IN THE HIGH COURT OF JUSTICE

IN THE BENIN JUDICIAL DIVISION

HOLDEN AT BENIN CITY

BEFORE HIS LORDSHIP, HON.JUSTICE P.A.AKHIHIERO,

ON MONDAY THE

6TH DAY OF JUNE, 2022.

BETWEEN: ***SUIT NO. B/9A/2021***

1. ***AUSTINE OLUMESE***
2. ***MR. UMERI IFEANYI*** } ***APPELLANTS***
3. ***MR. OSARETIN UWUBANMWEN***

AND

THE REGISTERED TRUSTEES OF FORESTORY ROAD SHOP OWNERS ASSOCIATION, BENIN CITY……..RESPONDENT

JUDGMENT

This is an Appeal against the judgment of Magistrate A. P. Saiki, sitting at the Oredo Magisterial District, Benin City, delivered on the 11th day of July 2019, wherein the Learned Trial Magistrate delivered judgment in favour of the Respondent and awarded the sum of N320,000.00 (Three Hundred and Twenty Thousand Naira) to the Respondent.

At the trial court, the Respondent's case as the Claimant was that the 1st Appellant applied for the sum of N200, 000.00 (Two Hundred Thousand Naira) as financial assistance from their association, but defaulted to pay back the agreed sum, before exiting the association. The 2nd and 3rd Appellants were sued because they stood as guarantors to the said 1st Appellant.

Furthermore at the trial court, the Appellants counter-claimed against the Respondent. At the trial, both parties testified, and tendered exhibits, and at the end

the learned trial Magistrate gave judgment in favour of the Respondent, and dismissed the Appellants' counter-claim.

However, the Appellants' case as Defendants at the trial court was that they were previously members of the Forestry Road Shops owners Association where they inter-related among themselves and the association gave financial assistance to needy members.

The 1st Appellant was given the sum of N200,000.00 (Two Hundred Thousand Naira) by the Respondent; expecting to be refunded at an agreed date without interest rate as enshrined in the Constitution of the Association which was admitted as Exhibit "B" at the trial.

Sometime in the month of June, 2016, the association was involved in a major crisis which caused many people to withdraw of membership from the meeting which was accepted by the Respondent. The Appellants alleged that they were surprised when the Respondent brought an action against them to pay the interest rate of money given to the 1st Appellant being guaranteed by the 2nd and 3rd Appellants.

Upon the conclusion of the hearing, the court gave judgment in favour of the Respondent.

Dissatisfied with the judgment of the trial court, the Appellants filed a Notice and Grounds of Appeal on the 8th day of January, 2020.

In accordance with the rules of this Court, the Appellants filed their Brief of Argument which they adopted at the hearing of this Appeal.

In his Brief of Argument, the learned counsel for the Appellants, ***S.U. Eboigbodin Esq.*** formulated five issues for determination as follows:

1. ***Whether the Lower Court has not erred in law by failing to utilize the findings adduce from the evidence of both parties?***
2. ***Whether the Respondent who was not licensed to borrow out money with interest by any concern authority can do so by demanding interest accrued from its members?***
3. ***Whether the Lower Court has not erred in law when it evaluated the evidences of both parties that N175, 000.00 was paid by the 1st Appellant from the N200, 000.00 given to him and later reversed its findings without using same?***
4. ***Whether the Learned Trial Magistrate has not misdirected himself in law when he proceeded to give unjustified awards in favour of the Respondent to the sum total of N320, 000.00 of what the Respondent never asked?***
5. ***Whether the judgment of the Lower Court is not against the weight of evidence adduce at the trial?***

In his arguments on the five issues formulated, learned counsel subsumed the issues into two main issues as follows:

(i)Whether the Lower Court has not erred in law and misdirected itself when it could not use the facts evaluated in its findings to arrive in judgment in this case?

(ii)Whether the learned trial Magistrate has not misdirected himself in law when he proceeded to give unjustified awards of N320, 000.00 of what the Respondent never asked in its claim?

ARGUMENTS ON ISSUE I:

Whether the Lower Court has not erred in law and misdirected itself when it could not use the facts evaluated in its findings to arrive in judgment in this case?

Arguing this issue, learned counsel submitted that the lower court erred in law and misdirected itself when it could not use the finding of facts evaluated in its findings to reach its judgment.

He said that the Court held that the Appellants should pay the sum of N200, 000.00 given to the 1st Appellant by the Respondent which had earlier been admitted in evidence by both parties that 1st Appellant had paid N175, 000.00 out of N200, 000.00 borrowed out to him. He referred the Court to page 12 line 17 – 18 of the records for the PW1 (Respondent's witness) evidence of admission; also the testimony of the 1st Appellant (1st Defendant) at page 36 line 14 – 15 of the Records; and the lower court's evaluation of evidence of its findings at page 115 page 14 – 17 of the Records.

He submitted that the issue of the sum of N175, 000.00 paid from the total of N200, 000.00 by the 1st Appellant was never in dispute, both parties having admitted same. He wondered why the court having made a finding that the sum of N175, 000.00 was paid still decided that the said money be paid again? He posited that this was an oversight which is fundamental to the Appellants' case.

Counsel submitted that the evidence of both parties admitting the amount (N175, 000.00) paid out of the principal sum (N200, 000.00) are facts admitted which need not to be proved. He said that they are also facts or evidence not challenged in the testimony at the trial and he cited the following the authorities on the point: ***AGBAJE V. IBRU SEA FOODS LTD (1972) 5 SC 50, FRANK V. ABDU (2004) 5 FR PAGE 110 at 117 ratio 20; WAEC V. OBISESAN (1998) 4 NWLR Pt 547; Section 123 of the Evidence Act 2011; BUSARI V. OSENI (1992) NWLR Pt. 237, 55 and BEDDING HOLDINGS LTD V. NEC (1992) 8 NWLR Pt. 260 at page 428. See also the case of AMAYO V. ERINMINGBOVO (2006) 26 NSCQR page 1455 at 1457 ratio 4.***

He posited that in spite of the admission, the Court went further to hold that there was no such refund of part of the welfare package made by the 1st Appellant. He submitted that such evaluation of evidence culminating in the Court's finding was erroneous.

