shell Trustees (Nig.) Ltd. v. Imani* & *Sons Ltd.* (2000) 6 NWLR (Pt. 662) 639 at 662 paragraphs A - B cited (supra) by respondent's counsel.

There is no evidence to show that respondent did obtained such leave. It is obvious that the condition precedent was not satisfied. I agree with the submission of respondent's counsel that the award did not qualify as judgment stipulated under S. 2 as such the Foreign Judgment (Reciprocal Enforcement) Act, 1961, Cap. 152, Laws of the Federation of Nigeria, 1990 is not applicable to the award under consideration.
(P. 388 lines 2 - 28; P. 394 lines 33 - 35; P. 395 lines 1 - 23

Per Ogunbiyi, JCA

It is pertinent to mention that the provision of section 66(I) of the English Arbitration Act, 1996 is an equivalent of section 31 (3) of the Arbitration and Conciliation Act, Cap. 19, Laws of the Federation 1990. The provision have been reproduced in the lead judgment and which should not again be replicated for the sake of avoiding monotony and suffice to say however that the enforcement of an award of this nature is subordinate to the leave of court by reason of its subjectivity. The pre-supposition and anticipation therefore is that the leave must first have been sought and obtained before the condition precedent could be satisfied. The absence of such, had therefore rendered the award fallen short of the standard of a judgment.

In other words, the award in terms of interpreting the intention of section 2(1) of the Act (supra):

> "..... has (not) in pursuance of the law in force in the place where it was made become enforceable in the same manner as a judgment given by a court in that place".

It is the fulfillment of the condition precedent that would give the force of law before it could attain the judgment status position.

With the arbitration award having been made within a period less than six years of the applicable limitation law, it cannot therefore be correct to label the respondent's suit as statute barred. This was, as rightly arrived at and held by the learned trial judge.
(P. 399 lines 26 - 45; P. 400 lines 1 - 3)

[2] ***Arbitration – Foreign Arbitral award – would become binding on parties concerned irrespective of the country in which it was made and as such the court before whom an application is brought for enforcement is duty bound to enforce same***

..As earlier stated the present case being an application for the recognition and enforcement of a foreign arbitral award was brought pursuant to S. 51 (1) of the Arbitration and Conciliation Act. Cap, 19. Laws of the Federation of Nigeria. 1990 which is the applicable law. Section 51 (1) provides:

> "51(I) An arbitral award shall irrespective of the country in which it was made be recognized as binding and subject to this section and section 32 of this Act, shall upon application in writing to the court, be enforced by the court."

The law is settled that where parties agree to refer their dispute to arbitration and an award is made, it is binding on the parties. See: *Onwu v. Nka* (1996) 7 NWLR (Pt. 458) I at pg. 17 paragraphs D-E where the Supreme Court per Iguh, J.S.C. had this to say:

> "The law is well settled that where disputes or matters in difference between two or more parties are by consent of the disputants submitted to a domestic forum, inclusive of arbitrators or a body of persons who may be invested with judicial authority to hear and determine such disputes and matters for investigation in accordance with customary law and general usages, and a decision is duly given, it is as conclusive and unimpeachable (unless and until set aside on any of the recognized grounds) as

> the decision of any constituted court of the land, Such a decision is consequently binding on the parties and the courts in appropriate cases will enforce it."

In *Commerce Assurance Ltd. v. Alli* (1992) 3 NWLR (Pt. 232) 710 at 725 paragraph E, the Supreme Court per Nnaemeka-Agu, J.S.C. said:

> "The underlying principle is that parties to a dispute have a choice. They may resort to the normal machinery for administration of justice by going to the regular courts of the land and have their disputes determined, both as to the fact and to the law, by the courts. Or, they may choose the arbitrator to be Judge between them. If they take the latter course, they cannot, when the award is good on the face of it, object to the award on grounds of law or of facts."

.The learned trial Judge was therefore right when he held at page 81 of the record as follows:

> "The relief being sought on behalf of the plaintiff/ applicant is for this court to recognize and enforce the Arbitral Award made in its favour.
>
> Before the coming into force of the Arbitration and Conciliation Act of 1988, the relevant law which provides methods for registration of foreign awards was Foreign Judgments (Reciprocal Enforcement) Act, Cap. 152 of the Laws of the Federation of Nigeria, 1990 and the New York Convention. But under the Arbitration and Conciliation Act, there is no need for registration, as section 51 of the Act provides that, an award shall be recognized as binding and shall be enforced by the court on application by either party to the Arbitration..... I am to state that since the Arbitration and Conciliation Act of 1988 has provided that an award shall be recognized as binding and shall be enforced by the court, on the application of either party to the arbitration, what is left for the court is to enforce the arbitration award."

(P. 388 lines 3 - 45; p. 389 lines 1 - 21; P. 395 lines 28 - 45)

[3] ***Arbitration – Foreign arbitral award - enforceable in Nigeria directly pursuant to the New York Convention to which Nigeria is signatory***

There is no doubt that a foreign arbitration award itself is now enforceable in Nigeria directly pursuant to the New York Convention to which Nigeria is signatory. See the preamble of the Arbitration and Conciliation Act, Cap. 19, LFN, 1990 and sections 31 and 51 of the Arbitration Act,Cap.

19, LFN, 1990. **(P. 395 lines 23 - 27)**

[4] ***Arbitration – Arbitral award – the words 'recognition' & 'registration' are not synonyms for the purpose of enforcement of an arbitral award by court***

In resolving issue 2, I find it necessary, to determine whether the word "registration" and "recognition" are synonyms. The word "registration" as defined by Webster Universal Dictionary at pages 400and 453 means "act of registering, the condition of having registered". The word registered means an official list a written record . the book containing such a record or list: to record: to enter in: or sign a register. Black's Law Dictionary Seventh Edition page 1288 defined registration as "the act of recording or enrolling."

On the other hand "recognition" is defined as the act of recognizing: identification: acknowledgment and admission. To recognize something means "to acknowledge formally: to accept, admit". See pages 397 and 651 of Webster's Universal Dictionary Black's Law Dictionary, 7th edition also defined recognition as:

> "confirmation that an act done by another person was authorized". The formal admission that a person, entity or thing has it particular status "

From the definition set out above, it is obvious that the word "registration" and "recognition" are not synonyms. Furthermore, it s worthy of note that the provisions of sections 31 and 51 of the Arbitration and Conciliation Act. Cap. A 18. LFN, 2004 under which the respondent's summons was brought refer to recognition and enforcement of arbitral awards which was what respondent prayed for. The provision did not mention the word registration". For clarity and emphasis sections 31 and 51 are reproduced hereunder:

·'31 (1) An arbitral award shall be recognized as binding and subject to this section and section 32 of this Act, shall upon application in writing to the court, be enforced by the court."

'51 (1) An arbitral award shall irrespective of the country in which it is made be recognized as binding and subject to this section and section 32 of this Act , shall, upon application in writing to the court be enforced by the court."

The provisions of section 31 and 51 of the Arbitration and Conciliation Act are clear and unambiguous. I agree with the submission of

respondent":' counsel that it was wrong for the appellants counsel to import the word "registration" which is not synonym with the word 'recognition' referred to under the two section relied upon.
(P. 391 lines 38 - 44; P. 392 lines 1 - 30)

[5] ***Arbitration – Section 8 Limitation Law of Lagos State – an arbitral award would be enforceable within six years from the date on which the cause of action arose, however, the arbitration agreement in respect of which the arbitral award was made must not be under seal or must not have been made in pursuance of any enactment***

The applicable law to the instant case is the Limitation Law. Cap. 67. Laws of Lagos State. Section 8(1)(d) provides that an action shall not be brought after the expiration of six (6) years from the date on which the cause of action accrued in actions to enforce an arbitral award where the arbitration agreement is not under seal or where the arbitration is under any enactment other than the Arbitration and Conciliation Act. .As found by the learned trial Judge the arbitration agreement was not made under seal and same was not also made pursuant to any other enactment. It was made under the charter party between both parties of this suit which provides under clause 48 that disputes arising from the charter party was to be referred to Arbitration. Since the applicable law is the Limitation Law the time within which the instant suit can be instituted is six (6) years from the time the cause of action arose. As observed earlier the arbitral award was made on 3 /6/98 and this suit was instituted on 2/ 12/03 i.e. a period of 4 years 8 months from the time the cause of action arose the respondents suit is therefore not statute barred.
(P. 396 lines 11 - 14; P. 396 lines 28 - 36)

[6] ***Commercial Litigation – Issues raised suo motu – parties must be given an opportunity to address the court thereon before it reaches any decision on the issue so raised***

A court of law is entitled to raise any issue of law in relation to any matter before it, however, the parties must be given an opportunity to address the court on the issue before it reaches any decision on the issue so raised, See: *Jatau v. Ahmed* (2003) 4 NWLR (PI, 81 I) 498 at 508-509. Paragraphs H - D and *Ibrahim v. JSC* (1998) 14 NWLR (PI, 584) I at 46 paragraphs G - H, In *Ibrahim* v. *JSC* (supra) Wali, JSC had this to say:

> "On no account should a court raise a point *suo motu* as it did in the present case, no matter how clear it may appear to be and proceed to resolve it one way or the other without hearing the parties." If it does not, it will be in breach of the fundamental right

of the parties to fair hearing."
(P. 390 lines 2 - 14)

[7] ***Commercial Litigation – Court - duty bound to take judicial notice of all laws, enactments and subsidiary legislation having the force of law***

It is also worthy of note that the lower court was entitled to take judicial notice of the Limitation Law of Lagos State as the applicable law. It is settled law that a court of law is duty bound to take judicial notice of all laws, enactments and any subsidiary legislation made thereunder having the force of law in Nigeria, See S. 74(d), (i) Evidence Act and case of *Eagle Super Pack (Nig) Ltd. v. A.CB. Plc* (2006) 19 NWLR (Pt. (013) 20 at 47. **(P. 391 lines 2 - 7)**

[8] ***Statutes – Limitation law of Lagos State – not restricted to actions commenced in Lagos State High Court only but applies to any action filed in any court operating within territorial area of Lagos State without an regard as to who the parties in the action are***

..As rightly contended by respondent's counsel the omission of the limitation law in the Laws of the Federation is of no moment as it has not been specifically repealed and so it is still an extant law, See *Ibidapo v. Lufthansa Airlines* (1997) 4 NWLR (Pt, 498) 124, The Supreme Court per Iguh, J.S.C. at page 163, paras, E-F had this to say:

> "It is a cardinal principle of the law that statutes are not repealed by inference or implication but by direct provision of the law,"

I do not subscribe to the argument of appellant's counsel that the limitation law is restricted to actions commenced in Lagos State High Court only. The Limitation Law of Lagos State which is the law of the forum where recognition and enforcement was sought is the applicable law, See: *Etim* v. *I.G.P* (2001) 11 NWLR (Pt. 724) 266 at 283-284 ..The Limitation Law of Lagos State was made to provide for limitation of action in Lagos State including Federal High Court without regard as to who the parties in the action are. This was the decision of this court in *Etim v. Inspector General of Police* (2001) 11 NWLR (Pt. 724) 266 at 283-284. Mohammed. J .C.A. stated at page 283 of the report thus:

> " ... the Limitation Edict Cap. 89 of the Laws of Kaduna State. 1991 was made to provide for limitation of action in Kaduna State. It therefore applied to any action filed in any court in Kaduna State including of course the Federal High Court sitting in Kaduna where the appellants chose to file their action against the

respondents. The law applies to any action filed in any court operating within territorial area of Kaduna State without an) regard as to who the parties in the action are."

(P. 389 lines 30 - 44; P. 396 lines 20 - 26)

MSHELIA, JCA (Delivering the lead judgment): This is an appeal against the judgment of Olomojobi J. of the Federal High Court Lagos Division delivered on the 23rd day of November, 2006.

The brief facts of the case are as follows: The respondent by originating summons dated 20/11/2003 sought leave of the court to recognize and enforce the Arbitral Award of the sum of US $103,982.39 made by Bruce David I. Mackenzie in the United Kingdom on 03/06/98. The defendant/appellant reacted to the said originating summons by filing a notice of preliminary objection dated 20/2/2004. The defendant/appellant's objection is that the plaintiff/respondent's action to recognize and enforce the award is statute barred as same was not brought within the limitation period.

The defendant/appellant also filed a six-paragraph counter- affidavit in opposition to the originating summons. On 24/6/2004 the trial court ordered that all pending applications would be taken together on 1/3/06, with the consent of counsel the trial court ordered parties to file written address. In a considered judgment the trial Judge had this to say at page 86 of the record:

"In conclusion therefore I hold as follows:

1. That this action is not statute barred.

2. The outstanding sum due to the plaintiff from the defendant from the arbitral award is USD18.671 .84 as at 30/6/99 with interest rate at 8% compounded at quarterly rate from that date i.e. 30/6/99 until it is exquished (sic).

3. The enforcement fee of £7, 500 is refused

This is the judgment of this court"

Being dissatisfied with the said judgment, the appellant on 6/12/06 filed a notice of appeal containing four (4) grounds of appeal. See pages 87-89 of the record of appeal. The appellant's grounds of appeal (without particulars) read as follows.

