# IN THE SUPREME COURT OF NIGERIA

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Suit No: SC48/1979

**Petitioner:** Chief Festus Sunmola Yesufu
And
**Respondent:** African Continental Bank Ltd

Date Delivered: 1980-01-25

**Judge(s):** Ayo Gabriel Irikefe, Mohammed Bello, Kayode Eso,Augustine Nnamani, Muhammadu Lawal Uwais

## Judgment Delivered

We dismissed this appeal on 26th November, 1979 and reserved our reasons. My Lords, I now give my reasons for agreeing that the appeal be dismissed.

In the Court of trial. the plaintiffs (the African Continental Bank) who are now the Respondents in this Court. and who would hereinafter be referred to as the Respondents in this judgment, took out a writ of summons against the Defendant. Chief Festus Sunmola Yesufu, who is the Appellant in this court, and would hereinafter be referred to as the Appellant

'. for the sum of N1,128.057.40 (One Million, One Hundred and Twenty-Eight Thousand, Fifty-Seven Naira, Forty Kobo) being money granted to the Defendant at his request. by way of overdraft accommodation and/or facilities from the plaintiff who are Bankers. As at 30th April 1976, the defendant was granted the total sum of N1,128,057.40, aforesaid, as overdraft drawn on his current account No.2285 with the plaintiff at Benin City within the Benin Judicial Division. The said sum of N1,128.057.40 which included the principal, interest and other bank charges calculated up to and inclusive of 30th April, 1976, has since become due and payable by the defendant to the plaintiff, but in spite of repeated demands made by the plaintiffs, the defendants neglects and/or refuses to pay.\"

There were also a claim for interest at the rate of 9%, a declaratory claim and a claim for specific performance to wit '

(a) A declaration that the plaintiff is entitled in terms of the deed of mortgage registered as No. 29 at Page 29 in Volume 10 of the Lands Registry in the Office at Benin City, to exercise the power of sale over the defendant\'s landed property situate and lying at No 48 Lawani Street, Benin City, the title deed of which was of the Lands Registry in the Office at Benin City.

(b) Specific performance compelling the defendant to make and execute a valid legal deed of mortgage of the landed property together with any building thereon situate and lying at Ward \'C\' Lawani Street, Benin City, the title deed of which was registered as No.41 at page 41 in Volume 48 in the Lands Registry in the office at Benin City and deposited with the plaintiff by way of an equitable mortgage by the defendant, as an additional security for the overdraft facilities accommodation aforementioned granted to the defendant.

After pleadings had been duly filed and evidence taken, the learned trial Chief Judge of Bendel State, V. E. Ovie-Whiskey, C.J. in a considered judgment entered judgment for the Respondents in the sum of N661,993.42. He dismissed all the other claims.

Both parties were dissatisfied with this judgment and they both appealed to the Federal Court of Appeal. Their Lordships of the Federal Court of Appeal, Eboh, Agbaje and Nnaemeka-Agu, JJ.C.A. having heard arguments on the appeal and cross appeal, in a well considered judgment, allowed both the appeal and the cross appeal, the sum total of which resulted in setting aside the judgment and order of award made by the learned Chief Judge in favour of the Respondents and in its place they entered a non-suit. In entering the order of non-suit their Lordships said '

\"There is no doubt in our minds that the defendant is indebted to the plaintiff in some amount of money having regard especially to Exhibit 8 in this case. It is just that it is not possible to quantify the amount of his indebtedness on the authorities and the evidence before the court. We are however satisfied that this is not a case where the plaintiffs\' case should be dismissed since that undoubtably will be wronging the plaintiff. On the evidence before the lower court the defendant definitely is not entitled to judgment since it is clear that he owed something to the plaintiff. The defendant even admitted in cross examination that at the time a document, Exhibit 54 was made i.e. 31st December, 1969, he was owing the plaintiff about '9,000 (N18,000.00). The order we propose therefore, to make guided by the decision of the Supreme Court in Chief Dada v. Chief Ogunremi and Another (1967) N.M.L.R. 181 at 185, is to non-suit the plaintiff.\"

It is against this order of non-suit the Appellant has appealed to this Court, and, quite naturally, this was the only point taken in this appeal before us.

It will now be convenient to set out the facts that led to this order of non-suit.

The Appellant, a customer of the Respondents was granted overdraft facilities at a compound interest of 9% per annum to be drawn on his current account, which he maintained with the Respondents in their Benin City Branch. He used his landed properties in Benin City as security for the overdraft. The Appellant drew various sums on the account. He also operated the account for what he referred to in his pleadings as negotiating or discounting a number of bills or sight drafts which were drawn on irrevocable import letters of credit opened in his favour and/or his company by his overseas customers to whom he exported various grades of locally processed rubber.

To prove their case, the Respondents tendered a lot of documents. Those relevant for the purpose of this judgment would be referred to presently.

Exhibit A is the statement of account of the Appellant with the Respondents. It shows statement from 12/11/66 to April 1976 and the last item therein shows debit of N1,108,057.40. This exhibit was tendered to prove paragraph 11 of the Appellant\'s statement of claim.

Exhibit 8, dated 21st July, 1971, was written during the currency of Ex.A by the Appellant to the Respondents and it reads '

Sarah & Yesufu Trading Company

P.O. Box 151,

Benin,

21st July, 1971

The Senior Solicitor,

African Continental Bank Ltd.,

Head Office,

P.M.B. 2466,

Lagos.

Dear Sir,

Re: My Overall Indebtedness

I intend to liquidate my total indebtedness with the Bank on or before the end of September, 1971 or substantially reduce the amount. The two months should be regarded as months of grace to enable me double my efforts towards the clearing of this adverse balance.

Considering my past relationship with the Bank, I hope you will use your good offices to make this consideration. I will also like the Senior Solicitor to give me sometime to reconcile some of the outstanding which are expected to be credited to my account to reduce my indebtedness and have not been done.

Litigation as you know is protracted and might not be in the interest of the cordial relationship that has always existed between the Bank and myself.

Kindly give this my unflinching proposal your consideration. If I fail, you can go on with your court action for recovery. I give my honour on this transaction and I promise that I won\'t fail.

I have outstanding Bills and as soon as they mature or the proceeds are received, I will pay same to reduce the balance and I am also expecting some money from Finance Houses for the expansion of my business.

Be rest assured that I will not fail.

Yours faithfully,

for: Sarah & Yesufu Trading Company

(Sgd.) F. S. Yesufu Managing Director

Exhibits 18-18N are the original ledger cards containing statement of account of the Appellant the last entry showing that the Appellant was in debit to the tune of N763,798.27 when the account was close as he case was already in court.

