

IN THE SUPREME COURT OF NIGERIA

Suit No: SC349/2001

Petitioner: M. O. Kanu, Sons & Company Limited

And

Respondent: First Bank Of Nigeria Plc

Date Delivered: 2006-05-26

Judge(s): Idris Legbo Kutigi , Aloysius Iyorgyer Katsina-Alu , George Adesola Oguntade , Sunday Akinola Akintan , Aloma Ma

Judgment Delivered

This appeal revolves around Bank/customer relationship that went sour. The appellant company was the customer and the respondent the bank. The dispute arose following a loan granted to the appellant to enable it import for resale in Nigeria a quantity of stockfish. The loan was to be repaid on 30/12/89. The appellant did not pay on due date. Rather the appellant claimed that the respondent negligently handled the shipment process. It then brought a suit at the Aba High Court of Abia State on 1st November, 1991 claiming against the respondent as defendant the following:

"(a) An order of this Honourable Court compelling the defendants to waive or absolve or write off the sum of N10, 805,000.00 (Ten million, eight hundred and five thousand Naira) being the cost of 2,900 bales of stockfish destroyed by the Health Authorities as a result of the defendant's negligence; or

Alternatively,

(b) N 30,000,000.00 (Thirty million Naira) as special and general damages for negligence."

The plaintiff filed a Statement of Claim and in reaction the defendant filed an Amended Statement of Defence to which was subjoined a counter-claim which reads:

"(i) The said total sum of N19,954,138.80 due on the plaintiffs account Nos. 004/02/01765/5 and 001 020 17655.

(ii) An order directing the plaintiff to liquidate the said outstanding total sums within 3 (three months) from the date of judgment or as the Honourable Court may deem fit.

(iii) Interest on the said total capital sum or any balance thereon at the rate of N10, 00 (Ten Naira) per centum per annum commencing from the date of judgment"

The suit was heard by Ogbuagu J. (as he then was). The plaintiff called three witnesses and the defendant two. In a judgment spanning 92 foolscap pages, the trial judge on 8-7-97 dismissed the plaintiffs' suit. He granted the first head of the counter-claim followed by an order that the plaintiff liquidate the judgment debt within twelve months with effect from 1-9-97. The claim for interest was refused.

The plaintiff was dissatisfied and brought an appeal before the Port-Harcourt Division of the Court of Appeal (i.e. 'the court below'). On 21-6.2001, the court below in a unanimous judgment, dismissed plaintiffs appeal. The plaintiff has come before this Court on a final appeal. In the appellant's brief filed for the plaintiff, the issues for determination in the appeal were stated to be these:

1. Whether the Respondent's charging of 36 1/2% on the loan given to the appellant as against C.B.N's approved lending rate was proper in the circumstances.

2. Whether the contract of loan entered into by the parties was not illegal considering the fact that the same was

not within C.B.N's lending rate.

3. Whether considering exhibit 'V' the respondent could not be deemed to have waived the initial contract agreement between the parties.

4. Whether the Respondent was not negligent in the way and manner he handled the appellant's shipment process."

It is a useful starting point to a consideration of the issues for determination in the appeal to examine the respective pleadings filed by the parties. In the statement of claim, it was pleaded, that the plaintiff, a major importer of stock fish, maintained a current account with the defendant. In 1989, the plaintiff applied for an overdraft facility on its account to enable it import stockfish. The defendant granted the plaintiff a loan of Seven Million Naira on some conditions which included that the loan be repaid on or before 31/12/89. The plaintiff sent the documents needed for the importation to the defendant on 30/10/89. It was pleaded that the defendant was negligent in the opening of Letters of Credit to cover the importation and that in consequence, the stockfish arrived Nigeria late such that the plaintiff could not take advantage of the expected brisk sale of stockfish in December, 1989. The price of stockfish in the market had fallen. The plaintiff, in writing, complained to the defendant about its (the defendant's) negligence, which led to that situation. The defendant accepted being negligent. The defendant agreed to waive a portion of the interest due leaving outstanding the sum of N11, 996,533.00. The plaintiff, because of the glut in the stockfish market, called upon the defendant to exercise its right of lien given under the loan contract over the stockfish. The defendant at first agreed to do so. However, it was discovered that some of the stockfish had deteriorated in quality. About 2,900 bales of them valued at N10, 805,000.00 were later condemned as unfit for consumption. The defendant then refused to exercise its right of lien. The 2,900 bales were destroyed by Health Authorities. The plaintiff, in the circumstances sued claiming as earlier stated-in the judgment.