"i. The learned trial Judge erred in law by holding that the Limitation Law of Lagos State is the applicable law.

ii. The learned trial Judge erred in law by holding that the plaintiff's suit which was to recognize and enforce a foreign judgment/arbitral award was not time barred.

iii. The learned trial Judge erred in law, by ordering the judgment debt on compound interest.

iv. The learned trial Judge erred in law by holding that the plaintiffs action was not registration of the award but one of recognition and enforcement of award."

In line with the practice of this court, appellant's brief of argument settled by Professor Taiwo Osipitan, SAN was filed on 13/2/08.

While respondent's brief was settled by Ayo Olorunfemi. Esq. and filed on 12/11/09 but same deemed properly filed and served on 21/1/l 0. When the appeal came up for hearing appellant's counsel Mr. Akinwale adopted and relied on appellant's brief of argument and urged the court to allow the appeal. While respondent's counsel also adopted and relied on the respondent's brief of argument and urged the court to dismiss the appeal as devoid of merit.

Appellant formulated four issues for the determination of this court as follows:

"(1) Did the learned trial Judge in the circumstance correctly or wrongly apply the Limitation Law of Lagos State to the arbitration award sought to be registered/ recognized?

(2) Whether the learned trial Judge rightly or wrongly held that the proceedings before her were not in respect of registration of the award.

(3) Whether or not the plaintiff's claim before the lower court was statute barred.

(4) Did the learned trial Judge rightly or wrongly allow post judgment interest to be assessed on the basis of compound interest?

Respondent on the other hand adopted *mutatis, mutandis* the four issues formulated by the appellant.

Issue I was formulated from ground I. The issue deals with the holding by the learned trial Judge that the applicable law of the case before him was the Limitation Law of Lagos State. Appellant's counsel argued that it is common ground that the Arbitral Award, the subject matter of the suit at the lower court was made in the United Kingdom on 03/06/98 and the plaintiff/respondent's suit was instituted on

21/2/2003 in order to recognize/ register /enforce the said award. Learned senior counsel contended that the plaintiff/ respondent's suit seeking the recognition and enforcement of the award was statute barred same having not been filed within 12 months of the award. Learned senior counsel argued that an Arbitration Award in the United Kingdom has an equal standing as the judgment of the court, consequently an application to register /recognize the award in Nigeria must be filed within 12 months in accordance with the applicable laws. The applicable laws are: section 3(I) of the Reciprocal Enforcement of Judgment Act, 1922 and section I(a) Foreign Judgments (Reciprocal Enforcement)Act 1961). See also section 2(I) of the Foreign Judgments (Reciprocal Enforcement) Act, 1990 which provides that judgment shall include an Award in proceedings on arbitration. Learned senior counsel submitted that section 7(1)(d) of the Limitation Act of 1966 is a non-existing law because it is not included in the 1990 and 2004 Laws of the Federation of Nigeria. That the application was limited to the Federal Capital Territory of Lagos State (now Federal Capital Territory Abuja) as opposed to being applied in Lagos State; Lagos having ceased to be the Federal Capital Territory) of Nigeria. Learned senior counsel submits that the above submissions of counsel was ignored by the learned trial Judge and without inviting counsel to address the court held as follows:

> "The applicable limitation law in the instant case is the Limitation Law. Cap. 67. Laws of Lagos State which provides under section 8(I)(d) that an action shall not be brought after the expiration of six years from the date on which cause of action accrued in actions to enforce an arbitral award where the arbitration is under any enactment other than the Arbitration and Conciliation Act. The Limitation Law of Lagos State was made to provide for limitation of actions in Lagos. The law applies to any action filed in any court in Lagos State and to any action filed in any court operating within Lagos State including the Federal High Court without regard to who the parties are .."

It was contended that the learned trial Judge wrongly applied the Limitation Law of Lagos State to the case before him when the parties did not address the court on its applicability and in so doing, violated the appellant's right to fair hearing. See: *Oje* v. *Babalola* (1991) 4 NWLR (Pt. 185) 267 at 280 paragraphs D-F and *Amasike v. Registrar-General,* C *A.C.* (2006) 3 NWLR (Pt. 968) 462.

Learned senior counsel conceded that a court of law is entitled to raise any issue of law in relation to any matter before it, however, the parties must be given an opportunity to address the court on the issue before it reaches a decision on the issue so raised. See: *Jatau* v. *Ahmed* (2003) 4 NWLR (Pt. 811) 498 at 508 - 509 paragraphs A - C and *Ibrahim v. J.S.C, Kaduna State* (1998) 14 NWLR (Pt. 584) I at 46 paragraphs F - H per Wali, JSC. That the failure of the learned trial Judge to invite counsel to address on the issue *suo motu* raised has occasioned a miscarriage of justice. Learned senior counsel urged the court to resolve the

issue under consideration in favour of the appellant.

In reply, respondent's counsel argued that respondent's case at the lower court was simply for "leave to recognize and enforce a foreign arbitral award" and cannot under any stretch of imagination be construed an application to "register a foreign judgment" so, that the provision of the Reciprocal Enforcement of Judgments Ordinance, Cap. 175. Laws of Federation of Nigeria, 1958 is clearly inapplicable to this case. The cases/authorities cited by the appellant in the court below are clearly inapplicable and inapposite to the present case in that those laws and cases deal with registration and enforcement of foreign judgments. That the Reciprocal Enforcement of Judgments Ordinance, 1922, Cap. 175. Laws of the Federation of Nigeria and Lagos. 1958: Foreign Judgments (Reciprocal Enforcement) Act. 1961. Cap. 152. Laws of the Federation of Nigeria and Lagos. 1990: *Macaulay* v. *R.Z.B. of Austria* (2003) 18 NWLR (Pt 852) 282 and *Dale Power System Plc. v. Witt* & *Busch Ltd.* (200I) 8 NWLR (Pt. 716) 699 at 709 are distinguishable and therefore inapplicable because they deal with foreign judgments of the High Courts sought to be registered and enforced in Nigeria. That the present case being an application for the recognition and enforcement of a foreign arbitral award can only be properly brought under the Arbitration and Conciliation Act, Cap. 19, Laws of the Federation of Nigeria, 1990 which is the applicable law.

Respondent's counsel further argued that though appellant's counsel contended that "judgment" shall include an award in proceedings on an arbitration, counsel curiously failed to mention the proviso or condition that must be fulfilled before an award can be enforceable as a judgment, which is, if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court of that place. See section 2 of Cap. 175, Laws of the Federation of Nigeria, 1958 and S. 2(1) of Cap. 152, Laws of the Federation of Nigeria, 1990. It was also the respondent's case that for an arbitral award to come under Cap. 175 (supra) and Cap. 152 (supra) it must be shown that such an award has "become ... as a judgment given by a court "and that this would have been the case if the applicant had applied before the English High Court for leave to enforce the arbitral award in the same manner as a judgment and once the High Court in England grants such an order it then becomes a judgment of the English High Court to which Cap. 175 (supra) and Cap. 152 (supra) will be applicable.

Indeed, there is a similar provision under section 31(3) of Arbitration and Conciliation Act (supra) by virtue of which a Nigerian arbitration award can be elevated to the status of a judgment of the High Court. Learned counsel submitted that the Limitation Act, 1966 is still extant and therefore applicable today having not been expressly repealed because an Act cannot be repealed by implication. See: *Raleigh Ind, (Nig.) Ltd.* v. *Nwaiwu* (1994) 4 NWLR (Pt. 341) 760 at 771 and section 51 (1) of the Arbitration and Conciliation Act. See also the preamble to the said Act. Respondent's counsel also contended that the law is settled that where parties

agree to refer their dispute to arbitration and an award is made, it is binding on the parties. See: *Onuwu v. Nka* (1996) 7 NWLR (PI. 458) I at 17 paragraph E and *Commerce Assurance Ltd.* v. *Alli* (1992) 3 NWLR (Pt. 232) 710 at 725 paragraph E.

Learned counsel further argued that both parties were granted ample opportunity to address the court on the issue whether or not the respondent's action was statute barred. Both parties' counsel were again invited to elucidate on which statute of limitation applied to the case which they did. He said the mere fact that the learned trial Judge applied the provision of S. 8(I)(d) of the Limitation Law of Lagos State instead of S. 7(I)(d) of the Limitation Act, 1966 or statute of limitation, 1623 (a statute of general application) both cited by the respondent or even the Reciprocal Enforcement of Judgment Ordinance, 1922 cited by the appellant on the issue of statute bar raised by the appellant does not amount to raising a fresh point or issue *suo motu,* neither is it a violation of the appellant's right to fair hearing.

Learned counsel submits that a court of law including the lower court is not precluded from relying on a particular law simply because neither party relied on or cited it. It is settled law that a court of law is duty bound to take judicial notice of all laws (including the Limitation Law of Lagos State), enactments and any subsidiary legislation made thereunder having the force of law in Nigeria. See: section 74(1) (a) and (i) Evidence Act and *Eagle Super Pack (Nig.) Ltd. v. A.C.B. Plc* (2006) 19 NWLR (Pt.l013) 20 at 47. He said the provision of the statute of limitation which also stipulates six (6) years as the limitation period for the enforcement of an arbitral award as in this case has been applied in Nigeria in several cases. See: *Thadant* & *Anor. v. NB.N. Ltd.* & *Anor.* (1972) 1 S.C. 105; (1972) NCLR 418; *Fadare* v. *A.-G., Oyo* State (1982) All NLR (Pt. 1) 24; section 32(1) Interpretation Act, Cap. 125. Laws of the Federation, 2004 and *Onagoruwa* v. *I.G.P* (1991) 5 NWLR (Pt. 193) 593. On the authority of *Etim v.I.G.P* (2001) 11 NWLR (Pt. 724) 266 at 283-284, the Limitation Law, Cap. 67, Laws of Lagos State which is the law of the forum where recognition and enforcement was sought is the applicable law. Section 8(1)(d) of the said law stipulate a period of six (6) years to commence an action to enforce an arbitral award. He urged the court to resolve issue I in favour of the respondent.

The respondent's application at the lower court giving rise to the present appeal was brought pursuant to sections 31 and 51 of the Arbitration and Conciliation Act. Cap. 19, Laws of the Federation of Nigeria, 1990 and under the inherent jurisdiction of the court. The said application prayed for:

> " Leave to recognize and enforce the arbitral award ."

In resolving the preliminary objection raised by the appellant that the suit was statute barred the learned trial Judge applied the Limitation Law of Lagos State. It

was contended by appellant's counsel that an Arbitration Award in the United Kingdom has an equal standing as the judgment of the court as such an application to register/recognize the award in Nigeria must be filed within 12 months in accordance with section 3 (1) of the Reciprocal Enforcement of Judgment Act, 1922 and section 10(a) Foreign judgments (Reciprocal Enforcement) Act, 1961. The contention of appellant's counsel is that by S. 2(1) of the Foreign Judgments (Reciprocal Enforcement) Act, 1990 'judgment' includes an award in proceedings on arbitration. It is pertinent at this stage to note the interpretation of the word "judgment" provided under S. 2(I) of the Foreign Judgments (Reciprocal Enforcement) Act, 1990. Section 2(1) provides:

> "In this Act, unless the context otherwise requires "judgment" means a judgment or order given or made by a court in any civil proceedings and shall include an award in proceedings on an arbitration if the award has in pursuance of the law in force in the place where it was made become enforceable in the same manner as a judgment given by a court in that place, or a judgment or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party."

As rightly submitted by respondent's counsel by the above interpretation, an award can only be elevated to the status of a judgment if the respondent had applied before the English High Court for leave to enforce the arbitral award in the same manner as a judgment and once the High Court in England grants such an order it then becomes a judgment of the English High Court. It is only then that the Reciprocal Enforcement of Judgment Ordinance, Cap. 175, Laws of the Federation of Nigeria, 1958 and Foreign Judgments (Reciprocal Enforcement) Act. 1990 will apply. The case of *Macaulay* v. *R.Z.B. of Austria* (supra) and *Dale Power System Plc. v. Witt* & *Busch Ltd.* (supra) are clearly distinguishable and therefore inapplicable because they deal with foreign judgments of the High Court sought to be registered and enforced in Nigeria. As earlier stated the present case being an application for the recognition and enforcement of a foreign arbitral award was brought pursuant to S. 51 (1) of the Arbitration and Conciliation Act. Cap, 19. Laws of the Federation of Nigeria. 1990 which is the applicable law. Section 51 (1) provides:

> "51(I) An arbitral award shall irrespective of the country in which it was made be recognized as binding and subject to this section and section 32 of this Act, shall upon application in writing to the court, be enforced by the court."