Addressing the aspect of administrative charges and/or interest rates, learned counsel submitted that the Lower Court cannot be approbating and reprobating at the same time in its judgment. He said that the Court agreed with the submission of the Appellant Counsel that since the Respondent was not a registered/licensed money lender who is permitted to charge interest rate on money borrowed out, that the Respondent cannot charge any interest and he referred to page 117 line 26 – 27 and page 118 lines 1 – 14 of the records. He submitted that the award of the percentage of the interest rate by the Court is a total error and misleading taking into consideration of the facts that the transaction entered by the parties was not for the purpose of lending money with interest rate which was in nowhere written in the Exhibits "A" and "B" of the Association.

He posited that the PW-1 admitted under cross examination that at the time the money was given to the 1st Appellant, the Association had not yet implemented the interest charge on loans but some months later they started to implement it. He maintained that the N200, 000.00 was given to the 1st Appellant without interest at the time he applied for it.

He contended that the subsequent implementation of interest rate cannot affect the 1st Appellant who had earlier collected his money because it cannot be a

retroactive law binding the members. He maintained that the effect of this illegal transaction is that anything emanating from it is a nullity and he cited the case of ***Ajayi V. Total Nigeria Plc (2013) Vol. 45 LRCN page 1 at 5 ratio 3***.

ARGUMENT ON ISSUE 2

Whether the learned trial Magistrate has not misdirected himself in law when he proceeded to give unjustified awards of N320, 000.00 of what the Respondent never asked in its claim?

Arguing this second issue, learned counsel submitted that the learned trial Magistrate misdirected himself in law when he proceeded to give unjustified awards of N320, 000.00 of what the Respondent never claimed.

He submitted that the judgment of the lower court appeared to have been influenced and biased to a large extent that the court did not take the testimonies of the Appellants and their witnesses into consideration; including the counter claim of the Appellants which the court did not properly evaluate in its findings before arriving at a conclusion in its judgment. He said that the Appellants and their witnesses testified in this regard to the fact that the money given to the 1st Appellant did not attract interest charges which was also admitted by the PW1 who was the witness to the Respondent. He referred to page 13 lines 5-8; and page 13 lines 17 – 20 of the Records which the testimonies of both parties corroborated and admitted without being challenged and controverted. He reiterated that all these are material facts admitted which need no further proof. Furthermore, that it is evidence which directly affects the matter in contention and is neither attacked nor successfully discredited that is good and credible and he cited the case of ***OMOREGBE V. LAWANI (1980) 3-4 SC 108.***

Counsel also submitted any piece of evidence that is relevant to the issue joined and was neither attacked nor discredited should be relied upon by the Court and he cited the case of ***AMAYO V. ERINMWINGBOVE (SUPRA).*** He also queried the award of Solicitor's fee of N100, 000.00 and general damages of N20,000.00 against the Appellants in a case which was not proper proved before the court and posited that for a party to succeed the relief must be specifically proved.

In conclusion, he urged the Court to set aside the judgment of the lower court and order a possible review of the case or re-trial.

In his Respondent's Brief of Argument, the learned counsel for the Respondent, ***Pedro Ihimekpen Esq.*** raised a Preliminary Objection and formulated a sole issue for determination which he argued thereafter.

PRELIMINARY OBJECTION

Arguing his preliminary objection, learned counsel posited that the Appellants formulated a total of six issues which they distilled from the four grounds of appeal. He said that in paragraph 5.0, there is a lone issue formulated before paragraph 6.0 where, supposedly, the five main issues for determination of this court are stated. However, he said that in paragraphs 7.0 and 8.0, the appellants appear to have considered only issues one and two stated in paragraph 6.1 and 6.2.

He posited that it is difficult to appreciate the two issues upon which legal arguments were presented in paragraphs 7.0 and 8.0 as the appellants refused to state on which ground(s) of appeal each of the issues were formulated.

Arguing further, learned counsel maintained that it is strange that the appellants, after stating their five issues for determination, went ahead and formulated additional two issues. He said that while it is desirable to formulate an issue from several grounds of appeal, it is improper to formulate more than one issue from a single ground of appeal. See ***OYELAKUN VS. GOV. OSUN STATE (2002), VOL. 15 W.R.N. 181 @187 lines 5 – 20;*** *and* ***SOMACO ENT. LTD. VS. NEW NIGERIA BANK PLC (2006) ALL F.W.L.R. (Pt. 293) 193 @ 212 paras. D – F.***

In the same vein, he said that in paragraph 6.5 the Appellants sought the leave of the court to subsume all the issues into two issues for a combined determination. He therefore urged the Court to strike out ground one in the notice of appeal as no competent issue has been formulated from it. He maintained that the two issues that are stated in paragraph 6.5 (a) and (b) have no bearing with ground one, and therefore liable to be struck out, as it is deemed abandoned and he cited the case of ***MHYA V MSHELIZH (2004) VOL. 19 WRN 128 @ 142 Lines 15 -25.***

Counsel submitted that the law is settled that where a ground of appeal alleges an error or misdirection in law, as in grounds 2 and 3 above, the appellants must

quote the passage where it occurs for it to be valid. He referred to the case of ***BABBA V TAFASHIYA (1999) 5 N.W.L.R. (Pt. 603) 468 @ 474*** where the appellate court, ***per Amaizu JCA*** held thus: '***for a ground of appeal which alleges an error or misdirection in law to be valid, it must quote the passages in the judgment where the misdirection or error in law is alleged to have occurred: specify the nature of error in law or misdirection: and give full and substantial particulars of the alleged error or misdirection'***. He submitted that the two grounds are vague and ought to be struck out.

Learned counsel submitted that in the light of the foregoing the entire appeal is incompetent and ought to be dismissed and he urged the Court to uphold the preliminary objection.