The learned trial Chief Judge in coming to the decision aforesaid, relied mainly on exhibits B, 18 to 18N and disregarded Exhibit A. He believed Ex. A was discredited in cross-examination. He accepted the contents of exhibits 18 to 18N as evidence of the transaction between the parties, and regarded Exhibit 8 as an acknowledgement of indebtedness by the Appellant to the Respondents. He said, in regard to this exhibit '

I am satisfied beyond any shadow of doubt on the evidence before me, that Exhibit 8 is a letter written by the defendant to the plaintiffs admitting his indebtedness to the plaintiffs on the 21st July, 1971

and then found for the Respondents as already stated.

The learned justices of the Federal Court of Appeal, though satisfied that exhibits 18 to 18N were admissible, however held, relying on s.37 of the Evidence Act, that the statements contained in Exhibits 18 to 18N are not sufficient to charge the Appellant with liability. On Exhibit 8, the learned justices held '

We are satisfied as the learned Chief Judge was and as the Supreme Court too was in African Continental Bank Limited V. Festus Sumoila Yesuf(1978) 2 S.C. 93 at 110 when a similar document was involved, that Exhibit 8 does not raise any doubt the defendant\'s admission of indebtedness to the plaintiff. But one cannot point to anywhere in Exhibit 8 as to the amount of indebtedness admitted by the defendant. So in our view besides Exhibit 8 the plaintiff would still have to furnish legal evidence of the indebtedness of the defendant to it in the sum claimed on the writ of summons ".

And having so held, the learned justices concluded that an order of non-suit would meet the justice of the case.

It is to be noted that the order of non-suit, which was made, in this case is the second of such order in the case. The case had once been heard in the Benin City High Court between the same parties in Suit No. B/10/72, though the claim then was for '376,320.10.10 that is, N752,641.00. Judgment was given by the High Court in favour of the plaintiffs, that is, the present Respondents, and on a p peal to this court (see SC. 4211975 reported in 1974 4 S.C.1) the Court, Fatai-Williams, J.S.C. (as he then was) Madarikan and Nasir, JJ.S.C. held that in view of an admission of an indebtedness made in a letter admitted in evidence as Exhibit \"O\" (which is now Exhibit 8 in the instant case) it would not be fair or just to dismiss the plaintiffs\' claim in its entirety. The court therefore entered a non-suit.

The powers of entertaining a non-suit should, it is admitted, be employed advisedly. As it was pointed out by this Court in Craig v. Craig (1967, N.M.L.R. 52, and also in Mandillas & Karaberis Limited v. J O. Oridota (1972) 2 S.C. 47,50, these powers are never only for the purpose of allowing a plaintiff who had failed to prove his case to have another opportunity of doing so. In Craig v. Craig (supra) this court said -

Inevitably a non-suit means giving the plaintiffs a second chance to prove his case. This court has to consider whether in this case that would be wronging the defendant, and on the other hand whether the dismissal of the suit would be wronging the plaintiffs.

See also the general observations in the Nigerian Fishing Company & Others v. Western Nigeria Finance Corporation. S. C. 327/67, a judgment of this court delivered on 27th June, 1969, but unreported. Surely, every case will depend on its own merit and it would not be right to lay down a hard and fast rufe about when to enter a non-suit more than to invoke a general statement. See Dawodu v. Gomez, 12 W.A.C.A. 151, 152; Nwakuche v.Azubike 15 W.A.C.A. 46, Chief Dada v. Chief Ogunremi & Anor. 1967 N.M.L.R. 181,185.

It is rather unfortunate that the Respondents did not take advantage of the order of non-suit made by this court in 1976 especially as that order of non-suit was made precisely as a result of the letter, Exhibit \"O\" in that case (and now Exhibit 8 m the instant case) whereby the appellant made an admission of indebtedness to the Respondents. Nevertheless, it is my considered view that, having regard to that admission, it would clearly be wronging the Respondents if they are not given yet another chance (albeit the last chance, as there must be an end to litigation), for I am in clear agreement with the Federal Court of Appeal when that court held that

On the evidence before the lower court, defendant definitely is not entitled to judgment since it is clear that he owed something to the plaintiff

The Appellant, upon this admission, should not in the interest of justice be permitted to get away with what he admittedly owes. A thorough examination of the exhibits in this case (even apart from exhibits 5, 18 to 18N) bear out the correctness of this conclusion of the Federal Court of Appeal. Indeed, it would be difficult for the Appellant, in view of the facts of the case, to deny owing \"something to the plaintiff\". On 8th July, 1970, according to the evidence of the 211d plaintiff witness, Raphael Olufemi Oguntobi, the appellant met the witness at the Advances Control Department at the Lagos Head Office of the Respondents\' Bank. Minutes of the meeting were contained in Exhibit 2 which is as follows -

AFRICAN CONTINENTAL BANK LIMITED

From: Advances Control Dept.,

Lagos Head Office Branch.

Our Ref. R00/0000

Date: 8th July, 1970

To: The Manager, Benin Ring Road Branch.

Subject: Mr. F. S. Yesufu. . . '227,747.3.7

Sarah & Yesufu Trad. Co. (Warri Branch). '183,344.15.6

An interview was held today (11.30 a.m.) between Mr. F. S. Yesufu Eke and Mr. S. A. O. Sule, (Manager, Head Office). The following members of the staff were also in attendance: Mr. A. J. Sule and Mr. R. O. Oguntobi for Advances Control Department.

The purpose of the meeting was to find out how Mr. F. S. Yesufu Eke would liquidate his accounts at Benin Ring Road Branch and also at Warri. After Mr. F. S. Yesufu Eke had stated his supposed difficulties with the bank and Mr. S. A. O. Sule\'s reiterating the bank\'s willingness to help him always, Mr. F. S. Yesufu promised:

1. To pay into the Warri account '30,000 in July, 1970 either by cash or bills but that he should be allowed to withdraw any excess above '30,000 so that he might plough this back into his business.

2. To clear up the balance of Warri Account within the year.

3. To reduce Benin Ring Road account regularly and to clear it very soon. The Manager, Head Office also directed that Branch Managers should not put embargo on the accounts of the customer and that the customer should be allowed to withdraw between 40 and 50% of any payments for his business pursuits.

(Sgd.)"'

for: Manager

Advance Control Dept.