The law is settled that where parties agree to refer their dispute to arbitration and an award is made, it is binding on the parties. See: *Onwu v. Nka* (1996) 7 NWLR (Pt. 458) I at pg. 17 paragraphs D-E where the Supreme Court per Iguh, J.S.C. had this to say:

> "The law is well settled that where disputes or matters in difference between two or more parties are by consent of the disputants submitted to a domestic forum, inclusive of arbitrators or a body of persons who may be invested with judicial authority to hear and determine such disputes and matters for investigation in accordance with customary law and general usages, and a decision is duly given, it is as conclusive and unimpeachable (unless and until set aside on any of the recognized grounds) as the decision of any constituted court of the land, Such a decision is consequently binding on the parties and the courts in appropriate cases will enforce it."

In *Commerce Assurance Ltd. v. Alli* (1992) 3 NWLR (Pt. 232) 710 at 725 paragraph E, the Supreme Court per Nnaemeka-Agu, J.S.C. said:

> "The underlying principle is that parties to a dispute have a choice. They may resort to the normal machinery for administration of justice by going to the regular courts of the land and have their disputes determined, both as to the fact and to the law, by the courts. Or, they may choose the arbitrator to be Judge between them. If they take the latter course, they cannot, when the award is good on the face of it, object to the award on grounds of law or of facts."

As earlier stated the Reciprocal Enforcement of Judgment Ordinance. Cap, 175. Laws of the Federation of Nigeria and Lagos, 1958 and the Foreign Judgments (Reciprocal Enforcement) Act Cap, 152. Laws of the Federation of Nigeria and Lagos 1990 are not applicable to the case at hand. Having regard to the circumstances of this case I am of the firm view that the learned trial Judge rightly invoked the provisions of section 8(1)(d) of the Limitation Law. Cap, 67, Laws of Lagos State to resolve the issues as to whether the action to enforce arbitral award was statute barred or not. As rightly contended by respondent's counsel the omission of the limitation law in the Laws of the Federation is of no moment as it has not been specifically repealed and so it is still an extant law, See *Ibidapo v. Lufthansa Airlines* (1997) 4 NWLR (Pt, 498) 124, The Supreme Court per Iguh, J.S.C. at page 163, paras, E-F had this to say:

> "It is a cardinal principle of the law that statutes are not repealed by inference or implication but by direct provision of the law,"

I do not subscribe to the argument of appellant's counsel that the limitation law is restricted to actions commenced in Lagos State High Court only. The Limitation Law of Lagos State which is the law of the forum where recognition and enforcement was sought is the applicable law, See: *Etim* v. *I.G.P* (2001) 11 NWLR (Pt. 724) 266 at 283-284.

The next point to resolve is whether the learned trial Judge *suo motu* raised the

question of applicability of the Limitation Law of Lagos State and proceeded to decide the question without listening to address of the parties on it. A court of law is entitled to raise any issue of law in relation to any matter before it, however, the parties must be given an opportunity to address the court on the issue before it reaches any decision on the issue so raised, See: *Jatau v. Ahmed* (2003) 4 NWLR (PI, 81 I) 498 at 508-509. Paragraphs H - D and *Ibrahim v. JSC* (1998) 14 NWLR (PI, 584) I at 46 paragraphs G - H, In *Ibrahim* v. *JSC* (supra) Wali, JSC had this to say:

> "On no account should a court raise a point *suo motu* as it did in the present case, no matter how clear it may appear to be and proceed to resolve it one way or the other without hearing the parties." If it does not, it will be in breach of the fundamental right of the parties to fair hearing."

In order to resolve the point raised it would be necessary to refer to the record of appeal particularly pages 62 -69. At pages 62 - 63 of the record, the learned trial Judge invited both counsel to address the court on a number of points raised by the court. For clarity and ease of reference I will reproduce the proceedings of 26/7/06 he reunder as follows:

> *"Court:* Ruling is yet to be concluded because I will want both learned counsel to throw more light on the provision of section 51 (I) of the Arbitration & Conciliation Act of 1990 as against provision of the Foreign Judgment (Reciprocal Enforcement) Act of 1961. I will want both learned counsel to come and throw more light on the provision of section 71(1)(d) of the Limitation Act of 1966 as regards enforcement of arbitration award and also on the argument of the learned counsel for the plaintiff/applicant is (sic) counsel to the effect that what his client is seeking is recognition and enforcement of arbitration award and not registration of the award."

Pursuant to the request made by the learned trial Judge on 9/10/06 both counsel addressed the court on the points raised *suo motu* by the Court. Appellant's counsel in his address contended that S. 7(1)(d) of the Limitation Law is not an existing law because it is not in the 1990 and 2004 Laws of the Federation. Or that its application was restricted to the Federal Capital Territory of Lagos as opposed of being applied to Lagos. The submission is at pages 64 - 65 of the record. Respondent's counsel also addressed the court at pages 66 - 68 of the record. Respondent's counsel submitted that the omission of the Limitation Law in the Laws of Federation is of no moment as it has not been specifically repealed. Having regard to the proceedings of the trial court reproduced supra, the contention of appellant's counsel that they were not given ample opportunity to address the court on issue of applicability of the Limitation Law of Lagos State cannot be sustained. The cases of *Oje v. Babalola* (supra) and *Amasike v. Registrar-General,* C. *A.C.* (supra) cited in support of the submission are inapplicable to the case at

hand. It cannot therefore be said that appellant's right to fair hearing was violated. It is also worthy of note that the lower court was entitled to take judicial notice of the Limitation Law of Lagos State as the applicable law. It is settled law that a court of law is duty bound to take judicial notice of all laws, enactments and any subsidiary legislation made thereunder having the force of law in Nigeria, See S. 74(d), (i) Evidence Act and case of *Eagle Super Pack (Nig) Ltd. v. A.CB. Plc* (2006) 19 NWLR (Pt. (013) 20 at 47.

For the reasons set out above I resolve this issue (No. 1) against the appellant. Ground I is dismissed.

Issue 2 was distilled from ground 4. The question to be resolved is whether the learned trial Judge rightly or wrongly held that the proceedings before her were not in respect of registration of the award. The learned senior counsel submitted that this issue relates to the finding by the learned trial Judge that the relief sought on behalf of the respondent for leave of the court to recognize and enforce the arbitral award made in its favour not for registration of the award. Contrary to the aforesaid finding by the learned trial Judge the appellant submits that there is no practical distinction between registration and recognition of judgment/award. Registration is an outward manifestation of recognition of the said judgment/award.

Learned senior counsel urged the court to resolve the issue in favour of the appellant.

Respondent's counsel contended that the learned trial Judge rightly held that the appellant's action was not for registration of the award but one for recognition and enforcement of the award. Learned counsel submitted that there is a clear and practical distinction between "registration" and "recognition" of a judgment award. Learned counsel set out the definition of registration and recognition as provided in Webster's Universal Dictionary and Thesaurus pages 400 and 653 published by Geddes & Grosset (2007 Edition) and pages 397 and 651 respectively. Learned counsel submitted that the provision of sections 31 and 51 of the Arbitration and Conciliation Act under which the respondents summons was brought is very clear and unambiguous. The said sections refer to "recognition" and enforcement" of arbitral awards which was what the respondent prayed for. There is no mention of the word registration as such the appellant would be wrong to import same to this matter. He urged the court to resolve issue 2 in favour of respondent.

In resolving issue 2, I find it necessary, to determine whether the word "registration" and "recognition" are synonyms. The word "registration" as defined by Webster Universal Dictionary at pages 400and 453 means "act of registering, the condition of having registered". The word registered means an official list a written record . the book containing such a record or list: to record: to enter in: or sign a register. Black's Law Dictionary Seventh Edition page 1288 defined registration as "the act of recording or enrolling."

On the other hand "recognition" is defined as the act of recognizing: identification: acknowledgment and admission. To recognize something means "to acknowledge formally: to accept, admit". See pages 397 and 651 of Webster's Universal Dictionary Black's Law Dictionary, 7th edition also defined recognition as:

> "confirmation that an act done by another person was authorized". The formal admission that a person, entity or thing has it particular status "

From the definition set out above, it is obvious that the word "registration" and "recognition" are not synonyms. Furthermore, it s worthy of note that the provisions of sections 31 and 51 of the Arbitration and Conciliation Act. Cap. A 18. LFN, 2004 under which the respondent's summons was brought refer to recognition and enforcement of arbitral awards which was what respondent prayed for. The provision did not mention the word registration". For clarity and emphasis sections 31 and 51 are reproduced hereunder:

> ·'31 (1) An arbitral award shall be recognized as binding and subject to this section and section 32 of this Act, shall upon application in writing to the court, be enforced by the court."
>
> '51 (1) An arbitral award shall irrespective of the country in which it is made be recognized as binding and subject to this section and section 32 of this Act , shall, upon application in writing to the court be enforced by the court."

The provisions of section 31 and 51 of the Arbitration and Conciliation Act are clear and unambiguous. I agree with the submission of respondent":' counsel that it was wrong for the appellants counsel to import the word "registration" which is not synonym with the word 'recognition' referred to under the two section relied upon. I am therefore of the firm view that appellants counsel has failed to substantiate his argument in support of issue 2. I will in the circumstance revolve issue 2 against the appellant. Ground iv is accordingly dismissed.

Issue No. 3 is whether or not the plaintiff's claim before the lower court was statute barred. The contention of the learned senior counsel was that the respondent's suit seeking the recognition and enforcement of the award was statute barred same having not been filed within 12 months in accordance with the applicable laws namely:

1. Section 3(I) of the Reciprocal Enforcement of Judgments Ordinance, 1922, Cap. 175. Laws of the Federation of Nigeria. 1958.

2. Section 10(a) of the Foreign Judgments (Reciprocal Enforcement) Act, 1961. Cap. 152. Laws of the Federation of Nigeria, 1990.

Learned senior counsel further submitted that contrary to the decision of the learned trial Judge that section 10(a) of the Foreign Judgments (Reciprocal Enforcement) Act of 1961 was not applicable to the award under consideration, the said provision applies to Foreign Arbitration Awards by virtue of section 2(1) of the said Act. Section 2(1) states that "judgment"

> " .... shall include an award in proceedings on an arbitration if the award has in pursuance of the law in force in the place where it was made become enforceable in the same manner as a judgment given by a court in that place."

It was argued that the arbitration award in question was made in the United Kingdom where an arbitration award has an equal standing as the judgment of the court in the United Kingdom. Appellant's counsel submits that an application to register/recognize the award in Nigeria must be filed within 12 months of the award as required by the applicable statutes. See: Section 3(1) Reciprocal Enforcement of Judgment Ordinance, 1922; Section 10(a) Foreign Judgments (Reciprocal Enforcement) Act. 1961, Cap. 152. Laws of the Federation of Nigeria, 1990 and the cases of *Macaulay v. R.Z.B. Austria* (2003) 18 NWLR (Pt. 852) 282 and *Dale Power System Plc. v.* Witt & *Busch Ltd.* (2001) 8 NWLR (Pt. 716) 699 at 709.

Furthermore appellant's counsel contended that where a party fails to institute an action within the limitation period provided by statute, the court would be deprived of jurisdiction. No legal proceedings can be validly instituted after the expiration of the prescribed period and such a party will be deprived of the right to enforce the cause of action by judicial process. Appellant placed reliance on the cases of *W.A.P.C. Plc.* v. *Adeyeri* (2003) 12 NWLR (Pt. 835) 517 at 632 paragraph E. 533 paragraph A – B and 535 paragraph G – H and *Ogbotu* v. *S.P.D.C. (Nig) Ltd.* (2005) 17 NWLR (Pt. 955) 596, 620 paragraph D – F, 624 paragraph E. He urged the court to resolve this issue in favour of the appellant.

In reply respondent's counsel submitted that since the suit commenced at the lower court was an action for leave to recognize and enforce an arbitral award and same was commenced within six (6) years of the accrual of the cause of action the said suit is not statute-barred. Learned counsel adopted his submissions on issue No.1 and No.2 above in support of issue No.3 herein. Learned counsel submitted that appellant's contention is predicated on the mistaken assumption and gross misconception that an arbitral award is of equal standing with a judgment of the High Court. He stated that the appellant having conceded at page 65 (paragraph 3) of the record that a decision of an arbitral tribunal is inferior to one given by a High Court, it is ridiculous to now contend that the same decision of an inferior body can be equated with a decision of the High Court. It was further argued that appellant's submission to the effect that an arbitration award in the United Kingdom has an equal standing as the judgment of the High Court is not

supportable in law. Learned counsel referred to section 2(1) of the Foreign Judgments (Reciprocal Enforcement) Act, Cap. 152. 1990 which is *ipssisima verba* with that section 2 of Cap. 175 (the 1922 Act) which defined the word "judgment". He said there is no evidence to show that the respondent sought for leave/permission of the English High Court to enforce the arbitration award in the same manner as a judgment.

He referred to part 62 of the 2002 White Books (now part 62, rule 62.18) of the Civil Procedure Rules. 1998 (White Books 2008 Volume 2, Page 563) which empowers the English High Court to recognize and enforce an arbitration award. See also section 31(3) of the Arbitration and Conciliation Act. Cap. 19, Laws of Federation 1990. For an award to be elevated to the status of a High Court judgment leave of the said court must be sought and obtained. See: *Shell Trustees (Nig.) Ltd. v. Imani & Sons Ltd.* (2000) 6 NWLR (Pt. 662) 639 at 662 paragraphs A-B. He said all the authorities cited by appellant on this issue are irrelevant and inapplicable because they deal with registration of foreign judgments of High Courts and not arbitral awards as such they should be discountenanced.