Learned counsel posited that in the event that the Court overrules his preliminary objection, he formulated a sole issue for determination as follows: ***Whether the learned trial magistrate was right in his findings that the Claimant/Respondent was entitled to the reliefs claimed. (Couched from grounds 2 and 3)***

Arguing the sole issue for determination, learned counsel reproduced the claim of the respondent before the lower court which has the following reliefs:

- ***The sum of N227, 000.00 (Two Hundred and Twenty Seven Thousand Naira) being the balance of the unpaid Financial assistance/ Administrative Charges granted the 1st Defendant with the 2nd and 3rd Defendants standing inn as guarantors.***
- ***The sum of N8, 000.00 per month from February 2018, till the loan is liquidated.***
- ***The sum of N100, 000.00 (One Hundred Thousand Naira) being out of pocket expenses, covering solicitor's fee and sundry expenses.***
- ***The sum of N100, 000.00 (One Hundred Thousand Naira) being general damages.***

He said that at the end of the trial, the trial magistrate found that the first arm of the relief was proved based on exhibit C2, signed by the 1st appellant himself,

excluding the administrative charge of N8, 000.00 from February 2018 (when the claim was filed) till when judgment is delivered which the Court refused.

He said that the third arm was granted as prayed in the light of the evidence presented, while N20, 000.00 was granted as general damage as against the N100, 000.00 prayed for. He said that since there is no cross appeal he submitted that the trial magistrate made a proper finding of all the issues presented for determination before granting the respondent's reliefs, while striking out the claim on the administrative charges.

He submitted that the defence of the appellants at the lower court was that the amount shown on exhibit C2 was given to him (1st appellant) ***as helping hand*** and that he has paid back. (See lines 17 to 19 of the record). That his evidence that it is the respondent that is indebted to them. He said that their counter-claim and evidence on oath indicate that he is not in any way indebted to the respondent. That at page 34, lines 11 - 12, the 1st Appellant stated thus: "***I am not owing the plaintiff but it is the plaintiff that is owing me in respect of my savings***." Then at line 14 – 15, he stated: "***I have paid the sum of N200, 000.00 to the plaintiff through Diamond Bank and submitted the teller to the plaintiff."*** However, he posited that no member of the respondent could be cited or mentioned as the person to whom the tellers were given nor was the bank statement tendered to verify such payments made by the 1st Appellant, whether by way of instalments or in lump-sum. He said that it was on the basis of this that the trial court found that the 1st appellant did not prove the payment of the sum of N200,000.00 collected, as shown by exhibit C2.

Furthermore, counsel posited that under cross examination the respondent was able to establish that apart from the financial package that led to this action in court, the 1st appellant also collected another financial package which he denied collecting. He said that exhibit J1 was tendered to disprove him. He said that at page 35, lines 7 – 13, the 1st appellant was forced to agree with the suggestions of the counsel to the respondent that he made payments of a certain amount, on certain dates, thus, demonstrating before the trial court that administrative charges and default payments, are part and parcel of the terms associated with the financial packages of the association. He said that the essence of cross examination is to test the veracity of the witness, his accuracy, his credibility, to discover who he is and his position in

life, as well as shake his credit by injuring his character. ***See Section 223 (a), (b), and (c)*** as well as ***Section 232 of the Evidence Act 2011***.

He said that it is strange that the 1st appellant who could not give any credible evidence on how he liquidated the facility he collected by virtue of exhibit C2, is laying claim to evidence elicited during cross examination to discredit him. He posited that whatever amount that was elicited from the 1st appellant relates to exhibit J1, the essence being to establish that administrative charges and default payments that he strenuously denied, was very much in vogue in the association. He said that it should not be confused with the one to which exhibit C2 relates. In any event, he posited that the amounts highlighted at page 35, does not in any way tally with the amount claimed before the lower court. That the appellants have deliberately decided to confuse the two financial packages.

He submitted that it is settled law that an appellant cannot set up a particular case at the trial court, and put up a totally different one on appeal. See ***MUSA V. KADIRI (2006) ALL F.W.L.R. (Pt. 295) 758 @ 760 ratio 4***., and ***GOV. AKWA IBOM V. UMAH (2002) 22 W. R. N. 148 @ 160 ratio 10.*** He said that at the lower court, the appellants' position was that they have paid the money and that it is the respondent that is indebted to them, hence a counter-claim was filed. He said that there was no application for a set-off, if indeed there was any payment made in respect of exhibit C2. He said that as a general rule, every party to a proceeding has a duty to adduce before the court, evidence that would support his case or his defence. He relied on the case of ***URIMONIYA V. C. O. P. (1961) N.N.L.R. 70***, which was referred to in the case of ***ENEMUO V. DIM (2002)25 W. R. N. 108*** where the court held thus:

"***A trial is the public demonstration before court of the cases of the contending parties, the demonstration is by assertion and evidence, and the testing is by cross-examination and argument. The function of the court is to decide between the parties on the basis of what has been so demonstrated and tested.***

It is not part of his duty to do cloistered justice by making inquiry into the case outside the court not even by examination of document which were in evidence, when the documents had not been brought out and exposed to test in court, or were not things that at least must have been noticed in court''

Counsel submitted that there was no hard evidence revolving round the N175, 000.00 at the lower court which the appellants dwelt extensively upon at page 7 of their brief. He said that it is in fact coming up for the first time on appeal, and without the leave of this court. He said that the trial court never made any finding on this and as such, it is a new issue and to be competent, the appellants must seek the leave of this Court. Moreover, he posited that this said issue is not referable to any of the grounds of appeal and he referred to the case of ***FARDOUN VS. M.B.C. INT'L BANK LTD. (2006) ALL F.W.L.R. (Pt. 294) 1130 @ 1153 para e – f***, where the appellate court noted thus:

"since grounds of appeal must draw a point considered and determined in the judgment appealed against, an appellant would not be allowed except with leave to raise on appeal a question which was not raised, tried and considered by the lower court which decision is being appealed against."