The Appellant at that meeting not only admitted, \"owing something\" to the Respondents but undertook to liquidate the debt within a year. Obviously he failed to honour this pledge for it was quite a year later he wrote Exhibit 8 which I have already discussed (supra) showing his intention to liquidate his \"total indebtedness with the Bank on or before the end of September 1971 or substantially reduce the amount.

Another exhibit worth examining is Exhibit 54. The Federal Court of Appeal did refer to this exhibit in their judgment. In that exhibit, a letter by the Appellant to the Respondents, the Appellant expressed a regret '

that owing to the difficulties in getting U.S.A. and Canada ports (sic) ship to Sapele port and also our own transaction with the Marketing Board which we have not been able to complete because of some hitch in documents,

he would be unable to meet up the balancing of the accounts with the Respondents at the end of December 1969. This is a clear admission of indebtedness. Finally, and as the Federal Court of Appeal pointed out in their judgment, the Appellant also admitted in the trial court that he owed about N18,000 as at the date he wrote exhibit 54. Certainly, all these present a clear picture of an admission of indebtedness to the Respondents through the exact amount was in doubt.

It is as a result of all these that I hold the respectful view that the Federal Court of Appeal was right in coming to the conclusion that it would be unjust to dismiss the claim of the Respondents with this admission by the Appellant on record.

As I said earlier, it is most unfortunate the Respondents failed to take full advantage of the opportunity granted them by this court in the earlier appeal S.C.42/1975. For the least, the Respondents should then have done, after being granted an order of non-suit, to use the words of the Federal Court of Appeal

". by way of supporting evidence for the entry in Exhibits 18 to 18N, would be to put the cheques so drawn by the defendant in evidence or if they have been destroyed or lost to give secondary evidence of them.

The Respondents could not have a better indication.

It is therefore, for the foregoing reasons, that on the evidence before the trial court, the Appellant is certainly not entitled to judgment having clearly admitted owing something to the Respondents, that I find myself in respectful agreement with the dismissal of the appeal and affirmed the order of non-suit made by the Federal Court of Appeal.

Judgment delivered by

Irikefe. J.S.C.

This is a second appeal. The respondents\' claim against the appellant in the Benin Judicial Division of the High Court of Bendel State reads as follows:

The plaintiffs\' claim against the defendant is for the sum of N1,128,057.40 (One Million One Hundred and Twenty-Eight Thousand Fifty-Seven Naira, Forty Kobo) being money granted to the defendant at his request, by way of overdraft accommodation and/or facilities from the plaintiff who are bankers. As at 30th April, 1976, the defendant was granted the total sum of N1,128,057.40 aforesaid, as overdrafts drawn on his current account No. 2285 with the plaintiff at Benin City within the Benin Judicial Division. The said sum of N1,128,057.40 which includes the principal, interest and other bank charges calculated up to and inclusive of 30th April, 1976, has since become payable by the defendant to the plaintiff, but in spite of repeated demands made by the plaintiff, the defendant neglects and/or refuses to pay.\"

There were other claims, which are not now relevant for the purpose of this appeal

After a hearing in which evidence was called on either side, Ovie-Whiskey, (C.J.) on 21st June, 1977 upheld the respondents\' claim and awarded the sum of N661,993.42 out of the total sum shown on the writ. The appellant being aggrieved by the above decision, appealed to the Court of Appeal which court, on 31st May, 1979, allowed his appeal and made an order non-suiting the action. The Court of Appeal came about its ultimate order in the appeal in the following words:-

There is no doubt in our minds that the defendant is indebted to the plaintiff in some amount of money having regard especially to Exhibit \"8\" in trils case. It is just that it is not possible to quantify the amount of indebtedness on the authorities and the evidence before the court. We are however satisfied that this is not a case where the plaintiffs\' case should be dismissed since that undoubtedly will be wronging the plaintiffs. On the evidence before the lower court the defendant definitely is not entitled too judgment since it is clear that he owed something to the plaintiffs. The defendant even admitted in cross-examination that at a time a document, Exhibit 54 was made i.e. 31st December, 1969, he was owing the plaintiffs about '9,000 (N18,000). The order we propose therefore, to make guided by the decision of the

Supreme Court in Chief Dada v. Chief Ogunremi & Anor. 1967 N.M.L.R. 181 at 185 is to non-suit the plaintiffs.

The appellant being again dissatisfied with the order of non-suit has now appealed to his court. After hearing the appellant\'s counsel on 26th November, 1979, and without calling upon the respondents\' counsel, we dismissed this appeal and indicated that we would give our reasons for doing so at a later date. The following are my reasons.

This appeal involves a short point of law and in so far as the facts are material for its determination, there is substantial agreement on them as between the parties. The said facts are set out in the judgment of my learned brother, Eso, J.S.C. which I had had the privilege of reading. It is common ground that the appellant operated a current account No.2285 at the respondents\' bank in Benin City at all times material to this action. It is also common ground that the appellant had written Exhibit \"8\" dated 21st July, 1971 to the respondents asking for time to liquidate his unspecified indebtedness to the respondents and also for an opportunity to reconcile documents, in order to reduce the quantum of the said indebtedness, after it might have been ascertained.

In deciding upon an order of a non-suit, the Court of Appeal took the view that such evidence as had been produced before the court of trial in the form of ledger entries, was inconclusive and ineffectual, to meet the needs of the standard of proof in civil matters, in the absence of the production, if available, of the actual cheques from which such entries were compiled.

At the hearing before us, the only point made by counsel appearing for the appellant was that an order non-suiting the claim was an oppressive order in the circumstances of this case as it is tantamount to affording the respondents an unlimited opportunity to establish its claim. I do not agree with this submission. It is the law that a non-suit order should not be made unless two elements are present in the aborted trial, namely:

(a) It must a p pear on the record of the case taken as a whole that the plaintiffs have not failed in toto, and

(b) That in any case, the defendant would not be entitled to the judgment of the court.\"

This clearly brings into focus the element of fair play, which is all that court proceedings are about.

It would be facile to argue that the above two elements do not exist in this case. In my view, they impinge violently on one\'s attention.

The attitude of this court as regards the order of a non-suit may be found in the following cases, to mention just a few:

(a) Craig v. Craig (1960) 1A.N.L.R. p.173.

(b) Chief Dada v. ChiefOgunremi (1967) N.M.L.R. p.181.

(c) Onwunalu v. Osademe (1971)1 A.N.L.R. p.1425.

(d) George v. U. B.A. (1972) 1A.N.L.R. (Part 2) p.347

I found nothing that commended itself to me in the argument of the appellant\'s counsel and I had no doubt in my mind that the appeal lacked merit and should be dismissed as it was in fact done.