It was finally submitted on this issue that the limitation period for an action to recognize and enforce a foreign arbitration award in Nigeria is clearly six (6) years and not one (1) year as contended by the appellant. See sections 8(1) (d) of the Limitation Law, Cap. 67, Laws of Lagos State: section 7(1) (d) of the Limitation Act 1966; English Limitation Act of 1623 (a statute of general application); *International Bulk Shipping* & *Services Ltd v. Minerals and Metals Trading Corporation of India* (1996) I All E.R.- l017 CA at 1021 (h); 1022 (a - g). 1028 (b - d) and *Agromet Motoimport Ltd.* v. *Maulden Engineering Co. (Beds) Ltd.* (1985) 2 All E.L.R. 436 at 443(h). He urged the court to resolve this issue in favour of the respondent.

It is common ground that the suit was instituted on 2/2/2003 by the respondent for the recognition and enforcement of an arbitral award made in the United Kingdom on 03/06/98 a period of 4 years 8 months from the time the cause f action arose. As far as the appellant is concerned the award was statute barred since same was not filed within 12 months in accordance with the applicable laws. The contention of appellant's counsel was that section 10 (a) of the Foreign Judgments (Reciprocal Enforcement) Act of 1961 which limits the period of registration of a foreign judgment or award to 12 months is applicable to the award under consideration. The said provision applied by virtue of S. 2(1) of the said Act which states that "judgment"

> " ... shall include an award in proceedings on an arbitration if the award has in pursuance of the law, in force in the place where it was made become enforceable in the same manner as a judgment given by a court in that place."

My own understanding of the above provision is that for an award to fall within the purview of S. 2(1) reproduced (supra) same must be elevated to a status of a judgment of High Court. In other words respondent must seek leave of High Court of England to enforce the award in the same manner as a judgment. See Section 66 of the English Arbitration Act 1996 (referred to in White Book, 2002 (vol. 2) page 277 cited by respondent in its brief of argument. For clarity section 66(1) provides thus:

> "An award made by the Tribunal pursuant to an Arbitration agreement may by leave of the court be enforced in the same manner as a judgment or order of the court to the same effect"

A similar provision under our law is section 31(3) of the Arbitration and Conciliation Act, Cap. 19, Laws of the Federation 1990. See also the case of *Shell Trustees (Nig.) Ltd. v. Imani* & *Sons Ltd.* (2000) 6 NWLR (Pt. 662) 639 at 662 paragraphs A - B cited (supra) by respondent's counsel.

There is no evidence to show that respondent did obtained such leave. It is obvious that the condition precedent was not satisfied. I agree with the submission of respondent's counsel that the award did not qualify as judgment stipulated under S. 2 as such the Foreign Judgment (Reciprocal Enforcement) Act, 1961, Cap. 152, Laws of the Federation of Nigeria, 1990 is not applicable to the award under consideration. There is no doubt that a foreign arbitration award itself is now enforceable in Nigeria directly pursuant to the New York Convention to which Nigeria is signatory. See the preamble of the Arbitration and Conciliation Act, Cap. 19, LFN, 1990 and sections 31 and 51 of the Arbitration Act,Cap. 19, LFN, 1990. The provisions of S. 31 and 51 (supra) were earlier reproduced in this judgment in the course of resolving issue No.2. The learned trial Judge was therefore right when he held at page 81 of the record as follows:

> "The relief being sought on behalf of the plaintiff/ applicant is for this court to recognize and enforce the Arbitral Award made in its favour.
>
> Before the coming into force of the Arbitration and Conciliation Act of 1988, the relevant law which provides methods for registration of foreign awards was Foreign Judgments (Reciprocal Enforcement) Act, Cap. 152 of the Laws of the Federation of Nigeria, 1990 and the New York Convention. But under the Arbitration and Conciliation Act, there is no need for registration, as section 51 of the Act provides that, an award shall be recognized as binding and shall be enforced by the court on application by either party to the Arbitration..... I am to state that since the Arbitration and Conciliation Act of 1988 has provided that an award shall be recognized as binding and shall be enforced by the court, on the application of either party to the arbitration, what is left for the court is to enforce the arbitration award."

As rightly observed by the learned trial Judge, appellant did not ask the lower court to refuse respondent's application to recognize and enforce the award made by Bruce David Ian Mackenzie the Arbitrator. The only complaint of the appellant was that the suit was statute barred and that respondent had paid the award or a substantial part of it.

As earlier stated Foreign Judgments (Reciprocal Enforcement) Act, 1961. Cap. 152. Laws of the Federation of Nigeria, 1990 is not applicable to the award under consideration. The applicable law to the instant case is the Limitation Law. Cap. 67. Laws of Lagos State. Section 8(1)(d) provides that an action shall not be brought after the expiration of six (6) years from the date on which the cause of action accrued in actions to enforce an arbitral award where the arbitration agreement is not under seal or where the arbitration is under any enactment other than the Arbitration and Conciliation Act. The Limitation Law of Lagos State was made to provide for limitation of action in Lagos State including Federal High Court without regard as to who the parties in the action are. This was the decision of this court in *Etim v. Inspector General of Police* (2001) 11 NWLR (Pt. 724) 266 at 283-284. Mohammed. J .C.A. stated at page 283 of the report thus:

> " ... the Limitation Edict Cap. 89 of the Laws of Kaduna State. 1991 was made to provide for limitation of action in Kaduna State. It therefore applied to any action filed in any court in Kaduna State including of course the Federal High Court sitting in Kaduna where the appellants chose to file their action against the respondents. The law applies to any action filed in any court operating within territorial area of Kaduna State without an) regard as to who the parties in the action are."

As found by the learned trial Judge the arbitration agreement was not made under seal and same was not also made pursuant to any other enactment. It was made under the charter party between both parties of this suit which provides under clause 48 that disputes arising from the charter party was to be referred to Arbitration. Since the applicable law is the Limitation Law the time within which the instant suit can be instituted is six (6) years from the time the cause of action arose. As observed earlier the arbitral award was made on 3 /6/98 and this suit was instituted on 2/12/03 i.e. a period of 4 years 8 months from the time the cause of action arose the respondents suit is therefore not statute barred. The learned trial Judge was right to have held that the respondent's action was not statute barred. In the circumstance, I find no substance in the submission of appellant's counsel in support of this issue. I will accordingly resolve issue 3 against the appellant. Ground 2 is equally dismissed.

I now come to issue No.4. The issue under consideration relates to the propriety of award by the trial Judge of post-judgment interest on compound basis. The learned senior counsel contended that the award of compound interest on the judgment sum by the trial court was in disregard of the appellant's counsel's

submissions that in England only simple interest could be awarded on judgment debts, it being against public policy to award compound interest. It was contended that the method of calculating post-judgment interest is provided under Order 42 rule 7 of the Federal High Court (Civil Procedure) Rules, 2000, which allows for only simple interest not exceeding ten per cent per annum of judgment debts. In the light of the foregoing provisions of the rules of court, the court was evidently in error to have awarded interest at 8% compounded at quarterly rate from 30/6/99 until it is extinguished.

Furthermore, appellant's counsel contended that the lower court has jurisdiction to award simple interest but lacks jurisdiction to award compound interest. See: *I.D.S. Ltd.* v. *A.I.B. Ltd.* (2002) 4 NWLR (Pt. 758) 660 at 683 paragraphs C - F. He urged the court to resolve this issue in favour of the appellant.

In reply respondent's counsel submitted that all the submissions canvassed in support of this issue by appellant's counsel is grossly misconceived. He argued that the present case is not one in which the learned trial Judge heard oral evidence, gave judgment and was required to award interest on the judgment sum. Rather, it is a simple case of recognizing and enforcing what was already awarded pursuant to the arbitration proceedings between the parties.

The learned trial Judge was merely giving effect to the arbitration award between the parties and it would be wrong to impose a different interest rate from what the arbitration award stipulates. It stands to reason therefore that the learned trial Judge can only recognise and enforce what was included in the award. Learned counsel further submitted that appellant's submission that only simple interest could be awarded on judgment debts in England on ground of public policy is equally misconceived. He said what the learned trial Judge recognized and ordered to be enforced was an arbitral award (not a judgment). That appellant should have pursued in England by way of an appeal against the arbitral award but failed to do so. Learned counsel contended that the provision of Order 42 rule 7 of the Federal High Court (Civil Procedure) Rules, 2000 will therefore not apply to the respondent's case as the trial Judge need not award any interest on the judgment save for the interest already awarded in the arbitral award. Learned counsel referred to the case of *Integrated Dimensional Systems Ltd.* & 2 *Ors . v. African International Bank Ltd.* (2002) 4 NWLR (Pt. 758) 660 at 663 paragraphs C - F cited by appellant's counsel and argued that the case is distinguishable from the facts of the case at hand. In that case the matter was instituted in the High Court of Oyo State and evidence duly led by both parties and the court proceeded to deliver its judgment. It is therefore understandable that the same court will have jurisdiction to award its interest rate pursuant to its rules of court as it did. The trial court did not have jurisdiction to impose another rate of interest different from what was awarded in the arbitration award. He urged the court to resolve this issue in favour of the respondent and dismiss the appeal with substantial costs.

On the propriety of the award by the learned trial Judge of post-judgment interest on compound basis, I agree with respondent's counsel that the submission of appellant's counsel on the issue is misconceived. The provisions of Order 42 rule 7 of the Federal High Court (Civil Procedure) Rules, 2000 is inapplicable. As rightly submitted by respondent's counsel, the learned trial Judge only recognized and enforced what was already awarded pursuant to the arbitration proceedings between the parties. The learned trial Judge in my humble view had no discretion to alter what the arbitrator awarded to the respondent. The situation would have been different if the case was heard and determined by the trial Judge. It is pertinent to reproduce relevant portion of the award appearing at page 29 of the record hereunder

> "2. the chatterers shall pay owners interest on the outstanding sums at the rate of 8 percent per annum compounded at quarterly rests from 15th October, 1997 when the vessel was withdrawn as follows:"

Having regard to the facts and circumstances of the case. I am of the firm view that the learned trial Judge was right when she awarded interest at 8% compounded at quarterly rests from 30/6/99 until it is extinguished. As earlier stated the learned trial Judge was only enforcing the award granted by the arbitrator in England. It is therefore not correct to say that the court below lacked jurisdiction to award compound interest. The case of *I. D.S. Ltd. v. A.I.B. Ltd* (supra) relied upon by appellant's counsel is inapplicable as the facts and circumstances are distinguishable from the case at hand. In the circumstances, I cannot fault the finding of the learned trial judge at pages 85 - 86 of the record where he stated as follows:

> "I agree with the view of the learned counsel for the defendant that exhibit OV I cannot take the place of the arbitral award. The award states the rate of interest as 8% per annum compounded at quarterly rests. As at 30/06/99, the outstanding sum against the defendant was USD 14,579.18 (fourteen thousand, five hundred and Seventy-nine United States Dollars eighteen cents only). And as such, the interest rate from that date will be 8% compounded interest at quarterly rests until it is extinguished.
>
> From exhibit vol (sic) therefore, 1 hold that the outstanding sum agreed to the plaintiff by the defendant as at 30/06/99 was USD 4.092.66 (four thousand, hundred and ninety-two United State Dollars sixty-six cents only) interest which the defendant ought to have paid by 30/06/99. And there is no evidence before this court that aforesaid interest had been paid. Thus making the total sum due to the plaintiff to be USD 18.671.84 (eighteen thousand, six hundred and seventy-one United State Dollars eighty-four cents only) as at 30/06/09. As regard the sum of £7,500.00 (seven thousand, five hundred pounds sterling only) enforcement fee on

behalf of the plaintiff, such fee is not included in the arbitral award."

What the learned trial judge recognized and ordered to be enforced was an arbitral award not a judgment. Appellant should have pursued in England by way of an appeal against the arbitral award but failed to do so. The award is binding on the parties and since the arbitral award is not fraudulently procured and it is not against public policy the court is bound to give effect to such award.

For the above reasons I will similarly resolve issue No.4 against the appellant. Ground iii is also dismissed.

Having resolved all the issues against the appellant, and for the various reasons stated herein above, I am of the considered view that this appeal is devoid of merit. It is hereby dismissed. The judgment of trial court dated 23rd November, 2006 is affirmed. Parties to bear own costs.

OGUNBIYI, JCA: I have read in draft the lead judgment just delivered by my brother, Mshelia, J.C.A. and I agree that the said appeal is devoid of any merit and I also have no hesitation in dismissing same.

On the question of the status of an, "arbitration award" *vis- a-vis* the word "judgment" it would be pertinent to relate to the definition of judgment as defined in section 2(1) of Cap. 175 (the 1922 Act) which had been dealt with adequately by my brother in the lead judgment.