Learned counsel maintained that there is nowhere in the transmitted record where the trial court made any finding of N175, 000.00, nor N320, 000.00 (to which issue two of the appellants relates, see para. 8.0). He said that as a generally rule, appeals are supposed to be a challenge to specific findings of the trial court and the appellants cannot be allowed to confuse the incidences relating to exhibits C2 and J1 by doing some addition and subtraction, when same was never demonstrated in the open court at the trial.

On relief one stated above, counsel posited that the learned trial magistrate at pages 118-119, found that there is no evidence on record that the appellants has in fact made the said payment vide Diamond Bank. See lines 24 – 28. He said that despite the deliberate attempt at stating half-truth and what never took place at the lower court as evidenced in paragraphs 7.0 to 7.2, of the appellants brief, there is nowhere such evidence flowed from the 1st appellant, that he has in fact paid the stated amount. He submitted that the trial magistrate was right in making the finding that the appellants have not paid the amount stated in exhibit C2

In proof of the third relief, counsel posited that the respondent tendered at the lower court exhibit E, showing the out of pocket expenses incurred owing to the appellants default in meeting up the contractual obligations in line with exhibit C2. He said that the trial court found at page 119 lines 24 - 26 as follows: ***The position***

of the law is that once documentary evidence supports oral evidence, such oral evidence become more credible. The reason is premised on the fact and the law that documentary evidence serves as a hanger from which to access oral testimony.

He said that the appellants have not challenged this specific finding by reference to any evidence that was presented at the lower court, but overlooked by the learned trial Magistrate, to persuade this court otherwise. He submitted that the trial magistrate was on sound legal footing when he granted this ambit of the respondent's claim and he cited the case of ***S. P. D. C. V. OKONEDO (2007) ALL F.W.L.R. (368) 1104 @ 1111ratio 17***.

He said that the relief was for N100, 000.00 as general damages. He referred to the lower court's observation as follows: ***"general damages are losses that flow naturally from the adversary and is generally presumed by law and as such it needs not be pleaded or proved. It is usually awarded by a trial court to assuage a loss suffered by act of the adversary"***. The court then went ahead and awarded N20, 000.00 to the respondent.

He said that the appellants have not advanced any reason why the court should interfere with the award. He said that N20, 00.00 cannot be said to be excessive in the circumstances of this case. He submitted that an appellate court cannot interfere with an award made by the trial court merely because he would have awarded a much higher or lower award. See ***U. B. A. V. CHIMAEZE (2007) ALL F. W. L. R. (Pt. 364) @ 309 ratio 9, JOSEPH V. ABUBAKAR (2001) 48 W. R. N. 97 @ 103 ratio 5 and OLOGUNDE V. CARNAUDMETAL PLC. (2002) 49 W. R. N. 76 @ 85 ratio 11.***

In conclusion, he urged the Court to uphold the judgment of the lower court and dismiss this appeal.

Upon receipt of the Respondent's Brief of Argument, the Appellants filed a Reply Brief. In their Reply Brief, the Appellant's counsel responded to the Preliminary Objection raised in the Respondent's Brief. Responding, learned counsel submitted that it is trite law that the Appellants are bound to give a summary of the details of the case at the lower court to enable the appellate court determine the proper issues in controversy. He said that this is what he tried to do in his Appellant Brief. He said that he never deviated from the grounds of appeal.

Secondly, he submitted that the issues raised in paragraphs 3 and 4 of the Respondent's Brief of argument are baseless. He said that it is trite law that documents speak for themselves and the alleged errors in controversy has been quoted by the Appellants at pages 8 and 9 of their brief particularly at paragraph 7.1 – 8.0. He therefore urged the Court to overrule the preliminary objection.

I have carefully gone through the evidence adduced at the trial court, the judgment of the court, the Grounds of Appeal and the Briefs of Argument of the learned counsel for the parties.

Before I determine the issues for determination in this appeal, it is expedient that I first examine and rule on the Preliminary Objection raised by the learned counsel for the Respondent.

From the records of the Court, the Respondent's Preliminary Objection was captured in the brief and argued before the sole issue which he formulated. It is pertinent to observe that unlike the rules of the Court of Appeal and the Supreme Court, the ***Edo State High Court (Civil Procedure) Rules, 2018*** does not make specific provisions on the mode of raising a preliminary objection to an appeal.

In the absence of any specific provisions, there is no harm if the arguments are incorporated in the Respondent's Brief of Argument as was done in the instant case, but it is more appropriate to file a Notice of Preliminary Objection stating the specific grounds of objection to enable the Appellants respond to the specific objections.

In the present case, there are no specific grounds for the objection in the Respondents' brief where the objection was argued. The Respondent's counsel simply articulated his arguments on the objection which was mainly on the alleged proliferation of issues by the Appellants' counsel and the challenge that some of the issues formulated and the arguments based on them are not covered by any ground of appeal.

It is settled law that a preliminary objection is only raised to the hearing of the appeal, and not to a few grounds of appeal. The purport of a preliminary objection is the termination or truncation of the appeal in limine. A Preliminary Objection should only be filed against the hearing of an appeal and not against one or more

grounds of appeal when there are other grounds to sustain the appeal. In such a situation, a preliminary objection is not the appropriate procedure to deploy against defective grounds of appeal when there are other grounds, not defective, which can sustain the hearing of the appeal. See the case of ***ADEJUMO & ORS v. OLUDAYO OLAWAIYE (2014) 12 NWLR (pt. 1421) 252 (SC); (2014) LPELR -22997 (SC); and BASHORUN MAJEED BOSUN AJUWON & ORS v. GOVERNOR OF OYO STATE & ORS (2021) LPELR-55339(SC).***

Furthermore, a preliminary objection is intended to terminate an appeal at the outset and not merely to invalidate some issues for determination. The objection on proliferation of issues can be determined in the main appeal. The preliminary objection of the Respondents if upheld cannot terminate this appeal ***ab initio.*** The preliminary objection is therefore incompetent and should be struck out. See ***Mohammed v. I.G.P. & Ors. (2019)4 NWLR (pt. 1663) 492 at 507. IKOI IKPI ITAM v. IKPI OKOI ITAM & ORS (2021) LPELR-54121(CA).***

Sequel to the foregoing, the Preliminary Objection is accordingly overruled. I will proceed to determine the main appeal forthwith.