The decision of the Court of Appeal in this matter dated 31st May, 1979 is hereby affirmed.

Judgment delivered by

Bello. J.S.C.

The main question for determination at the hearing of this appeal on 26th November, 1979 was whether it was proper to non-suit the Plaintiff as the Court of Appeal had done or whether it was proper to dismiss the Plaintiffs claims under the circumstances of the case. We decided that the Court of Appeal had acted rightly in non-suiting the Plaintiff and we dismissed the appeal accordingly.

The several claims of the Plaintiff in the trial court, the facts and the circumstances of the case have been fully set out by my learned brother, Eso, J.S.C. in his reasons for the judgment of the court which he is about to deliver, and which I had the opportunity to read in draft form. I do not intend to recount them.

In the consideration of the appeal of the Defendant, the Court of Appeal observed and concluded:

We are satisfied that barring Exhibit 18-18N in this case there is nothing to show that the defendant was indebted to the plaintiff in the sum of N661 ,993 .40 for which judgment was given against him by the learned Chief Judge as overdraft. Since as we have pointed out, the entries in Exhibit 18-18N are not alone sufficient to fix the defendant with liability, we are satisfied that the judgment of the learned Chief Judge in this matter cannot stand.

In respect of the cross appeal of the Plaintiff, the Court of Appeal concluded as follows:

Since we have held that the judgment in favour of the Plaintiff cannot stand, it follows that the declaratory reliefs sought by the Plaintiff and the interest claimed by the Plaintiff on the overdraft the subject matter of the action before the court cannot stand also.

The Court of Appeal then went on to state the factors they took into account

before making the order of non-suit. As regard the Plaintiff\'s claim for interest, they expressed the view that the trial Chief Judge was in error in holding that the Plaintiff was estopped from charging interest from March 1972. They held that the Plaintiff was entitled to interest on the overdraft to the defendant, if proved, from March 1972 up to the date of judgment. They were also of the opinion that the Chief Judge erroneously applied section 68 of the Stamp Duty Law (Cap. 118) Laws of Western Nigeria to Exhibit 4 and that he was wrong in holding that the Mortgage Deed, Exhibit 4, was enforceable only in respect of the sum of N800 stated therein. Finally, the Court of Appeal stated:

There is no doubt in our minds that the defendant is indebted to the plaintiff in some amount of money having regard especially to Exhibit 8 in this case. It is just that it is not possible to quantify the amount of his indebtedness on the authorities and the evidence before the court. We are, however, satisfied that this is not a case where the Plaintiff\'s case should be dismissed since that undoubtedly will be wronging the Plaintiff. On the evidence before the lower court, the defendant definitely is not entitled to judgment since it is clear that he owed something to the Plaintiff. The Defendant even admitted in cross-examination that at the time a document, Exhibit 54 was made i.e. 31st December, 1969, he was owing the Plaintiff about '9,000 (N18,000). The order we propose therefore, to make guided by the decision of the Supreme Court in Chief Dada v. Chief Ogunremi & Another (1967) N.M.L.R. 181 at 185 is to non-suit the Plaintiff.

The ground of appeal relating to the order of non-suit is wanting in brevity but since it embraces the substance of the argument of learned counsel for the Appellant in his brief, I think it is necessary to set it out in full. It reads:

1. The learned Justices of Appeal erred in law in non-suiting the plaintiff after allowing the defendant\'s appeal and setting aside the judgment of the lower court when the proper order should in the circumstances, have been one dismissing the plaintiff\'s case in its entirety.

Particulars of Error:

(a) The pleadings and the judgment of the lower court made it clear that there was a previous action, Suit Number B/10/72 on the same subject-matter between the same parties, in which the plaintiff was non-suited on appeal by the Supreme Court vide Appeal Number S.C./42/1975 reported in (1976) 4 S.C. pages 1-22 but the learned Justices of Appeal did not advert to this and the great injustice the defendant will suffer by the door being left open for the plaintiff to start fresh proceedings all over again against the defendant especially, in view of their Lordships\' opinion which in effect, allowed the plaintiff\'s cross-appeal on item b of its claim viz: the right to interest up to and including the date of

judgment in an action.

(b) The insufficiency or lack of evidence on which the order of non-suit was based, was on a point more specifically pleaded and put in issue by the defendant in paragraphs 7 and 8 of the Statement of Defence.

(c) The failure of the plaintiff to prove its case was not the result of any technical or legal hitch in the course of the proceedings therefore, the defendant is fully entitled to a judgment dismissing the plaintiffs\' case.

(d) There was no evidence or finding by their Lordships that the production of the cheques referred to in the judgment will prove or support the entries in exhibits 18-18N, the pivot of the plaintiffs\' case or to the amount claimed or any especially, when the plaintiff by their 4th witness failed to justify entries in exhibit 18-18N, and by documents which did not support or prove those entries.

(e) The learned Justices of Appeal did not advert to section 148(d) of the Evidence Act, Cap.62 Laws of the Federation of Nigeria; had they done so, they would have found that that section read with section 37 of the Act, makes the issue in the instant case, one of failure by the plaintiff to discharge the onus of proof wherefore, an order of non-suit is inappropriate as affording yet another opportunity to the plaintiff who has failed to discharge the onus of proof.

(f) The basis of the transaction between the parties as found by the lower court being one of alleged indebtedness arising from a purported exercise of a right of recourse in the matter of the collection, negotiation and discounting of Overseas bills drawn under irrevocable letters of credit for exported commodity, a non-suit by reference to any other basis works hardship and is unjust to the defendant. Wherefore, their Lordships also failed to advert to the pertinent portion of the evidence of the 3rd witness for the plaintiff: \"On the face of the invoice we worked out the value of the goods shipped by him (the defendant) and we credit the amount to him . . . The payment by the Bank of New York was at par with the invoice value which we had credited to the defendant\'s account, we would do nothing to his account, but if there was a difference, because he was short-paid, the short payment would be debited to his account. It is this type of transaction that has resulted into the defendant\'s indebtedness.\"

(g) The learned Justices of Appeal are not justified in making the order of non-suit by reference to Exhibit 8 when as their Lordships also found, there was no letter of demand stating a specific sum of indebtedness to which Exhibit 8 could be tied or could be related; a fortiori Exhibit 8 was not an admission of any debt owed to the Bank.