It is pertinent to mention that the provision of section 66(I) of the English Arbitration Act, 1996 is an equivalent of section 31 (3) of the Arbitration and Conciliation Act, Cap. 19, Laws of the Federation 1990. The provision have been reproduced in the lead judgment and which should not again be replicated for the sake of avoiding monotony and suffice to say however that the enforcement of an award of this nature is subordinate to the leave of court by reason of its subjectivity. The pre-supposition and anticipation therefore is that the leave must first have been sought and obtained before the condition precedent could be satisfied. The absence of such, had therefore rendered the award fallen short of the standard of a judgment.

In other words, the award in terms of interpreting the intention of section 2(1) of the Act (supra):

> "..... has (not) in pursuance of the law in force in the place where it was made become enforceable in the same manner as a judgment given by a court in that place".

It is the fulfillment of the condition precedent that would give the force of law before it could attain the judgment status position.
With the arbitration award having been made within a period less than six years

of the applicable limitation law, it cannot therefore be correct to label the respondent's suit as statute barred. This was, as rightly arrived at and held by the learned trial judge.

My learned brother, Mshelia, JCA had on all issues raised, adequately considered and resolved same. I therefore agree with the reasonings and conclusions arrived in respect thereof which I also adopt as mine. In other words and in the same tone as the lead judgment, I also resolve all the issues in this appeal against the appellant.

The appeal in the circumstance is devoid of any merit and is hereby also dismissed by me. As a consequence, I further abide by orders made in the lead judgment inclusive of costs.

MUKHTAR, JCA: I have had the advantage of reading before now the judgment just rendered by my learned brother, Mshelia, J.C.A. in this appeal in which all the issues submitted for the determination of the appeal were meticulously and exhaustively appraised. I have nothing further to add but suffice for me to adopt the reasoning therein and conclusion as mine, I, too, find no merit in this appeal. I dismiss it accordingly and affirm the judgment of the court below delivered on the 23rd November, 2006. I subscribe to the order for costs proposed in the said lead judgment.

Appeal dismissed.

Cases cited in the judgment

Amasike v. Registrar-Gen., C *A.C.* (2006) 3 NW LR (Pt. 968) 462
Commerce Assurance Ltd. v. *Alli* (1992) 3 NWLR (Pt. 232) 710
Dale Power System Plc v. *Witt* & *Busch Ltd.* (200 I) 8 NWLR (Pt. 716) 699
Eagle Super Pack (Nig.) Ltd. v. *A.CB. Plc* (2006) 19 NWLR (Pt.1013) 20
Etim v. IGP (2001) II NWLR (Pt. 724) 266
Fadare v. *A.G Oyo* State (1982) All NLR (Pt. 1) 24
I.D.S. Ltd. v. A. I. B. Ltd. (2002) 4 NWLR (Pt. 758) 660
Ibidapo v. Lufthansa Airlines (1997) 4 NWLR (Pt. 498) 124
Ibrahim v. J.S.C. Kaduna State (1998) 14 NWLR (Pt. 584) I
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Oje v. Babalola (1991) 4 NWLR (Pt. 185) 267
Onagoruwa v. *I.G.P.* (1991) 5 NWLR (Pt 193) 593
Onwu v. *Nka* (1996) 7 NWLR (Pt. 458) I
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Thadant v. NB.N. Ltd. (1972) 1 SC 105
WA.P.C. Plc v. *Adeyeri* (2003) 12 NWLR (Pt. 835) 517

Foreign cases cited in the judgment
Agromet Motoimport Ltd. v. *Maulden Engineering Co. (Beds) Ltd.* (1985) 2 All E.R. 436
International Bulk Shipping & *Services Ltd.* v. *Minerals and Metals Trading Corporation of India* (1996) 1 All E.R. 1017

Statutes cited in the judgment
Arbitration and Conciliation Act. Cap. 19. Laws of the Federation of Nigeria 1990, sections 31 (3) and 51 (I)
Arbitration and Conciliation Act, Cap. A 18 Laws of the Federation of Nigeria 2004. sections 31 (I) and 51 (I)
Evidence Act Cap. 112, Laws of the Federation of Nigeria 1990, S. 74(I)(a)(d)(i)
Foreign Judgments (Reciprocal Enforcement) Act, Cap. 152,
Laws of the Federation of Nigeria, 1990, Sections 2(I) and 10(a)
Interpretation Act, Cap. 125, Laws of the Federation of Nigeria, 1990,S.32(1)
Limitation Act, 1966, S. 7(1)(d)
Limitation Law, Cap. 67, Laws of Lagos State, S. 8(1)(d)
Reciprocal Enforcement of Judgments Ordinance ,1922 Cap. 175, Laws of the Federation of Nigeria,1958, Sections 2 and 3(1)

Rules of Court referred to in the judgment
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Books referred to in the judgment
Webster's Universal Dictionary and Thesaurus, 2007 Edition, pp. 397,400,453,651 and 653
Black's Law Dictionary, 7th Edition, p. 1288

History:

HIGH COURT
Federal High Court (Lagos Division)

COURT OF APPEAL (Lagos Division)
Clara Bata Ogunbiyi. JCA *(Presided)*
Adzira Gana Mshelia, JCA *(Read the lead judgment)*
Hussein Mukhtar, J CA

Counsel:
O.J. Akinwale for the appellant
Ayo Olorunferni (with him, Olakunle Yusuf) for the respondent

IPCO (W.A.) HOLDING LTD & ANOR. v. SEMBCORP ENG. PTEL LTD

COURT OF APPEAL
(PORT HARCOURT DIVISION)

CA/PH/12/2007
WEDNESDAY 5TH JANUARY, 2011

(*MUHAMMAD; THOMAS; AWOTOYE, JJ.CA*)

ARBITRATION- Plea for reference to arbitration - constitutes a challenge to the court's jurisdiction, thus court would lack jurisdiction to proceed to determine the matter as it cannot overlook a party's right to submit to the arbitration which clearly, is a condition precedent to the exercise of its jurisdiction – Court – would only assume jurisdiction in the absence of any dispute over a transaction in respect of which an agreement between the parties has provided for reference to arbitration

COMMERCIAL LITIGATION – Party – thereto would be deemed to have waived an irregular procedure were he failed to object but instead participated therein– Record of proceedings – being the only indication of what transpired in court must speak for the court as well as the parties

EVIDENCE – Court - would accept as the best evidence and dispense with further proof where a party voluntarily acknowledges the existence of certain facts which are inconsistent with his position in a given dispute – would be in error to rely and act on a self defeating though unchallenged evidence– duty thereof does not extend to the examination of documentary evidence that has not been examined in open court as to do for the party that which it has neglected to do would be a breach of the principle of fair hearing

JUDICIAL DEFINITION – Admission

Facts:

The appellant and respondent had, sometime in 1995, entered into an agreement for the supply of various forms of equipments to the Bonny Export Terminal in Rivers State owned by the Nigerian National Petroleum Corporation. The total cost of the contract being the sum of US $7,778,875.00.

The respondent being the supplier of the equipment, supplied same and the appellant refused to pay the respondent the outstanding balance of the cost of the contract despite repeated demands by the respondent and approval by appellant of the payment of the sum of US $837,72.5.00 to the respondent. The respondent thus instituted an action at the High Court of River's State for the recovery of the outstanding sum of US$4,733,183.62 with accrued interest against the appellant.

Having entered appearance, the appellants by an application, prayed the court that the matter be referred to arbitration as provided for by clause 26 of the contract, exhibit A. They also asked that further proceedings into the matter be stayed pending the arbitration. Upon receipt of appellant's application, the respondent filed a motion seeking the court's order for judgment against the appellants in the sum of US $837,725.00 which sum had been admitted and thence not within the subject matter of arbitration.

In considering the appellant's application to stay the proceedings, the court found that the appellants had admitted respondent's claim to the tune of US $837,725.00 and thus entered judgment for it on the grounds that the sum does not form the subject matter of arbitration. The court on the other hand, granted appellants' application and referred the matter to arbitration. Dissatisfied with the court's ruling, the appellant as defendant appealed to the Court of Appeal.

Held: (Unanimously allowing the appeal)

[1] ***Arbitration- Plea for reference to arbitration - constitutes a challenge to the court's jurisdiction, thus court would lack jurisdiction to proceed to determine the matter as it cannot overlook a party's right to submit to the arbitration which clearly, is a condition precedent to the exercise of its jurisdiction***

Where a plea for reference to arbitration arising from an agreement in a contract between parties has successfully been raised, the trial court cannot proceed to determine a dispute it otherwise could. The plea for reference to arbitration constitutes a challenge to the court's jurisdiction and ignoring the challenge amounts to ignoring a party's right, pursuant to an agreement with the other, to submit the dispute to arbitration first. In real pragmatic terms, the court would lack jurisdiction to proceed in the light of the agreement which parties voluntarily and lawfully subscribed to thereby ousting the jurisdiction of the court until and unless a condition precedent has been met. In *Confidence Ins. Ltd. v. Trustees of Ondo State College of Education Pension Staff* (1999) 2 NWLR (Pt.59)) 373, also, this court resolved the issue whether an arbitration clause in a trust deed is capable of *ousting* the jurisdiction of the trial court or affecting the judgment entered in the case, the very issue that rages in this appeal. In that case this court held at page 386 of the report that even though:

> "the inclusion in an agreement to submit a dispute to arbitration does not generate the heat of *ouster* of jurisdiction of the court and that it merely postpones the right of either of the contracting parties to resort to litigation court whenever the contracting party elects to submit the dispute under contract, where such reference to arbitration under the arbitration clause is properly raised the trial court seized of the action cannot overlook a party's right to

> submit to the arbitration which clearly, is a condition precedent to the exercise of its jurisdiction (underling supplied for emphasis)

The foregoing decisions of the two courts still bind us. The appellants must therefore be right to insist that the arbitration clause in the contract between the two parties that makes reference to arbitration before any or the parties can resort to court to enforce his right constitutes a challenge of the lower court's jurisdiction on the ground that a condition precedent to the commencement of the action has not been met. Their application of 18/10/99 supported by affidavit urging the trial court to refer the matter to arbitration as agreed is an acceptable procedure for challenging the competence or respondent's action against the appellant. See *Nnonye v. Anyilue (supra*); *Confidence Ins. Ltd v. Trustees of O.S.C.E. (supra) and A.G. Kwara State v. Olawale (*1993) 1 NW LR (Pt. 172) 64.
(P. 414 lines 3 - 11; P. 413 lines 44 - 45; P. 414 lines 1 - 25)

Per Awotoye, JCA

It is trite law that where a plaintiff jumps arbitration and commences an action in a court of law, a defendant is to take steps to stay the proceedings in court before taking any further proceedings apart from entry of formal appearance otherwise the defendant would be taken to have waived his right to go to arbitration. See *Kurubo v. Zach – Motison (Nig.) Ltd* (1992) 5 NWLR (Pt. 239) 1102, *M.V. Lupex v. N.O.C. S Ltd*. (2003) 15 NWLR (Pt. 843) 469, *Kano State Urban Development Board v. Fanz Construction Co. Ltd* (1990) 4 NWLR (Pt. 142) 1 SC**.**

The court would stay such proceedings in court if such application is filed. See *Sonnar (Nig.) Ltd v. Nordwind (*1987) 4 NWLR (Pt. 66) 520.
(P. 421 lines 1 - 11)

[2] ***Arbitration – Court – would only assume jurisdiction in the absence of any dispute over a transaction in respect of which an agreement between the parties has provided for reference to arbitration***

Clause 26 of the contract agreement that provides for reference to arbitration as well as the relevant sections of the Arbitration and Reconciliation Act 1990 CAP 19 Laws of the Federation are very germaine to our resolution of the issue.

Clause 26 of the agreement, exhibit A provides:-

> "In the event of any dispute not resulting in a settlement. The dispute shall be reserved to and finally settled by arbitration."

Clause 19 of exhibit A has earlier provided thus:-

"- - - - The laws or Nigeria shall apply to and govern the interpretation, performance and enforcement of the purchase order."

Section 5(1) and (2) of the Arbitration and Reconciliation Act 1990 CAP 19 Laws of the federation applicable to exhibit A provide as follows:-

"5(1) if any party to an arbitration agreement commences any action in any event with respect to any matter which is the subject of an arbitration agreement, any party to the arbitration agreement may at any time after appearance, and before delivering any pleading or taking any other steps in the processing apply to the court to stay proceedings.

(2) A court to which an application is made under sub- section (1) of this section may, if it is satisfied: (a) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement and (b) that the applicant was at the time when the action was commenced and the other party remains ready and willing to do all things necessary to the proper conduct of the arbitration make an order staying proceedings".