For the avoidance of doubts, the Appellants filed four Grounds of Appeal. Bereft of their particulars, the grounds are as follows:

GROUND 1:
The learned Magistrate erred in law when he held that the total financial package of the N200,000 given to the 1st Defendant/Appellant by the Claimant/Respondent which was guaranteed by the 2nd and 3rd Defendants/Appellants was unpaid without taking regards (sic) to the evidence before the court.

GROUND TWO
The learned trial Magistrate misdirected himself in law when he proceeded to give unjustified award in favour of the Claimant/Respondent on the judgment in the sum of N320, 000

GROUND THREE
The learned trial Magistrate misdirected himself in law when he proceeded to enter judgment in favour of the Claimant/Respondent contrary to his evaluation of evidence.

GROUND FOUR

The judgment is against the weight of the evidence adduced at the trial.

From the four grounds the Appellant formulated five issues for determination as follows:

1. ***Whether the Lower Court has not erred in law by failing to utilize the findings adduce from the evidence of both parties?***
2. ***Whether the Respondent who was not licensed to borrow out money with interest by any concern authority can do so by demanding interest accrued from its members?***
3. ***Whether the Lower Court has not erred in law when it evaluated the evidences of both parties that N175, 000.00 was paid by the 1st Appellant from the N200, 000.00 given to him and later reverse its findings without using same?***
4. ***Whether the Learned Trial Magistrate has not misdirected himself in law when he proceeded to give unjustified awards in favour of the Respondent to the sum total of N320, 000.00 of what the Respondent never asked?***
5. ***Whether the judgment of the Lower Court is not against the weight of evidence adduce at the trial?***

However, in his arguments on the five issues formulated, learned counsel thereafter condensed the issues into two main issues as follows:

(i)Whether the Lower Court has not erred in law and misdirected itself when it could not use the facts evaluated in its findings to arrive in judgment in this case?

(ii)Whether the learned trial Magistrate has not misdirected himself in law when he proceeded to give unjustified awards of N320, 000.00 of what the Respondent never asked in its claim?

There is a serious dispute over the issues formulated by the learned counsel for the Appellant in this appeal. The Respondent has seriously contended that the five issues formulated amounts to a proliferation of issues which is not allowed. Again, the Respondent has contended that some of the issues argued are not covered by any ground of appeal.

There are established principles that govern the formulation of issues for determination in an appeal. At the core is that issues distilled for determination in an appeal must flow from the grounds of appeal. An issue formulated for determination that does not relate to or arise from any of the grounds of appeal is not competent

and ought to be disregarded; ***Oyegun v Nzeribe (2010) 16 NWLR (Pt.1220) 568 S.C.; Kalu v Odili (1992) 6 SCNJ 76; Oje v Babalola (1991) 5 S.C. 128.***

Indeed, a Court is without the vires to consider for determination an issue that does not relate to or flow from a ground of appeal. Furthermore, issues for determination reduce the grounds of appeal from which they are distilled into compact formulations; ***Sanusi v. Ayoola (1992) 11/12 SCNJ 142***. Thus, a number of grounds could, where appropriate, be formulated into a single issue running through them. There need not be a separate issue formulated for each ground of appeal. But it is patently undesirable to split the issue in a ground of appeal; ***per Karibi Whyte, JSC in Labiyi v Anretiola (1992) LPELR-1730 (SC).*** Therefore, formulating issues for determination in excess of the grounds of appeal or formulating more than one issue from a single ground of appeal is not in line with the principles governing the formulation of issues for determination in an appeal. It amounts to proliferation of issues, which is not acceptable; ***Nwankwo v Yar'Adua (2010) 12 NWLR (Pt.1209) 518 S.C.; Okwuagbala v Ikwueme (2010) 19 NWLR (PT 1226) 54 S.C; EXECUTIVE GOVERNOR, NASARAWA STATE & ANOR V. UKPO (2017) LPELR-42445(CA) (PP. 6-7 PARAS. A).***

On the complaint that some of the Appellants' issues do not arise from any of the grounds of appeal, I observed that upon a juxtaposition of the grounds of appeal with the initial five issues formulated by the Appellant, issues number 2 and 3, relating to the issue of license to borrow out money with interest and finding in respect of the payment of the sum of N175, 000.00 by the 1st Appellant from the N200, 000.00 given to him are clearly not supported by any ground of appeal.

It is axiomatic that an issue for determination which is not supported by any ground of appeal is incompetent. In the case of ***Baridam v State (1994) 1 NWLR (Pt. 320) 250 Iguh J.S.C.*** bluntly made the point that: ***"It is trite law that an appellate Court can only hear and decide on issues raised in the grounds of appeal filed before it and that an issue which is not covered by the grounds of appeal must be struck out as incompetent."***

Conversely, where any ground of appeal is not reflected in the issues formulated by the parties, the ground of appeal is deemed to have been abandoned See ***Odutola v Kayode (1994) 2 NWLR (Pt. 324) 1 at 20.***

Sequel to the foregoing, issues number 2 and 3, relating to the issue of license to borrow out money with interest and the finding in respect of the payment of the sum of N175, 000.00 by the 1st Appellant which are not supported by any ground of appeal, are incompetent and they are struck out forthwith.

Incidentally, the two issues which have been struck out were not reflected in the condensed two issues identified above which the Appellant eventually argued in this appeal.

Furthermore, on the complaint on the alleged proliferation of issues, I am of the view that since the Appellant eventually condensed his issues into the two issues which he argued, he tactically avoided any proliferation of issues.

On the part of the Respondent, as earlier stated, they formulated and argued a sole issue for determination as follows:

"Whether the learned trial magistrate was right in his findings that the Claimant/Respondent was entitled to the reliefs claimed."