In his argument, learned counsel for the Appellant points out that the Court of Appeal based the order of non-suit on the decision in Chief Dada v. Chief Ogunremi (Supra) and submits that the Court of Appeal erred in failing to appreciate that the facts and the circumstances of that case are different from those of the case in hand, the distinguishing factor being that there was a counter claim in the Chief Dada\'s case whereas there is no such claim in the present case.

Relying on Craig v. Craig (1960)1 All N.L.R. 173 at 177 and Mandillas & Karaberis v. Oridota (1972) 2 S.C. 47 at 50, learned counsel argued that the discretion to make an order of non-suit ought to be judiciously exercised and that in determining whether a suit should be non-suited or dismissed, each case must be decided on its facts. He further contends that in the exercise of the discretion, the Court would not non-suit a plaintiff who has failed to prove his case. He contends that the plaintiff in the case in hand has failed to prove its case.

Learned counsel refers to Awosanya v. Algata & Others (1965)1 All N.L.R. 228 at 230 and submits that the Plaintiff having been non-suited previously on the same facts in Yesufu v. African Continental Bank (1976) 4 S.C. 1 a second order of non-suit is unjust and oppressive to the defendant since the possibility of a third action may render him liable for a higher sum than previously claimed due to accrued interest charges.

Learned counsel further contends that a non-suit is generally granted in cases where a Plaintiff is unable to obtain judgment on account of some technical and legal hitch. He cites Mandillas & Karaberis Ltd. v. Oridota (Sup ra), Ogunde v. Ojomu(1972) 4 S.C. 105 at 107 and Odiete & Another v. Okotie & Others (1972) 6 S.C. 83 at 90 in support of his proposition. He argues that there is no hitch whatever in the case in hand and that Exhibit 8 is not an admission of liability in view of other subsequent correspondence denying liability. He concludes that the Plaintiff has failed to prove its case as pleaded and that this is not a proper case to make an order of non-suit but to dismiss the suit.

Before considering the submission of learned counsel, I think it is pertinent to reiterate the test to be applied before making an order of non-suit as stated in numerous cases by this Court. In Chief Dada v. Chief Ogunremi (Supra) upon which the Court of Appeal relied, this Court said at p.185:

We have given consideration to the nature of the Order to make in the circumstances of the case. We have no doubt that on the evidence before the Court, the defendants are not entitled to the judgment of the court. With regards to the plaintiff\'s case, whilst it is true that in a Claim for a Declaration of Title the plaintiff must succeed on the strength of his own case and not on the weakness of the case of the defendant, it is well established that where neither of the parties before the court is entitled to Judgment the Court is entitled to enter a non-suit instead of dismissal. (Italics is mine for emphasis)

The case of Craig v. Craig (1966)1 All N.L.R. 173 at 177 stated the text as follows:

Inevitably a non-suit means giving the plaintiff a second chance to prove his case. The Court has to consider whether in this case that would be wronging the defendant, and on the other hand whether the dismissal of the suit would be wronging the plaintiffs.

See also Olayioye v. Oso (1969)1 All N.L.R. 281 at 284-285 and Onwunalu v. Osademe (1971)1 All N.L.R. 14 at 17.

It seems to me from the authorities that in considering whether to grant a non-suit instead of dismissal, the Court has to weigh all the facts and circumstances of the case and see whether the scale of justice has tilted on the side of a non-suit, or on the side of dismissal. In other words, the Court has to do what is fair and just to the parties in the circumstances of the case.

I entirely agree with the submission of learned counsel for the Appellant that a plaintiff who completely fails to prove his case is not entitled to a non-suit. The Court decided so in Ferdinand George v. The United Bank for Africa Ltd. (1972) 8-9 S.C. 254 at 281. Olayioye v. Oso (Supra) and Odiete v. Okotie (Supra).

However, I do not agree with learned counsel that the Plaintiff in the case in hand failed to prove its claims in their entirety. The Plaintiff proved in the trial court, by the defendant\'s admission in Exhibit 8, that the defendant is indebted to the Plaintiff in a certain sum of money. The Plaintiff only failed to prove the quantum. That being the case, it seems to me that the scale of justice weighed in favour of a non-suit since, in view of the evidence of his indebtedness to the Plaintiff, the Defendant would not be entitled to judgment of dismissal and it would also be wronging the Plaintiff to enter such judgment. Having regard to the circumstances of the case, particularly of the amount involved, I do not think that a second non-suit is unfair or unjust to the defendant.

I do not consider it necessary to comment on the other grounds of appeal since they are concerned with the observations of the Court of Appeal which are obiter dicta.

Judgment delivered by

Nnamani. J.S.C.

On the 26th November, 1979 this Court dismissed the appeal of the defendant/appellant and indicated that it would give its reasons later. On the 21st June, 1977, Ovie-Whiskey, C.J. gave judgment for the plaintiffs/respondents in this suit in the sum of N661,993.42. Both the defendant/appellant and the plaintiffs/respondents a p pealed to the Federal Court of appeal, Benin Judicial Division. The Federal Court of Appeal allowed both appeals, non-suited the plaintiffs/respondents stating in the concluding part of their judgment:

There is no doubt in our minds that the defendant is indebted to the plaintiff in some amount having regard especially to Exhibit 8 in this case. It is Just that it is not possible to quantify the amount of his indebtedness on the authorities and the evidence before the Court. We are however satisfied that this is not a case where the plaintiffs\' case should be dismissed since that undoubtedly will be wronging the plaintiff. On the evidence before the lower court the defendant definitely is not entitled to judgment since it is clear that he owed something to the plaintiff. The defendant even admitted in cross examination that at the time a document, Exhibit 54 was made i.e. 31st December, 1969, he was owing the plaintiff about '9,000 (N18,000). The order we propose therefore to make guided by the decision of the Supreme Court in Chief Dada v. Chief Ogunremi and Another (1967) N.M.L.R. 181 at 185 is to Non-Suit the plaintiff.

It is against this judgment that the defendant/appellant has appealed to this Court. I must pause here to state that I agree completely with the facts of this case as stated in the judgment of my learned brother Eso, J.S.C. just delivered and part of which I had the privilege of seeing.

Only one ground of Appeal was argued before us. That is

(i) The learned Justices of Appeal erred in law in non-suiting the plaintiff after allowing the defendant\'s appeal and setting aside the judgment of the lower Court when the proper order should in the circumstances have been one dismissing the plaintiffs\' case in its entirety.