The combined effect of clause 26 of exhibit *A* and the foregoing applicable statutory provision, as held in the various cases authoritatively alluded to by both sides in this appeal, is that a court of law only assumes jurisdiction in the absence of any dispute over a transaction in respect of which an agreement between the parties has provided for reference to arbitration. It is the existence of a dispute or difference in the positions of the parties to such agreement that confers jurisdiction to an arbitration panel. The lower court is very much aware of this position of the law . The sum continues to be in "dispute" and by clause 26 or exhibit A as well as section 5 of the Arbitration Law CAP 10 Laws of Rivers State, the lower court lacks the jurisdiction of adjudicating on the sum by excluding it from arbitration.
(P. 415 lines 1 - 40; P. 418 lines 17 - 19)

[3] ***Commercial Litigation – Party – thereto would be deemed to have waived an irregular procedure were he failed to object but instead participated therein***

As shown earlier in this judgment, however, where the appellants not only failed to object to the use by the court of the irregular procedure but participated in the proceedings inspite of the irregularity, they cannot now complain. They are deemed to have waived their right to protest and endorsed the procedure inspite of its irregularity see; *Katsina Local*

Authority v. Makuduwa (1971) 1 NWLR 100, *Jadesimi v. Okotei-Eboh* (1986) 1 NWLR (Pt.16) 264, *NDIC v. Central Bank of Nigeria* (2002) 7 NWLR (Pt.766) 272.**(P. 414 lines 32 - 38)**

[4] ***Commercial Litigation – Record of proceedings – being the only indication of what transpired in court must speak for the court as well as the parties***

Per Awotoye, JCA

The record of the court is a solemn declaration of what transpired in court. It must speak for the court and the parties in respect of whatever happened in the proceedings. If a document is admitted in court, its content must be demonstrated in open court and the evidence therefrom recorded in the court record to prevent private investigation by the court to the exclusion of one of the parties and resultant breach of right to fair hearing of the said party. See *Owe v. Oshibanjo* **(1965)** 1 All NLR 72, *Habib Bank Nig. Ltd v. Gifts Unique* (2005) All FWLR (Pt. 241) P. 234.

According to Belgore JSC in *Fawehinmi Construction Co. Ltd v. O.A.V*. (1998) 6 NWLR (Pt. 553) 171 at 183.

> "Record of proceedings is the only indication of what took place in the court. It is not like minutes of a meeting. It is always the final reference of events step by step that took place in court."

See also *Yarzabadin & Anor v. Kano* (1961) SCNLR 144, *State v. Aibangbee* (1988) 3 NWLR (Pt. 84) 548 at 577; *Alhaji Animasaun v. UCH* (1996) 10 NWLR (Pt. 476) 65 at 76. This cannot be said about the case. How the learned trial judge arrived at his decision that there was an admission in a case in which the defendants did not file any statement of defence and did not admit in any affidavit filed by them is with due respect very difficult for me to fathom. **(P. 421 lines 18 - 38)**

[5] ***Evidence –Court - would accept as the best evidence and dispense with further proof where a party voluntarily acknowledges the existence of certain facts which are inconsistent with his position in a given dispute***

The practice, pursuant to S. 75 of the Evidence Act, has grown (sic) that a voluntary acknowledgement of the existence of certain facts which are inconsistent with the party's position in a given dispute is readily accepted as the best evidence of such facts and further proof of same is dispensed with. **(P. 416 lines 37 - 40)**

[6] ***Evidence – Court – would be in error to rely and act on a self defeating though unchallenged evidence***

Learned appellants' counsel is however, also correct in his submission that where the unchallenged and uncontroverted evidence is self-defeating and unacceptable the trial court will be wrong to rely on such unworthy evidence. See *Ogbechie v. Onochie* (1988)1 NWLR (Pt.70) 370 at 379 and *Jalingo v. Nyame* (1992) 3 NWLR (Pt.231)538 at 545. An examination of paragraphs 5, 6 and 7 of the affidavit in support of respondent's application and annextures A 1 - B 16, which the trial court relied upon to conclude the admission by the appellants of the amount discounted by the court from respondent's total claim shows clearly that such an inference is not untenable. The annextures contain hand written figures and cancellations and nowhere on the face of these documents have any explanation been given to show why, how and by whom the alterations were made. **(P. 417 lines 16 - 28)**

[7] ***Evidence - Court – duty thereof does not extend to the examination of documentary evidence that has not been examined in open court as to do for the party that which it has neglected to do would be a breach of the principle of fair hearing***

..Even at this level it takes the detailed explanation and tabulations made by counsel at pages 8 to 10 of the respondent's brief to enable us appreciate the purport of the annexture and the fact that the alterations were made by Mr. Holcroft. The record of appeal does not contain similar tabulation to suggest that the lower court's conclusion had drawn from that much.

In any event, it is wrong for counsel to proffer evidence as such is now the essence of counsel's statement on the documents which had failed to speak for themselves. In the absence of this explanation it would only mean that the lower court had itself and outside the court perused the documents and drawn its own meaning and conclusions from them. It has long been the principle that the function of a court is to decide between parties on the basis of what the parties themselves demonstrated and had tested in the open court. That duty does not extend, certainly, to the examination of documentary evidence that had not been examined in open court and where such subsequent examination discloses facts that were not either incapable of being noticed or exposed to test in court. A party relying, on documents in proof of his case, therefore, must specifically relate such documents to the parts of the case the documents are being tendered. The court is not empowered to do so for the party that has neglected or out rightly refused to discharge that burden. The principle has its foundation, this court has held, in the breach of the right

to fair hearing for a court to do for a party in the recess of its chambers what the party failed to do in the advancement of its own case in the open court. See *Duriminiya v. COP* (1961) N.N.L.R. 70 at 73 - 74 and *Terab v. Lawan* (1992) 3 NWLR (Pt. 231) 569 at 590. **(P. 417 lines 28 -45; p. 418 lines 1 - 7)**

[8] ***Judicial Definition – Admission***

In Black's Law Dictionary, 6th edition, admission has been defined as a statement by a party or someone identified with him in legal interest, or the existence of a fact which is relevant to the cause of his adversary. An admission is, therefore, a formal waiver or proof which relieves the opposing party from proving the admitted facts and bars the party who made the admission from disputing same. Where made by a party's attorney for the purpose of being used as a substitute for the regular legal evidence of the facts at trial, the admission is called judicial admission. See *Onyenge v. Ebere* (2004) 13 NWLR (Pt.889) 20 and *Archibong v. Ita* (2004) 2 NWLR (858) 590 SC.**(P. 416 lines 40 - 45; p. 417 lines 1 - 4)**

MUHAMMAD, (OFR) (Delivering the lead judgment): On the 10th June 1999 the respondent in this appeal commenced suit No. NHC/109/99 at the Nchia division of the High Court of Rivers State claiming the outstanding sum of US $4,733,183.62 with accrued interest against the appellants as defendants. The two parties had, on 19th December 1995, entered into an agreement for the supply of various forms of equipments to the Bonny Export Terminal in Rivers State owned by the Nigerian National Petroleum Corporation. The plaintiff/respondent is, under the agreement, the supplier of the equipments, the total cost of which is US $7,778,875.00.

The action from which the instant appeal arose is for the recovery or the outstanding balance of the cost of the contract after the appellant had persistently refused to pay the sum inspite of respondent's repeated demands allegedly agreed and approved the payment of the sum of US $837,72.5.00 to the respondent. Having entered appearance, the appellants by an application, filed on 18th October 1999, prayed the lower court that the matter be referred to arbitration as provided for by clause 26 of the contract, exhibit A. They also asked that further proceedings into the matter be stayed pending the arbitration. Upon receipt of appellant's application, the respondent filed a motion seeking the court's order for judgment against the appellants in the sum of US $837,725.00 which sum had been admitted and thence not within the subject matter of arbitration. Annexed to respondent's application, are the invoices bearing appellants' purported admission of the sum in respect of which judgment was being urged.

Arguments in respect of the two applications were heard jointly by the court on 21st March 2001. In a considered ruling, dated 14th November 2000, the court

having found that appellants had admitted respondent's claim to the tune of US $837,725.00, accordingly entered judgment for the respondent on the grounds that the sum does not form the subject matter of Arbitration. The court otherwise granted appellants' application and referred the matter to arbitration. Aggrieved with the court's ruling, the defendant has appealed against same on a notice containing four grounds.

Parties have filed and exchanged briefs of arguments and same, including appellants' reply brief have been adopted and relied upon at the hearing of the appeal. The two issues formulated by the appellants at paragraph 3.01 of their brief as calling for determination in the appeal read:-

(i) Whether the learned trial judge was right in granting final judgment whilst considering an application or jurisdiction. (Distilled from Grounds 1 and 2 of the Grounds of Appeal)

(ii) In the alternative, whether the learned trial judge was right in holding that there was an admission of liability to the tune of US$837,725.00 (Eight hundred and thirty seven thousand, seven hundred and twenty five US Dollars) by the defendants/appellants. (Distilled from Grounds 3 and 4 or the grounds of appeal.

The two issues the respondent distilled from the grounds of appeal for determination are:-

1. Whether the learned trial judge was right in entertaining and granting an application for judgment on admission whilst considering an application seeking a reference to arbitration?

2. Whether the learned trial judge was right in holding that there was an admission of liability to the tune of US$837,725.00 (Eight hundred and thirty seven thousand seven hundred and twenty five dollars) by the defendants/appellants.

On appellant's first issue, their learned counsel submits that the motion before the lower court as indicated at page 235 lines 15-30 of the record of appeal is theirs filed on 18 - 10 - 99. The motion challenges the lower court's jurisdiction and prays that the matter before the court be referred to arbitration as required by the contract agreement between the parties. The court's failure to consider whether the condition precedent to the exercise of its jurisdiction, whether the matter is one for arbitration or not, is a grave error. Learned counsel cited the decisions in *Nokoprise Intermark Company Limited & ors. v. Dobest Trading Corporation Inc. & Ors.* (1997) 9 NWLR (Pt. 521) 334 at 336 and *Gabriel Madukolu and Ors. v. Johnson Nkemdilim* (1962) 2 ANLR 581 at 590.

Learned appellants' counsel further contends that the only motion before the

court is appellant's application and none other. The law is settled, it is argued, that a court must restrict itself to the prayers contained in the application before it. The court has no jurisdiction to do otherwise. The lower court's order giving final judgment to the plaintiff/respondent as prayed for in an application that is not before the court is a nullity since same has proceeded without the necessary jurisdiction. Reliance is placed by counsel on *APP & Ors. v. Professor Albert F. Ogunsola* (2001) 5 NWLR (Pt.761) 484 at 503, and *Union Bank of Nigeria Plc v. Ekulo Arms Ltd. & Anor*. (2001) FWLR (Pt. 67) 1019 at 1031.

Concluding his argument under the issue, learned appellant's counsel submits that because the lower courts' order entering judgment for the plaintiff/respondent in respect of the sum allegedly admitted by the appellants is a violation of the latter's right to fair hearing, same should be set aside. The case of *Pius Okeke & 9 Ors. v. Iche Otika Nwokoye & 3 Ors.* (1999) 13 NWLR (Pt.635) 495, counsel contends, buttresses their stand.

Under appellant's 2nd issue, which learned appellant counsel argues in the alternative, he asks that it be taken without being conceded that the lower court has the jurisdiction to consider plaintiff/respondent's application for the order the court made entering judgment for the sum the appellants allegedly admitted. The court's conclusion that the appellants have admitted the sum, it is argued, is manifestly wrong. Appellants have, in opposition to plaintiff/respondent affidavit in support or the application for judgment, filed a counter - affidavit on 17- 3 - 2000. By paragraphs 9, 10, 11 and 12 of the counter affidavit as well as exhibit "INJ" annexed to the counter-affidavit, appellants indebtedness has not' only been strongly denied, respondent is averred to have been over paid to the tune of US $367,056,89. The lower court's finding that the appellants have admitted owing the respondent the sum of US$ 837,725.00 as part of the latter's claim at page 241 lines 15 – 25, learned appellants counsel contends, results from the court's improper evaluation of the affidavit evidence of the two sides. The basis of the finding has not been explained by the court. A decision such as that inspite of the persisting conflict of the sworn affidavit of parties is perverse. The court is under duty to resolve the conflict in the evidence before it can validly determine the issue in controversy. Relying on the case of *E.O. Falola v. Union Bank of Nigeria Plc*. (2005) 7 NWLR (Pt. 924) 405 at 408, learned counsel urges that the issue as well as the appeal be resolved in favour of the appellants.

Responding under their first issue, learned respondent counsel submits that the lower court has considered appellants application dated 18th October 1999 for the suit to be referred to arbitration and respondent's application dated 4th October seeking judgment on the sum admitted by the appellants jointly. The court, counsel argues, is right to have so proceeded. He supports his position with *Shell Trustees (Nig) Limited v. Imam and Sons (Nig) Limited* (2006) 6 NWLR (Pt. 662) (639. He further contends that appellant's application that the matter be referred for arbitration never *ousted* the lower court's jurisdiction and the court is competent to enter

judgment in respect of the sum admitted by the appellants. Citing section 5(2a) of the Arbitration and Conciliation Act, *Lignes Acrineunes Congolaises (L.A.C.) v. Air Atlantic Nigerian Limited (AAN)* (2006) 2 NWLR (Pt.963) 4 and *Confidence Insurance Limited v. The Trustees of the Ondo State College of Education Staff Pension* (1999) 2 NWLR (Pt.591) 373, learned counsel submits that the lower court's correct decision be allowed to persist. For one, learned counsel emphasizes, the appellants had the opportunity of objecting to the procedure the lower court adopted in arriving at the decision being appealed against and did not. It is too late for them to do so now.