Upon a careful examination of the issues formulated by both counsel, I am of the view that the two issues argued by the Appellants and the Respondent's sole issue are quite germane to the just determination of this appeal.

Consequently, I will adopt the three issues, reframe them and compress them into two issues as follows:

1) ***Whether the learned trial Magistrate properly evaluated the evidence before making its findings in this case?***
2) ***Whether the learned trial Magistrate was right in his findings that the Claimant/Respondent was entitled to the reliefs claimed?***

I will proceed to resolve the two issues seriatim.

ISSUE 1:

Whether the learned trial Magistrate properly evaluated the evidence before making its findings in this case?

It is apparent that the determination of this appeal is largely predicated on the evaluation of evidence. It is an established principle of law that evaluation of

evidence is primarily the function of a trial Court. It is only where and when it fails to evaluate such evidence properly or at all that an appellate Court can intervene and re-evaluate such evidence. See the case of ***DIAMOND BANK V. OKPALA (2016) LPELR-41573(CA) (PP. 7-8 PARAS. F).***

In the case of ***FALANA & ORS V. ADEDEJI & ORS (2020) LPELR-50162(CA) (PP. 31-32 PARAS. C)***, the Court of Appeal exposited that the evaluation of evidence comes in two forms:

(a) Findings of fact based on the credibility of witnesses; and

(b) Findings based on evaluation of evidence.

In (a) they posited that an appellate Court should be slow to differ from the trial judge because it was he that saw and heard the witnesses, he watched their demeanour and so his conclusion must be accorded some respect.

But in respect of (b), they maintained that an appellate Court is in a good position as the trial Court to evaluate the evidence. They posited that in both (a) & (b), the conclusion of the trial judge should be accorded much weight except if found to be perverse. According to them, trial Courts receive evidence, which is perception. It is then the duty of the Court to weigh the evidence in the context of the surrounding circumstances of the case, which is evaluation. They said that a finding of fact involves both perception and evaluation.

In the case of ***OKE V. NWIZI (2013) LPELR-21252(CA) (PP. 67-69 PARAS. C),*** the Court of Appeal elucidated more on evaluation of evidence when they exposited thus: ***"An evaluation goes beyond restating the evidence led by each side. It involves an appraisal, assessment or analysis of the evidence on each issue determined in the case. An evaluation must demonstrate the view of the Court on the probative value of each evidence and the preponderance of evidence on each issue tried in the case."***

Again in the case of ***GILSOD ASSOCIATES LTD V. ALGON (2011) LPELR-4197(CA) (PP. 54-55 PARAS. C),*** the Court exposited thus: ***"It should be noted that there is a world of difference between a summary of evidence, known as review of evidence by a trial Court, and the evaluation or assessment of such evidence for the purpose of ascribing value to it. A summary of evidence simply***

means what it says, i.e. restating the oral testimony of witnesses in brief or shortened form or setting out the material points or effect of the evidence without repeating every words used by the witnesses. It is merely a condensation, abridged or concise restatement of the testimony of a witness by a court in writing or considering its judgment in a case. A summary of evidence represents a court's review of the key or vital points in the oral evidence of a witness on material facts in issue in the case."

Applying the foregoing principles to the instant case, I observed that the trial court embarked on a comprehensive review of the evidence before him. He carried out some evaluation of the evidence and made salient findings of fact. At this stage I intend to carefully examine the evaluation of the evidence carried out by the trial court together with the salient finding of facts to ascertain whether they were in order.

It is pertinent to refer to the extant claim of the Respondent at the trial court. For the avoidance of doubt, the Respondent's Claims at the lower court were as follows:

a) ***The sum of N227, 000.00 (Two Hundred and Twenty Seven Thousand Naira) being the balance of the unpaid Financial assistance/ Administrative Charges granted the 1st Defendant with the 2nd and 3rd Defendants standing inn as guarantors;***
b) ***The sum of N8, 000.00 per month from February 2018, till the loan is liquidated;***
c) ***The sum of N100, 000.00 (One Hundred Thousand Naira) being out of pocket expenses, covering solicitor's fee and sundry expenses;***
d) ***The sum of N100, 000.00 (One Hundred Thousand Naira) being general damages.***

It is instructive that at page 10 of the judgment before the trial Magistrate embarked on any evaluation of the evidence, he made some specific finding of facts enumerated as items number (1) to (7). In item number (4) the court made a finding that: ***"1st Defendant has paid the sum of N175, 000.00 to the association."***

But quite curiously, still on the payment of the said sum of N175, 000.00 to the association, at page 13 of the judgment, the trial court made a different finding when it stated thus: ***"In this case, the 1st Defendant told the court under cross***

examination that he has paid the sum of N175, 000.00 vide Diamond Bank which teller he gave to the claimant. There is no documentary evidence on record that supports the above stated fact as stated by the 1st Defendant….in the circumstance, I hold that the claimant is entitled to the sum of N200, 000.00 given to the 1st Defendant as financial assistance package."

In this appeal, the learned counsel for the Appellants has seriously challenged the trial court's final finding that the Appellants did not prove that the 1st Appellant paid the sum of N175, 000.00 to the Respondent. He contended that the issue of the sum of N175, 000.00 paid from the total of N200, 000.00 by the 1st Appellant was never in dispute, that both parties admitted that fact. That the court having made a finding that the sum of N175, 000.00 was paid cannot turn around to hold that the money was not paid.

The issue now is whether the trial court was right when it made a final finding of fact that the Appellants did not prove that the 1st Appellant paid the sum of N175, 000.00 to the Respondent. This invariably raises the issue of whether this Court can re-evaluate the evidence adduced at the trial in this circumstance.