Particulars of Error

(a) The pleadings and the judgment of the lower Court made it clear that there was a previous action, Suit No.8/10/72 on the same subject matter between the same parties in which the plaintiff was non-suited on appeal by the Supreme Court vide Appeal number S.C./42/1975 reported in (1976) 4 S.C. pages 1-22, but the learned Justices of Appeal did not advert to this and the great injustices the defendant will suffer by the door being left open for the plaintiff to start fresh proceedings all over again against the defendant especially, in view of their Lordships op inion which in effect, allowed the plaintiffs\' cross-appeal on item (b) of its claim viz: the right to interest up to and including the date of judgment in an action.

(b) The insufficiency or lack of evidence on which the order of non-suit was based, was on a point more specifically pleaded and put in issue by the defendant in paragraphs 7 and 8 of the Statement of Defence.

(c) The failure of the plaintiff to prove its case was not the result of any technical or legal hitch in the course of the proceedings wherefore, the defendant is fully entitled to a judgment dismissing the plaintiffs\' case.

(d) There was no evidence or finding by their Lordships that the production of the cheques referred to in the judgment will prove or support the entries in exhibits 18-18N, the pivot of the Plaintiffs\' case or to the amount claimed or any especially, when the plaintiff by their 4th witness failed to justify entries in exhibit 18-18N, and by documents which did not support or prove those entries.

(e) The learned Justices of Appeal did not advert to section 148(d) of the Evidence Act, Cap. 62 laws of the Federation of Nigeria; had they done so, they would have found that that section read with section 37 of the Act, makes the issue in the instant case, one of failure by the plaintiff to discharge the onus of proof wherefore, an order of non-suit is inappropriate as affording yet another opportunity to the plaintiff who has failed to discharge the onus of proof.

(f) The basis of the transaction between the parties as found by the lower Court being one of alleged indebtedness arising from a purported exercise of a right of recourse in the matter of the collection, negotiation and discounting of overseas bills drawn under irrevocable letters of credit for exported commodity, a non-suit by reference to any other basis works hardship and is unjust to the defendant. Wherefore, their Lordships also failed to advert to the pertinent portion of the evidence of the 3rd witness for the plaintiff: \"On the face of the invoice we worked out the value of the goods shipped by him (the defendant) and we credit the amount to him. . . The payment by the Bank of New York was usually made to our Head Office at Lagos . . . If the payment by the Bank of New York was at par with the invoice value which we had credited to the defendant\'s account, we would do nothing to his account but if there was a difference, because he was short-paid, the short payment would be debited to his account. It is this type of transaction that has resulted into the defendant\'s indebtedness\".

(g) The learned Justices of Appeal are not justified in making the order of non-suit by reference to exhibit 8 when as their Lordships also found, there was no letter of demand stating a specific sum of indebtedness to which exhibit 8 could be tied or could be related; a fortiori Exhibit 8 was not an admission of any debt owed to the bank.

Learned Counsel for the appellant in addition to his brief of argument in which he cited several legal authorities contended that the issue of a Non-Suit is in the discretion of the Court. He drew the Court\'s attention to Exhibits 8 and 36. He also reminded the Court of a previous Suit between the parties Chief Festus Sunmoila Yesuf v. African Continental Bank Limited (1976)4 S.C. 1-22 in which the plaintiffs were non-suited as a result of a technical or legal hitch on the question of the admission of the only available evidence on which the plaintiffs claim was based, and argued that the situation was different in the instant case. Learned Counsel drew the Court\'s attention to circumstances, which he thought if considered by the Federal Court of Appeal would have resulted in an outright dismissal of the plaintiffs\' case. He also contested the view of the Federal Court of Appeal that Exhibit 8 represented an admission of indebtedness by the defendant/appellant. Referring to the case of Chief Dada v. Chief Ogunremi (1967) N.M.L.R. 181 relied on by the Court of Appeal, learned Counsel for the appellant contended that the facts and circumstances of that case are quite different from the present one as he claimed that the defendant/appellant was not counter claiming and property interests were not involved. Finally, he argued that to give the plaintiff/respondent another chance would cause hardship to the appellant.

After studying the pleadings, facts and circumstances of this case, it is difficult not to come to the conclusion that the plaintiffs/respondents had failed to discharge the onus on them which was to prove their case within the balance of probabilities. In a matter in which the evidence necessary is essentially documentary, it is quite evident that the plaintiffs/respondents did not do much, to put it mildly, in trying to prove their case. Exhibit A, which was the statement of account prepared by them and tendered in evidence, was discredited by one of their own witnesses. The trial Chief Judge had no alternative but to disregard it. Even though the learned trial Chief Judge seems to have based his judgment on Exhibits 8 and 18 to 18N, his actual award of N661,993.42 to plaintiffs/respondents was arrived at by deducting errors in Exhibits 18-18N amounting to N73,759.78 from the Total amount of N735,153.10 the last entry on Exhibit 18N. Even Exhibit 18-18N, which was the pivot of the plaintiffs/ respondents\' case, was insufficient, without something more, to charge the defendant with liability particularly having regard to Section 37 of the Evidence Act. In paragraph 8 of their statement of Claim the plaintiffs/respondents stated

The plaintiffs from time to time, send to the defendant periodic statements of his account with the plaintiffs.

No attempt was made to use copies of these statements or to demand the production of the originals.

Again in paragraph 10 of the same statement of claim, the plaintiffs stated

The plaintiffs and/or through their Solicitors wrote several (italics mine) letters, demanding that the defendant should liquidate his outstanding indebtedness to the plaintiffs, but although the defendant admitted liability and promised to pay up the said debt he has since refused and/or neglected so to do '..

In spite of this it would appear that all that was used was the letter to which Exhibit 8 was a reply.

Finally on this point, in paragraph 11 of the Statement of Claim the plaintiffs stated

''. plaintiffs may also found on various cheques issued by the defendant on his said current account as well as vouchers, debit Notes and other relevant documents/books kept by the plaintiffs touching on defendant\'s said current account

Not one cheque or other document was tendered in evidence. The Federal Court of Appeal after dealing with the insufficiency of Exhibit 8 continued, and I agree with their views,

So in our view besides Exhibit 8 the plaintiff would still have to furnish legal evidence of the indebtedness of the defendant to it in the sum claimed on the writ of summons. For as was observed by the Supreme Court in Jolasimi Zaria v. Alhaji Abdul Small (1973) 6 S.C. 61 at 68 it is the duty of the plaintiff in this case in consonance with Section 135 of the Evidence Act to leave facts to the Court which on a proper appraisal would enable the court to give it judgment. Definitely on the face of Exhibit 8 alone plaintiff would not be entitled to judgment in the sum claimed by it. We have pointed out above that Exhibits 18-18N would not be sufficient having regard to Section 37 of the Evidence Act to charge the defendant with liability in respect of the overall debit balance shown thereon or part thereof. On the evidence for the plaintiff and the authority of Cuthbert v. Robarts Lubbock & Co. (Supra) the overdraft granted to the defendant by the plaintiff consisted of the cheques drawn by the defendant on the plaintiff when the former was not in fund which cheques were honoured. The least the plaintiff could have done byway of support evidence for the entries in Exhibit 18-18N could be to put the cheques so drawn by the defendant in evidence or if they had been destroyed or lost, to give secondary evidence of them. Neither was done ''.