The record of appeal at page 223, learned counsel submits, shows clearly that appellants counsel submissions at the court below are in respect of both applications. Appellants cannot, therefore, contend that the court has denied them their right to fair hearing. Counsel relies on *Pabod Suppliers Limited v. Beredugu* (1996) 5 NWLR (Pt. 445) 309.

Under respondent's 2nd issue it is submitted that appellants had admitted liability for the sum US $837,725.00 out of the total claim presented by the respondent. This admission is contained in paragraphs 4, 5 and 6 of the affidavit in support of respondent's application for judgment for the admitted sum and annextures B1 to B16 thereto. From these averments and the combined invoices for the sum of US $ 1,876,541.03 presented to the appellants by the respondent between August and November 1999, Bob Holcroft, the appellants order manager, after disputing some of the figures, confirmed that the sum or US $837,725.00 was owed the respondent by the appellants. He indicated the sum agreed upon on each of the invoices and approved same for payment. There is no conflict in the affidavit evidence before the court the resolution of which required oral evidence since the counter-affidavit relied upon in opposition to respondent's application had been found fraudulent and rejected by the lower court, a decision that has not been appealed against. Given the decision in *Gabari v. Ilori* (2002) 14 NWLR (Pt.786) 67, learned respondent's counsel submits, the lower court is bound to act on the unchallenged averments in the affidavit in support of respondent's application. Granting without conceding that appellant's counter affidavit is still extant, it contains so much internal contradictions and same had rendered it unreliable. Learned counsel urges that the issues be resolved in respondent's favour and the appeal dismissed.

The appellants on being served the respondent's brief filed a reply brief. The reply brief is hereby discountenanced being a clear bid to re-argue the appeal rather than a reply to any fresh point raised in the respondent's brief that had not been addressed earlier in the appellant's brief. See *Uzoegwu v. Ifekandu* (2001) 17 NWLR (Pt.741) 49 CA, *Mozie v. Mbamalu* (2006) 15 NWLR (Pt.1003) 466 SC and *Dada v. Dosunmu* (2006) 18 NWLR (Pt. 1010) 134 SC.

The point must out rightly be made that parties to an appeal are bound by the appeal's print record. Mr. Olumide Aju Esq., see page 232 of the record of appeal,

appeared for the plaintiff at the lower court, the respondent in the instant appeal. Responding to the arguments of defendant/applicants counsel in respect of their application dated 18/10/99 for order of the lower court referring the suit to arbitration, the counsel stated thus:

> "We have sworn to a counter affidavit by one Akeem Oladejo and also filed an application dated 26 - 11 - 99 for judgment on admission. We are relying on the affidavit in support of the application as well as the counter-affidavit filed in opposition to this application."

Mr. Aju proceeded to argue that the parties had resolved, pursuant to clause 26 of their agreement, exhibit A, to refer to arbitration only such matters they had not agreed upon and since by paragraph G of the plaintiff/respondents' counter-affidavit in opposition to defendants/appellant's application dated 18 - 10 - 99, the sum of US $837,725 had, by annextures A1 – B16 been admitted by the defendants, judgment should accordingly be entered for the admitted sum in plaintiff/ respondent's favour.

Mr. Oruwani concluded his reply to plaintiff / respondent counsel's submissions by stating that the defendants/appellants had not admitted or settled anything and that the dispute in the suit is over the whole amount allegedly owned the plaintiff.

It does not, therefore, lie in appellant's mouth to argue that plaintiff's motion for judgment for the sum that defendants purportedly admitted had not been argued at the lower court and their right to trampled upon. The 1999 Constitution has provided in section 36 for a party's right to fair hearing. It requires that the party be given opportunity to present his case before his right is determined. In the instant case appellants have not only had such opportunity but have utilized same.

The issue the instant appeal raises is the very question the lower court addressed having rightly narrowed same at page 238 of the record thus:

> "Whether this court can enter judgment in favour of an applicant against a defendant in monetary terms to the extent that is admitted by the latter and refer the reminder to arbitration."

The main thrust of the argument or learned appellant's counsel is that their application at the lower court for the reference to arbitration of the extant matter constituted a challenge to the court's jurisdiction and needed a decision one way or another before the court does anything else. Learned appellants counsel insists that the lower court is wrong in its consideration of respondent's application for judgment of the sum allegedly admitted by appellants.

Learned appellants counsel is not totally wrong.

Where a plea for reference to arbitration arising from an agreement in a contract between parties has successfully been raised, the trial court cannot proceed to determine a dispute it otherwise could. The plea for reference to arbitration constitutes a challenge to the court's jurisdiction and ignoring the challenge amounts to ignoring a party's right, pursuant to an agreement with the other, to submit the dispute to arbitration first. In real pragmatic terms, the court would lack jurisdiction to proceed in the light of the agreement which parties voluntarily and lawfully subscribed to thereby ousting the jurisdiction of the court until and unless a condition precedent has been met.

Jurisdiction has been defined, as the power of the court to hear and determine the subject matter in controversy between parties. It is the authority of the court to exercise judicial powers. A court is said to have jurisdiction or to be competent when it is properly constituted as regards numbers and qualification of members of the bench and no member is disqualified for one reason or another; the subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising, its jurisdiction; and the case comes before the court initialed by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction see *Madukolu v. Nkemdilim* (1962) 1 All NLR 587; *Tukur v. Govt. of Gongola State* (1989) 4 NWLR (117) 517 and *Adesola v. Abidoye* (1999) 10-12-SC 109. In the instant case, learned appellants' counsel is right to insist that their plea for the instant suit to be referred to arbitration constitutes a challenge to the lower court's jurisdiction and the law is that once raised it should be timeously determined one way or another see *Eze v. Ikechukwu* (2002) 18 NWLR (Pt. 799) 348 and *Ajay Ltd. v. Airline Management Support Ltd* (2003) 7 NWLR (Pt. 820) 597. In *Nnonye v. Anyichie* (2005) 1 NWLR (Pt.910).623 at 647, the Supreme Court stated thus:-

> "It may be mentioned that the effect of non-service of a pre-action notice, where statutorily required, as in this case is only an irregularity which, however , renders all Action incompetent.
>
> - - - - if, therefore, a defendant refuses to waive it and he raises it, then the issue becomes a condition precedent which must be met before the court could exercise its jurisdiction – Once it is raised, and it is shown that there has been non-service, as in the present case, the court is bound to hold that the plaintiff has not fulfilled a pre condition before instituting his action. See *Ademola II v. Thomas* (1946) 12 WACA 81; *Kastina Local Authority v. Makudawa (supra*); and *Eze v. Ikechukwu (supra),"* (underling supplied for emphasis).

In *Confidence Ins. Ltd. v. Trustees of Ondo State College of Education Pension Staff* (1999) 2 NWLR (Pt.59)) 373, also, this court resolved the issue whether an arbitration clause in a trust deed is capable of *ousting* the jurisdiction of the trial

court or affecting the judgment entered in the case, the very issue that rages in this appeal. In that case this court held at page 386 of the report that even though:

> "the inclusion in an agreement to submit a dispute to arbitration does not generate the heat of *ouster* of jurisdiction of the court and that it merely postpones the right of either of the contracting parties to resort to litigation court whenever the contracting party elects to submit the dispute under contract, where such reference to arbitration under the arbitration clause is properly raised the trial court seized of the action cannot overlook a party's right to submit to the arbitration which clearly, is a condition precedent to the exercise of its jurisdiction (underling supplied for emphasis)

The foregoing decisions of the two courts still bind us. The appellants must therefore be right to insist that the arbitration clause in the contract between the two parties that makes reference to arbitration before any or the parties can resort to court to enforce his right constitutes a challenge of the lower court's jurisdiction on the ground that a condition precedent to the commencement of the action has not been met. Their application of 18/10/99 supported by affidavit urging the trial court to refer the matter to arbitration as agreed is an acceptable procedure for challenging the competence or respondent's action against the appellant. See *Nnonye v. Anyilue (supra*); *Confidence Ins. Ltd v. Trustees of O.S.C.E. (supra) and A.G. Kwara State v. Olawale (*1993) 1 NW LR (Pt. 172) 64. The authorities relied upon by the learned respondent counsel not suggesting otherwise are, therefore, unavailing to his client.

Learned respondent counsel is however right that in the determination of applications before it a court retains the discretion of entertaining one at a time or considering the for (sic) jointly. Learned counsel to the appellants countered that the procedure is irregular. It might as well be. As shown earlier in this judgment, however, where the appellants not only failed to object to the use by the court of the irregular procedure but participated in the proceedings inspite of the irregularity, they cannot now complain. They are deemed to have waived their right to protest and endorsed the procedure inspite of its irregularity see; *Katsina Local Authority v. Makuduwa* (1971) 1 NWLR 100, *Jadesimi v. Okotei-Eboh* (1986) 1 NWLR (Pt.16) 264*, NDIC v. Central Bank of Nigeria* (2002) 7 NWLR (Pt.766) 272.

The issue to resolve in the determination of this appeal is whether on the basis of the two applications argued before it the lower court is right to have discounted the sum of US $837,725.00 allegedly admitted by the appellants out of the sum due to the respondent and referring the remaining to arbitration.

Clause 26 of the contract agreement that provides for reference to arbitration as

well as the relevant sections of the Arbitration and Reconciliation Act 1990 CAP 19 Laws of the Federation are very germaine to our resolution of the issue.

Clause 26 of the agreement, exhibit A provides:-

> "In the event of any dispute not resulting in a settlement. The dispute shall be reserved to and finally settled by arbitration."

Clause 19 of exhibit A has earlier provided thus:-

> "- - - - The laws or Nigeria shall apply to and govern the interpretation, performance and enforcement of the purchase order."

Section 5(1) and (2) of the Arbitration and Reconciliation Act 1990 CAP 19 Laws of the federation applicable to exhibit A provide as follows:-

> "5(1) if any party to an arbitration agreement commences any action in any event with respect to any matter which is the subject of an arbitration agreement, any party to the arbitration agreement may at any time after appearance, and before delivering any pleading or taking any other steps in the processing apply to the court to stay proceedings.
>
> (2) A court to which an application is made under sub- section (1) of this section may, if it is satisfied: (a) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement and (b) that the applicant was at the time when the action was commenced and the other party remains ready and willing to do all things necessary to the proper conduct of the arbitration make an order staying proceedings".

The combined effect of clause 26 of exhibit *A* and the foregoing applicable statutory provision, as held in the various cases authoritatively alluded to by both sides in this appeal, is that a court of law only assumes jurisdiction in the absence of any dispute over a transaction in respect of which an agreement between the parties has provided for reference to arbitration. It is the existence of a dispute or difference in the positions of the parties to such agreement that confers jurisdiction to an arbitration panel. The lower court is very much aware of this position of the law. The appellants had by their motion urged the court to refer the entire matter to arbitration. On the other hand, the respondent by their application asserted that US $837725.00 admitted by the appellants should be discounted from the claim the court is to refer to arbitration. The admitted sum not being in dispute between the parties ceases to be the subject of arbitration. The lower court at page 243 of the record of appeal concluded its ruling as follows:-

> "Since the law is that these cannot be an arbitration on the admitted portion of the claim, this court cannot therefore refer that part of the claim, made upon of US Dollars 837,725.00 to since it does not fall within a part the claim which the panel can arbitrate upon. I shall there by enter judgment in the sum and refer the remainder to arbitration".

Appellants' complaint against the foregoing is that the evidence before the lower court does not support its finding that the sum of US$837,725.00 has ceased to be in dispute having been admitted by the appellants. This contention cannot be treated lightly.

.

The lower court, see pages 237 – 238 of the record, drew from paragraphs 6 and 7 of the counter – affidavit the respondent filed in opposition to the appellant's application for the reference of the entire matter to arbitration. The court held thereat as follows

> " Paragraphs 6 and 7 of the counter - affidavit spells (sic) out that part or the claim - - - that has been admitted ie. Exhibit A 1 – B16."

Without any evaluation of these paragraphs *vis-a-vis* the annextures, the court after a review of the authorities on the issue concluded at page 243 of the record thus:-

> "Since the law is that there cannot be an arbitration on the admitted portion of the claim, this court cannot therefore refer that part of the claim. This court cannot therefore refer that part of the claim, made up of US Dollars 837,725.00 to arbitration since it does not fall within a part of the claim which the panel can arbitrate upon."

The question to answer here is if paragraphs 6 and 7 of the respondent's counter-affidavit and exhibit A1 - B16 annexed thereto warrant the court's inference of admission of the sum of US $837,725.00 out of the plaintiff/respondent's claim by the defendants/ appellants. I think not.