It is settled law that an Appellate Court can re-evaluate or evaluate the evidence and come to a decision that is correct and fair to the parties when the evaluation of the trial Court is not specific, contradictory or inconsistent. See the following decisions: ***AFOLABI v. W.S.W. LTD (2012) 17 NWLR (PT.1329) 286 AT 300 PARAS F; HENSHAW v. EFFANGA (2009) 11 NWLR (PT.1151) 65 AT 89 PARAS C-H; 90 PARAS A.B; and RICH FLOUR MILLS (W.A.) LTD V. UNITY BANK PLC (2015) LPELR-40896(CA) (PP. 20 PARAS. B)***.

Furthermore, the proper steps for an appellate Court to take where the lower Court has failed to properly evaluate the evidence led by parties at the trial is either to order a retrial or carry out the evaluation of the evidence available on the records itself, if the question of credibility of witnesses would not arise. See ***Orianwo Vs. Okene (2002) 14 NWLR (pt 786) 156, Wachukwu Vs. Owunwanne supra, Ovunwo Vs. Woko (2011) 17 NWLR (pt 1277) 522.***

Thus, where the credibility of a witness is not on point, a Court sitting on appeal can evaluate such evidence. Where the conclusion is arrived at without any real, controversy, such as in the case of documentary evidence, or where there is oral

evidence which involves merely an admission by the adversary, or there is an unchallenged piece of evidence, an appellate Court should consider itself to be in as good a position as the trial Court, in so far as the evaluation of such evidence is concerned. See: ***Ebba Vs. Ogodo (1984) 1 SCNLR 372; Ogundepo Vs. Olumesan (2011) 18 NWLR (pt 1278) 54; and RUDMAN V. OLUDE STORES LTD (2013) LPELR-22627(CA) (PP. 27-28 PARAS. E-E).***

In the instant case, upon a careful examination of the evidence, it is apparent that from the outset, the Respondent proceeded against the 1st Appellant and his guarantors on the understanding that they were suing them for the balance of the unpaid financial assistance given to the 1st Appellant.

For the avoidance of doubt the first part of the Respondent's claim is stated thus:

"(a) The sum of N227, 000.00 (Two Hundred and Twenty Seven Thousand Naira) being the balance of the unpaid Financial assistance/ Administrative Charges granted the 1st Defendant with the 2nd and 3rd Defendants standing inn as guarantors."(Underlining, supplied)

From the wordings of the claim above, it is clear that the 1st Appellant had made some payments while some amount was alleged to be outstanding for him to balance the payment.

Incidentally, the tenor of the evidence at the trial followed the same assumption that the 1st Appellant had made some payments. From the available evidence, both parties actually admitted that the 1st Appellant had paid N175, 000.00 out of N200, 000.00 borrowed to him. At page 12 of the records one David Osita who testified for the Respondent as PW1 stated *inter alia* as follows:

"According to Exhibit 'C2', he was supposed to be paying the sum of N24, 660.00 monthly for 11 months and pay N24, 740 on the twelfth month. In this case, the 1st Defendant paid N25, 000.00 monthly for 7 months after which he stopped paying."

The evidence of the Respondent's P.W 1 reproduced above was a clear admission that the 1st Appellant had paid the sum of N175, 000.00 to the Respondent as part payment of the loan.

Moreover at page 36 of the Records in his the testimony, the 1st Appellant himself also confirmed the fact that he paid the sum of N175, 000.00 to the Respondent.

It is a trite principle of the law of evidence, that facts admitted need not be proved. See Section 123 of the Evidence Act 2011. See also ***DR. HENRY EFFIONG BASSEY v. ATTORNEY-GENERAL, AKWA IBOM STATE & ORS (2016) LPELR-41244(CA); and MOZIE V. MBAMAU (2006) 15 NWLR (1003) 466, 493; ATTORNEY-GENERAL OF ABIA STATE v. PHOENIX ENVIRONMENTAL SERVICES NIGERIA LIMITED & ANOR (2015) LPELR-25702(CA).***

In the face of the incontrovertible admission by both parties that the 1st Appellant had made a part payment of the financial support given to him, it is difficult for me to comprehend how the trial court evaluated the entire evidence to reach the conclusion that the 1st Appellant was still owing the total sum of N200, 000.00 because he did not prove that he had repaid the sum of N175, 000.00.

As earlier stated in this judgment, where there is oral evidence which involves an admission by the adversary, or there is an unchallenged piece of evidence, an appellate Court should consider itself to be in as good a position as the trial Court, in the evaluation of the evidence. See: ***Ebba Vs. Ogodo (1984) 1 SCNLR 372; Ogundepo Vs. Olumesan (2011) 18 NWLR (pt 1278) 54; and RUDMAN V. OLUDE STORES LTD (2013) LPELR-22627(CA) (PP. 27-28 PARAS. E-E).***

Thus the proper step for me to take at this stage is for me to re-evaluate the evidence to determine the amount outstanding from the sum of N200, 000.00 which was advanced to the 1st Appellant after deducting the sum of N175, 000.00 already repaid by the 1st Appellant. I am not unmindful of the fact that the Respondent is claiming the sum of N227, 000.00 (Two Hundred and Twenty Seven Thousand Naira) as the balance of the unpaid Financial assistance/ Administrative Charges granted to the 1st Appellant.

It is pertinent to note that the trial court made a salient finding at page 12 of the said judgment, that there was no evidence of administrative charges on Exhibit 'C2'. The court held thus: ***"A cursory look at Exhibit 'C2', it is clear that the Association gave the 1st Defendant the sum of N200, 000.00 as financial assistance***

with an interest rate of 4% with the 2nd and 3rd Defendants as guarantors. With the greatest respect to claimant's counsel, there is no evidence of administrative charges on Exhibit 'C2'. This court cannot act on assumption, speculation or conjecture, there must be evidence on which it would base its judgment."

In the absence of any cross appeal by the Respondent, the above finding of the trial court remains unchallenged in this appeal. So the subtle attempt by the learned counsel for the Respondent to still argue that administrative charges were part of the financial assistance package cannot be countenanced in this appeal.