The question then is, in the face of all this ought the Federal Court of Appeal to have made an order of Non-Suit'

One may just in passing mention that in the High Court of Judicature in England there is now nothing like a Non-Suit. Before the Judicature Act and at Common Law, it was open to a plaintiff who is compelled through lack of some necessary piece of evidence or for some other adequate reason to abandon his present proceedings, but may wish to preserve his right to bring a fresh action under more favourable circumstances.

See Odgers\' Principles of Pleadings and Practice in Civil actions in the High Court of Justice by Casson and Dennis at p.232.

The Courts have consistently decided that the order of non-suit should not be used merely to give the plaintiff another chance at proving his claim. But they have also held that where there is a hitch defendant must not be allowed to take advantage of it.

In Francis A. Odiete & Others v. Omamujewhe Okotie & 3 others (1972) S.C. 83 Coker, J.S.C. delivering the judgment of the Court, stated at p.90:

We observe that in the present case learned counsel for the plaintiffs has asked us to enter a non-suit for his clients. We are unwilling to do this for the order of non-suit is not to be employed for affording yet another opportunity to a party who had failed to discharge the onus of proof which lies on him but only when in the interest of justice (italics mine) the plaintiff has only failed to get judgment on account of a hitch of which the defence is not, in the opinion of the Court, entitled to take advantage...

It is settled law too, that the matter of granting an order of Non-Suit is one which is in the discretion of the Court, a discretion which is to be exercised with great care. Each case is however to be determined on its merits and peculiar circumstances.

In the case of Mustapha S. B. Dawodu v. Sabina Gomez (1947)12 W.A.C.A. 151 the Court was called upon to apply Order XLV Rule 1 of the Supreme Court (Civil Procedure) Rules, Cap. 211 Laws of Nigeria 1948, which stated that

The Court may in any suit, without the consent of the parties non-suit the plaintiff, where satisfactory evidence shall not be given entitling either the plaintiff or defendant to the judgment of the Court.

Dismissing the Appeal, it held that it was impossible to lay down any hard and fast rules to the p roper occasions when a non-suit should be preferred to a dismissal and each case must be considered on its merits. See also Okosun Epi and Another v. Johnny Aighedion (1973) N.M.L.R. 31 at p.35. On the same point and for a situation in which this Court referred to the fact that there may be circumstances which in the interest of justice may make it necessary that an order of non-suit rather than dismissal be made. In Chief Dada and others v. Chief Ogunremi and Another (1967) N.M.L.R.

181, a case decided by this Court and relied on by the Federal Court of Appeal, it was held that where neither of the parties before the Court is entitled to judgment the Court is entitled to enter a non-suit instead of dismissal. Learned Counsel for the appellant had argued that this was wrongly relied on by the Federal Court of Appeal. I am unable to agree with this. For the reasons I have already given, judgment could not have been given on the evidence before the Court in favour of the plaintiff/respondent. Nor as I shall presently show would it have been in the interest of justice that judgment be given in favour of the defendant. It is immaterial in my view that the defendant in Chief Dada\'s case did not counter claim. An order of dismissal of the claim in that suit would have been a judgment \"in favour\" of the defendant.

I am satisfied from a review of these authorities and the evidence before the High Court that the Federal Court of Appeal exercised its discretion properly when it made an order of non-suit. In Abudu Salami Keshinro vs Lasisi Bakare and others (1968) N.M.L.R. 230 at p.232, this Court held that the onus is on the appellant to satisfy the Appeal Court that the trial Judge (or in this case the Federal Court of Appeal) was wrong to exercise his discretion in the way he did by non-suiting rather than dismissing the plaintiff\'s claim. The defendant/appellant has clearly in my view failed to discharge that burden. There were also circumstances in this instant case justifying such an order in the interest of justice. It would have amounted to grave miscarriage of justice if the claim of the plaintiff had been dismissed in the face of clear, and in my view, unequivocal admission by the defendant of his indebtedness to the plaintiff/respondent, albeit the exact amount was not clear on the evidence available. In Exhibit 8, dated 21st July, 1971, the defendant/appellant wrote thus:

The Senior Solicitor,

African Continental Bank Limited, Head Office,

P.M.B. 2466,

Lagos.

Dear Sir,

Re: My overall Indebtedness

I intend toll liquidate my total indebtedness with the Bank on or before the end of September, 1971 or substantially reduce the amount. The two months should be regarded as months of g race to enable me double my efforts towards the clearing of his adverse balance. Considering my past relationship with the Bank, I hope you will use your good offices to make this consideration. I will also like the Senior Solicitor to give me sometime to reconcile some of the outstanding which are expected to be credited to my account to reduce my indebtedness and have not been done. Litigation as you know is protracted and might not be in the interest of the cordial relationship that has always existed between the Bank and myself.

Kindly give this my unflinching proposal your consideration. If I fail, you can go on with your court action for recovery. I give my honour on this transaction and I promise that I won\'t fail. I have outstanding Bills and as soon as they mature or

the proceeds are received, I will pay same to reduce the balance and lam also expecting some money from Finance Houses for the expansion of my business.

Be rest assured that I will not fail.

Yours faithfully,

for: Sarah & Yesufu Trading Company

(Sgd.) F. S. Yesufu

MANAGING DIRECTOR

(Italics is mine) Though Exhibit 2 was produced by the plaintiff, it is the minutes of a meeting in which the defendant\'s indebtedness was discussed. In Exhibit 36, dated 6th September, 1971, there is at least an implied admission of indebtedness though there is argument as to the amount. The defendant ends his letter thus:

Meanwhile you are advised to go through your books thoroughly for more clarification on this matter while I assure you of my co-operation at all times

Then finally, there is Exhibit 54 dated 31st December, 1969 in which the Defendant wrote:

The Manager,

African Continental Bank Limited,

Ring Road,

Benin City.