The practice, pursuant to S. 75 of the Evidence Act, has grown that a voluntary acknowledgement of the existence of certain facts which are inconsistent with the party's position in a given dispute is readily accepted as the best evidence of such facts and further proof or same is dispensed with. In Black's Law Dictionary, 6th edition, admission has been defined as a statement by a party or someone identified with him in legal interest, or the existence of a fact which is relevant to the cause of his adversary. An admission is, therefore, a formal waiver or proof which relieves the opposing party from proving the admitted facts and bars the party who made the admission from disputing same. Where made by a party's attorney for the purpose of being used as a substitute for the regular legal evidence

of the facts at trial, the admission is called judicial admission. See *Onyenge v. Ebere* (2004) 13 NWLR (Pt.889) 20 and *Archibong v. Ita* (2004) 2 NWLR (858) 590 SC.

I agree with learned respondent's counsel that given the lower court's decision to discountenance defendants/appellants' counter-affidavit in opposition to respondent's application for judgment, a decision that has not been appealed against, the evidence contained in paragraph 5, 6 and 7 of the affidavit in support of the application for judgment as supported by annextures A 1 – B16 remains unchallenged and uncontroverted and that the lower court must act on such evidence. It is indeed the principle that the decision of a validly constituted court subsists as long as it has not been appealed against and upturned . .See *Umanah v. Attah* (2006) 17 NWLR (Pt.1009) 503 SC.

Learned appellants' counsel is however, also correct in his submission that where the unchallenged and uncontroverted evidence is self-defeating and unacceptable the trial court will be wrong to rely on such unworthy evidence. See *Ogbechie v. Onochie* (1988)1 NWLR (Pt.70) 370 at 379 and *Jalingo v. Nyame* (1992) 3 NWLR (Pt.231)538 at 545.

An examination of paragraphs 5, 6 and 7 of the affidavit in support of respondent's application and annextures A 1 - B 16, which the trial court relied upon to conclude the admission by the appellants of the amount discounted by the court from respondent's total claim shows clearly that such an inference is not untenable. The annextures contain hand written figures and cancellations and nowhere on the face of these documents have any explanation been given to show why, how and by whom the alterations were made. Even at this level it takes the detailed explanation and tabulations made by counsel at pages 8 to 10 of the respondent's brief to enable us appreciate the purport of the annexture and the fact that the alterations were made by Mr. Holcroft. The record of appeal does not contain similar tabulation to suggest that the lower court's conclusion had drawn from that much.

In any event, it is wrong for counsel to proffer evidence as such is now the essence of counsel's statement on the documents which had failed to speak for themselves. In the absence of this explanation it would only mean that the lower court had itself and outside the court perused the documents and drawn its own meaning and conclusions from them. It has long been the principle that the function of a court is to decide between parties on the basis of what the parties themselves demonstrated and had tested in the open court. That duty does not extend, certainly, to the examination of documentary evidence that had not been examined in open court and where such subsequent examination discloses facts that were not either incapable of being noticed or exposed to test in court. A party relying, on documents in proof of his case, therefore, must specifically relate such documents to the parts of the case the documents are being tendered. The court

is not empowered to do so for the party that has neglected or out rightly refused to discharge that burden. The principle has its foundation, this court has held, in the breach of the right to fair hearing for a court to do for a party in the recess of its chambers what the party failed to do in the advancement of its own case in the open court. See *Duriminiya v. COP* (1961) N.N.L.R. 70 at 73 - 74 and *Terab v. Lawan* (1992) 3 NWLR (Pt. 231) 569 at 590.

The lower court's decision that the sum of 871,725.00 dollars the court entered judgment for the respondent because the sum, as averred in paragraphs 5, 6 and 7of the respondent's counter-affidavit and annexture A1 - B16 thereto, is no longer in dispute having been admitted by the appellants, stand in breach of these recounted principles. The paragraphs as supported by the annextures do not, on their own, in the least, suggest any admission by the appellants of the sum under reference. The decision must have been the outcome of the inquiry undertaken by the court and on its own. The basis for the conclusion is not readily ascertainable. The sum continues to be in "dispute" and by clause 26 or exhibit A as well as section 5 of the Arbitration Law CAP 10 Laws of Rivers State, the lower court lacks the jurisdiction of adjudicating on the sum by excluding it from arbitration.

This resolves appellant's 2nd issue for the determination of the appeal. It also determines the appeal. Being meritorious, the appeal is accordingly allowed. The decision of the lower court excepting the sum of 837,725 US Dollars from the respondent's claim referred to arbitration is hereby set - aside. Instead, the entire sum claimed by the respondent which remains in dispute is hereby referred to arbitration compliance with clause 26 of exhibit A, and the law. Appellants are entitled to the cost of the appeal put at N50,000 and hereby ordered against the respondent.

THOMAS JCA: I read in advance, the lead judgment of my learned brother, M. D. Muhammed, JCA, just delivered, and I entirely agree with the reasoning and conclusions reached in the lead judgment that the appeal is meritorious and allowed. In my considered opinion, once there is an Issue of jurisdiction of the trial court, that particular issue ought to be heard and determined before going into other matters if necessary.

In the case of *BASF. Nig . Ltd v. Faith Ent. Ltd* in 41 Nigeria Supreme Court Quarterly Reports 381, particularly at 395, MUNTAKA COOMASSIE, JSC has stated as follows:-

> **"It is pertinent in my view to consider an important issue of jurisdiction raise by the respondent** herein, **This is so because the issue of jurisdiction is so fundamental and being a** threshold **issue, it is imperative** to have **it determined first before proceeding to the 'substantive** matter **since lack of it would deprive this court the power to pronounce on the main issue."**

In the instant matter at the lower court, the present appellant had filed on 18th October, 1999, an application.

I abide I with the orders made in the lead ruling that **parties are to bear their** costs.

AWOTOYE JCA: I have had a privilege of reading in draft of the lead judgment just delivered by my learned brother **M. D. MUHAMMAD JCA.**
I have the following to add.

The plaintiff had instituted an action against the defendant claiming as follows:-

> "WHEREOF the plaintiff claims against the defendants jointly and severally as follows:
>
> (a) The sum of U5$4,733,183.62 (four million, seven hundred and thirty three thousand, one hundred and eight three dollars, sixty-two cents) being sum outstanding by virtue of change of order, extension of contract time and courier telephone charges incurred in the course of executing the standard purchase contract No. 5-100-1410-003 made between the plaintiff and the defendants herein.
>
> (b) Interest on the said sum of US$4,733,183.62 (four million, seven hundred and thirty three thousand, one hundred and eight three dollars, sixty-two cents; at. the rate of 8% per annum from 1st August 1998 until final liquidation."

The claim of the plaintiff arose from an agreement which contained on arbitration disclose in: clause 26 which reads.

> "IN THE EVENT OF ANY DISPUTE BETWEEN PURCHASER AND SUPPLIER ARISING OUT OFTHE PERFORMANCE OR INTERPRETATION OFTHE PURCHASE ORDER, PURCHASER AND SUPPLIER SHALL NEGOTIATE IN GOOD FAITHIN AN ATTEMPT TO REACH A MUTUALLY ACCEPTABLE SETTLEMENT OF SUCH DISCIN THE EVENT SUCH NEGOTITATION IN GOODFAITH DOES NOT RESULT INTO A SETTLEMENT OF THE DISPUTE THE DISPUTESHALL BE REFERRED TO AND FINALLY SETTLED BY ARBITRATION."

Inspite of the above provision the Plaintiff instituted this action in court.

The defendant therefore filed a motion on notice praying for the following order

> "1. An order directing the parties to arbitration as stipulated in - the contract agreement: entered into by the parties.

2. An order staying further proceedings in this suit pending the determination of the arbitration proceedings.

3. Any other (s) as this Honourable court may deem fit to make in this regard."

The above application was heard with the motion for judgment and the court below subsequently gave a ruling as follow in his ruling.

> "Since the law. is that there cannot be an arbitration on the admitted portion of the claim this court cannot therefore refer that part of the claim made up of, US Dollars ₦837,725.00 to arbitration since it does not fall within a part of the claim which the panel an arbitrate upon.
>
> I shall thereby enter judgment in the sum and refer the remainder to arbitration."

It is against the said ruling that the appellant filed notice and grounds of appeal containing 4 grounds of appeal.

Parties later exchanged briefs of argument the appellants formulated two issues far determination as follows:

> "(i) Whether the learned trial judge was right in granting final judgment whilst considering an application an jurisdiction. Distilled from grounds 1 and 2 of the grounds of appeal.
>
> (ii) In the alternative; whether the learned trial judge was right in holding that there was an admission of liability to the tune of US $837,725.00 (Eight hundred and thirty thousand, seven hundred and twenty-five US Dollars by the defendant/appellants. Distilled from grounds 3 of and 4 of the grounds of appeal.

The respondent similarly formulated two issues. The issues formulated by the two parties are essentially the same.

My learned brother **M.D. MUHAMMAD JCA** has exhaustively and beautifully treated issue one as formulated by the parties.

I just want to add a few comments an issue 2, which also has been commendably treated in the leading judgment.

It is trite law that where a plaintiff jumps arbitration and commences an action in a court of law, a defendant is to take steps to stay the proceedings in court before taking any further proceedings apart from entry of formal appearance otherwise

the defendant would be taken to have waived his right to go to arbitration. See *Kurubo v. Zach – Motison (Nig.) Ltd* (1992) 5 NWLR (Pt. 239) 1102, *M.V. Lupex v. N.O.C. S Ltd*. (2003) 15 NWLR (Pt. 843) 469, *Kano State Urban Development Board v. Fanz Construction Co. Ltd* (1990) 4 NWLR (Pt. 142) 1 SC.

The court would stay such proceedings in court if such application is filed. See *Sonnar (Nig.) Ltd v. Nordwind (*1987) 4 NWLR (Pt. 66) 520.

The court below however refused to refer part of the contract for arbitration because of an alleged admission.

I have gone through the entire record of proceedings. I am unable to see the admission referred to by the learned trial judge.

The record of the court is a solemn declaration of what transpired in court. It must speak for the court and the parties in respect of whatever happened in the proceedings. If a document is admitted in court, its content must be demonstrated in open court and the evidence therefrom recorded in the court record to prevent private investigation by the court to the exclusion of one of the parties and resultant breach of right to fair hearing of the said party. See *Owe v. Oshibanjo* **(1965)** 1 All NLR 72, *Habib Bank Nig. Ltd v. Gifts Unique* (2005) All FWLR (Pt. 241) P. 234.

According to Belgore JSC in *Fawehinmi Construction Co. Ltd v. O.A.V*. (1998) 6 NWLR (Pt. 553) 171 at 183.

> "Record of proceedings is the only indication of what took place in the court. It is not like minutes of a meeting. It is always the final reference of events step by step that took place in court."

See also *Yarzabadin & Anor v. Kano* (1961) SCNLR 144, *State v. Aibangbee* (1988) 3 NWLR (Pt. 84) 548 at 577; *Alhaji Animasaun v. UCH* (1996) 10 NWLR (Pt. 476) 65 at 76. This cannot be said about the case. How the learned trial judge arrived at his decision that there was an admission in a case in which the defendants did not file any statement of defence and did not admit in any affidavit filed by them is with due respect very difficult for me to fathom.

Learned counsel for the respondent in his brief did an analysis of exhibit B1 - B16 on page 187-220 of record of proceedings with a view to highlighting the admission of the defendants. I need to state right away that there is no evidence tested in open court to back his analysis. The documents referred to were mere annextures to the supporting affidavit of the plaintiff/applicant. An address of counsel no matter how beautifully and brilliantly drafted cannot be a substitute for evidence. See *Atanze v. Attah* (1999) 3 NWLR (Pt. 596) 647; *Citizens International Bank v. SCAO(Nig.) Ltd* (2006) 18 NWLR (Pt. 1011) 333, *Ishola v. Ajiboye* (1998) I NWLR (Pt.532) 71; *Buhari v. Obasanjo* (2005) 50 WRN 1; *Yoye v. Olubode* (1974) 9

NSCC 409.

I am unable to see any admission to warrant the decision of the trial court not to stay the whole proceedings. The judgment given ought not to have been given. I resolve issue 2 in favour of the appellant. I agree with the reasoning and conclusion of **M. D.** MUHAMAD **JCA** in the lead judgment.

This appeal is allowed. I also abide by the order as to costs made in the lead judgment.

Cases cited in the judgment

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Uzoegwu v. Ifekandu (2001) 17 NWLR (Pt.741) 49 CA
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S. 75 of the Evidence Act,
Section 5 of the Arbitration Law CAP 10 Laws of Rivers State,
Section 5(1) and (2),(2a) of the Arbitration and Reconciliation Act 1990 CAP 19 Laws of the federation

Book of court referred to in the judgment
Black's Law Dictionary, 6th edition

History:

HIGH COURT
High Court of River State (Nchia Division)

COURT OF APPEAL (PORT HARCOURT DIVISION)
M. Dattijo Muhammad, JCA (*Presided and delivered the lead judgment*)
Isifanus Thomas, JCA
Tunde Oyebanji Awotoye, JCA

Counsel:
N. Erema Esq. holding the brief of A.R. George Esq. for the appellant.
Olumide Aju Esq. for the respondent.