In view of the erroneous evaluation of the evidence by the trial court, I will exercise my power to re-evaluate the evidence to make the right finding in respect of the amount claimed by the Respondent under the first head of the claim. It is settled law that an appellate Court has the power to revisit any decision of the trial court in its consideration of an appeal before it, and vary or even amend orders made by the trial court in the interest of justice. See ***OKOYA V. SANTILLI (1990) 2 NWLR (PT. 132) 322; IBWA V. PAVEX INTERNATIONAL (2000) 4 S.C. (PT. II) 196; (2000) 4 SCNJ 200; FIRST BANK V. NAZIA & BROTHERS (NIG) LTD & ORS (2018) LPELR-46197(CA) (PP. 6-7 PARAS. F-F).***

Furthermore ***Section 72 (C) of the Magistrates Courts Law of Bendel State, now applicable to Edo State*** provides as follows:

"On the hearing of an appeal, the appeal court may draw any inference of fact and either-

(C) Make a final or other order on such terms as the court thinks proper to ensure the determination on the merits of the real question in controversy between the parties."

Sequel to the foregoing, upon a careful re-evaluation of the totality of the evidence adduced at the trial court, I am of the view that in respect of item (a) of the Claim, the finding of the trial court that the Appellants are liable to pay the sum of N200, 000.00 to the Respondent is not supported by the available evidence. I hold that since the 1st Appellant has repaid the sum of N175, 000.00, the Respondent is only entitled to the sum of N25, 000.00 (Twenty Five Thousand Naira) which is the

balance of the unpaid financial assistance granted to the 1st Appellant by the Respondent.

Since I have held that the learned trial Magistrate did not properly evaluate the evidence before making his findings in this case, I resolve Issue One in favour of the Appellants.

ISSUE 2:

Whether the learned trial Magistrate was right in his findings that the Claimant/Respondent was entitled to the reliefs claimed?

The Respondent's reliefs are as contained in the Respondent's extant Claim which is already set out in this judgment. It is noteworthy that the trial court did not grant all the reliefs claimed by the Respondent in this suit. For example, in Relief (a) where the Respondent claimed the sum of N227, 000.00, the court awarded the sum of N200, 000.00 which I have further reduced to the sum of N25, 000.00.

Again, the sum of N8, 000.00 per month from the month of February 2018 till the loan is liquidated, which the Respondent claimed under item (b) was refused by the trial court. The sum of N100, 000.00 (One Hundred Thousand Naira) claimed under item (c) as out of pocket expenses was granted; and the sum of N100, 000.00 (One Hundred Thousand Naira) claimed under item (d) as general damages was reduced to N20,000.00 by the trial court.

Since the Respondent did not file any cross appeal, there is no complaint against the various sums that were refused or reduced by the trial court. In this appeal, we are only concerned with the complaint of the Appellants which is in respect of items (a), (c) and (d) of the Claim.

In view of my salient finding under Issue 1 that the trial court was in error when he awarded the Respondent the sum of N200, 000.00 instead of the sum of N25, 000.00 which can be supported by the evidence, I will say straight away that the trial court was wrong when it held that the Respondent was entitled to the sum of N200, 000.00 being the balance of the unpaid financial assistance package.

In respect of the sum of N100, 000.00 awarded to the Respondent as out of pocket expenses, it is settled law that costs follow events. Clearly, the Respondent is entitled to costs of prosecuting the case at the trial court. In the case of ***International Offoshore Construction Limited V. Shoreline Lift Boats Nigeria Limited (2003) 16 NWLR (845) 157 @ 179***, it was held that a party is entitled to expenses incurred on services of counsel, genuine and reasonable out of pocket expenses, as costs of litigation, as indemnity, not as a bonus to him or as a punishment to the party who pays. See also ***Sogunro V. Yeku (2003) 12 NWLR 1853) 644 @ 667, Adelakun V. Oruku (2006) ALL FWLR (308) 1360 and NBCI Vs. Alfifir Nigeria Limited (1993) 4 NWLR (287) 346.***

I agree entirely with the trial court that the Respondent is entitled to the sum of N100, 000.00 (One Hundred Thousand Naira) being out of pocket expenses, covering solicitor's fee and sundry expenses.

On the award of the sum of N20, 000 (Twenty Thousand Naira) as general damages when the Respondent asked for the sum of N100, 000.00 (One Hundred Thousand Naira), I am of the view that the amount awarded is excessive. As a matter of fact, it is quite meagre.

In relation to the Appellants' Counter-Claim, it is pertinent to observe that the Appellants Grounds of Appeal did not complain against the dismissal of the Counter-Claim and as a result no issue was formulated in respect of the dismissal of the Counter-Claim in this appeal.

On the whole, except for the erroneous award of the sum of N200, 000.00 in respect of Relief (a), I am of the view that the learned trial Magistrate was partly right in his findings that the Claimant/Respondent was entitled to the reliefs claimed. Thus, Issue 2 is partly resolved in favour of the Respondent and the Appellants.

Having resolved part of the issues for determination in favour of the Appellants, ***I hold that this appeal succeeds in part. I hereby set aside the part of the judgment of the lower court where the 1st,2nd and 3rd Appellants were ordered to pay the sum of N200,000,00 (Two Hundred Thousand Naira) being balance of the unpaid financial assistance package and order as follows:***

a) ***The 1st,2nd and 3rd Appellants are to pay the sum of N25,000,00 (Twenty Five Thousand Naira) being the balance of the unpaid financial assistance package;***
b) ***The 1st, 2nd and 3rd Appellants are to pay the sum of N100,000,00 (One Hundred Thousand Naira) being out of pocket expenses, covering solicitors fees and sundry expenses to the Respondent; and***
c) ***The 1st, 2nd and 3rd Appellants are to pay the sum of N20, 000.00 (Twenty Thousand Naira) as general damages to the Respondent.***

I make no order as to costs.

P.A.AKHIHIERO

JUDGE

06/06/2022

<u>COUNSEL:</u>

S.U. EBOIGBODIN ESQ----------APPELLANTS

PEDRO IHIMEKPEN ESQ----------RESPONDENT