Dear Sir,

We regret to inform you that owing to the difficulties in getting U.S.A. and Canada port ship to Sapele and also our transaction with the Marketing Board which we have not been able to complete because of some hitch in documents, we will be unable to meet up the balancing of account with your Bank at the end of this month. This we regret the inconveniences it might cause, but by the grace of God before January 20th we hope to liquidate all the outstanding debt.

Yours faithfully,

Sarah & Yesufu Trading Company Ltd.

(Sgd.) F. S. Yesufu

MANAGING DIRECTOR

On the question of hardship the learned counsel for the appellant referred us to the case of Musa Awosanya vs. Alhaji Algata and Madam H. Eko (1965)1 All N.L.R. 228 in which this Court decided that if the dismissal of the claim might work injustice to the plaintiff and no injustice or hardship need result to the defendant from non-suiting the plaintiff, an order of non-suit would produce the juster result. I cannot see any injustice that a fresh action would cause the defendant. He would resist the action with the defence he has used in the present suit. A fresh action may involve a slightly higher sum of money in the claim due to the fact that the Federal Court of Appeal allowed the plaintiff\'s appeal too and ordered that interest be charged on the overdraft to defendant, if proved, after March 1972 and up to the date of judgment. Not to have ordered a non-suit would have been unjust and unfair to the plaintiff/respondent. This was also the view of this Court in the earlier action between the parties Chief Festus Sunmoila Yesufu vs. African Continental Bank Limited (1976) 4 S.C. 1-22 in which Exhibit 8 in this suit was tendered as Exhibit O. There the document Exhibit 8 (Statement of Account) which was the pivot of the plaintiff/respondent\'s case in that suit was admitted in error, but Exhibit O was a clear admission by the defendant of his indebtedness to the plaintiff\' respondent.

The appeal of the defendant/appellant was therefore dismissed with costs to respondent assessed at N300.

Judgment delivered by

Uwais. J.S.C.

The instant appeal is grounded against the order of non-suit made by the Federal Court of Appeal after setting aside the decision of the learned Chief Judge, Ovie-Whiskey, C.J.

Learned counsel for the appellant argued that following the decision in Dawodu v. Gomez 12 W.A. C A. 151 the Federal Court of Appeal ought to have dismissed the respondent\'s case, notwithstanding the decision in Chief Dada v Chief Ogunremi & Anor. 1967 N.M.L.R. 181, which supported the view that where neither party is entitled to judgment a non-suit, should be entered instead of a dismissal. His reason, in support of the submission, being that the respondents failed to produce at the hearing of the suit before the learned Chief Judge, the cheques on which the appellant was purported to have withdrawn the money allegedly owed, by him, in spite of the demand made by the appellant. In his statement of defence, that the said cheques be produced at the trial of the action.

In his reply learned counsel for the respondents conceded that the cheques should have been produced at the hearing of the case in response to the appellant\'s pleadings.

The respondents averred in paragraph 7 of their statement of claim thus:-

The plaintiffs as Bankers and in the normal course of banking business, at various times and at the request and/or instructions of the defendant paid out moneys to and for the benefit of the defendant and debited same to the account of the defendant. Such payments include inter alia, letters of credits, mail transfers, bank correspondents, (sic) standing orders, cable charges, travellers cheques, inter-bank transactions, customs charges and other charges and interest and personal cheques.

while the appellant replied in paragraph 8 of his statement of defence with the following averment:

8. Except as appears by paragraph 3 hereof which is repeated in this connection, the defendant denies paragraph 7 of the Statement of Claim, and will put the plaintiffs to strict proof of any disbursements allegedly made on his behalf and on orders or instructions, not only as to the particular item of disbursement on the account but also as to the mandate, orders, requests or instructions on which such money was paid out or debited to defendant\'s account. Furthermore, the defendant does not admit that the plaintiffs rendered him all or any of the services enumerated in paragraph 7 of the Statement of Claim or that the services if any are distinct and entirely separate from the transaction hereinbefore referred to in paragraph 3 of this Statement of Defence or were such as the plaintiffs are entitled to charge for or separately wherefore, the defendant puts the plaintiffs to strict proof that they rightly and correctly debited his account with the charges for the said services or that they kept accurate and proper accounts/records of their dealings with the defendant.

The order of non-suit was made by the Federal Court of Appeal by reason of the appellant\'s admission and also in the words of the Court of Appeal:

There is no doubt in our minds that the defendant is indebted to the plaintiff in some amount of money having regard especially to exhibit 8 in this case. It is just that it is not possible to quantify the amount of his indebtedness on the authorities and evidence before the Court. We are however satisfied that this is not a case where the plaintiff's case should be dismissed since that undoubtedly will be wronging the plaintiff. On the evidence before the lower court the defendant definitely is not entitled to judgment since it is clear that he owed something to the plaintiff. The defendant even admitted in cross-examination that at the time a document exhibit 54 was made i.e. 31st December, 1969, he was owing the plaintiff about '9,000 (N18,000).

It is not clear from the record of proceedings if the Federal Court of Appeal called upon the counsel for the parties to address them before non-suiting the respondents as laid down and followed by this Court in Craig v. Craig (1966)1 All N.L.R. 173 at p.177 and emphasised in a long line of authority thereafter. However this is not the issue argued before us and the point need not be dwelt upon further.

In Dawodu v. Gomez (supra) cited by learned counsel for appellant the West African Court of Appeal was asked to substitute an order of dismissal with an order of non-suit and the court rejecting the plea stated:

We have been invited to set out our views as to the proper occasions when a non-suit should be preferred to a dismissal. Obviously, it is quite impossible to lay down a hard and fast rule and each case must be considered on its merits.

Also in Craig\'s case (supra) this Court observed that:

Inevitably a non-suit means giving the plaintiff a second chance to prove his case. The Court has to consider whether in this case that would be wronging the defendant, and on the other hand whether the dismissal of the suit would be wronging the plaintiffs.

In my view the Federal Court of Appeal followed these principles in non-suiting the respondents and I think rightly too. The evidence adduced shows that the appellant was owing the respondents some money, the exact sum of which was not actually determined by the trial court. The appellant by admission in his letter, exhibit 8, to the respondents as well as under cross-examination at the trial of the suit confirmed that he was owing the respondents. In the light of this it will surely be inequitable and wronging the respondents to debar them from recovering the amount owing by entering an order of dismissal. I am satisfied that the justice of the case, as established by the evidence, demands that an order of non-suit was the appropriate order to be made.

The appeal therefore fails and I dismiss it.

Appeal allowed.