The defendant in its amended statement of defence and counter-claim pleaded that at plaintiff s request, it granted an overdraft of N8.5million to the plaintiff, which was to expire on 30/11/89, and a further loan of N7million, which was to expire on 31/12/89. The loan was granted on the conditions, which both parties agreed the plaintiff later submitted the documents to enable defendant issue Letters of Credit. The documents were submitted on 27/10/89. The defendant forwarded them to Standard Chartered Bank, London on 31.10/89. It followed up with a telex message on the same day. The plaintiff, the defendant pleaded, had signed documents wherein it represented that the stockfish would leave the port of shipment on 30/12/89. The stockfish, in fact left the port on 22/11/89. It was averred that, although the stockfish arrived Nigeria on 12/1/90, the decision to stockpile the stockfish till April 1991 in the hope that the importation of stockfish would be banned^ was entirely the plaintiffs and this was against the advice and wish of the defendant. The defendant pleaded that it agreed to waive interest in the ordinary course of business and not because it admitted any negligence. The defendant denied that it agreed to exercise a right of lien over the stockfish or that it was aware of the destruction of some of the stockfish. Finally, the defendant pleaded that it was lured into a reduction of plaintiffs' indebtedness from N16, 724,961.47 to N11, 996,553.00 by the promise made by the plaintiff that it would immediately pay the later amount. The defendant then raised its counter-claim for N19, 954,138.00 being the amount due on plaintiff s accounts.

In reaction to the defendant's statement of defence and counter-Claim, the plaintiff filed an amended Reply and defence to the defendant's counter-claim. I shall have cause in this judgment to refer to some of the averments pleaded in plaintiffs reply and defence to the counter-claim. I have set out above, the issues raised for determination in this appeal by the plaintiff. Issues 1 and 2 thereof relate to the contention by the plaintiff that the interest charged on the loan granted to it by the defendant was illegal, arising from the fact that the same at 36\2% was excessive and not in conformity with the advertised Central bank of Nigeria lending rate. I intend to take the two issues together.

The first observation to be made in relation to plaintiffs grouse with the interest charged on the loan, granted by the defendant, is that the plaintiff did not anywhere in its amended statement of claim plead any fact concerning the interest charged. It was not pleaded in the aforesaid pleading that interest charged was excessive or that it was not in conformity with the Central Bank of Nigeria's approved lending rates. However, in paragraph 13(b) and (c) of its defence to the counter-claim, the plaintiff in a muted or half-hearted manner raised the issue of interest thus:

\(b) The interest charged on the two respective accounts were unilaterally done by the defendant without communicating the plaintiff and same were not based on approved Central Bank of Nigeria Guidelines on interest rate and overdraft facilities.

(c) The plaintiff further avers that it is the policy of the Federal Government of Nigeria Monetary Credit, Foreign Trade and Exchange policy Guidelines to regulate interest rate on loans and overdraft. The plaintiff pleads and shall rely on the Central Bank of Nigeria Monetary Credit, Foreign Trade and Exchange policy Guidelines for 1990, 1991, 1992, 1993 and 1994 respectively.\

At the trial of this suit, the plaintiff did not tender in evidence \the Central Bank of Nigeria Monetary Credit, Foreign Trade and Exchange Policy Guidelines for 1990, 1991, 1992, 1994\ which the plaintiff pleaded. It was not therefore shown in specific terms how the interest charged by the defendant offended the said policy guidelines. Further, an averment that the interest charged, did not conform to the rate approved by the Central bank of Nigeria, (C.B.N.) did not without more convey that the defendant had charged a higher rate of interest than approved. Interest charged, which is lesser than that approved by C.B.N., could still be described as not being in conformity with the authorised rate. In any case, it is settled law that a plaintiff whose case is that the defendant has been guilty of malpractices amounting to an illegality must set out the particulars of the nature of the illegality pleaded or involved. In *Akinbola George & Ors. v. Dominion Flour Mills Ltd* {1963} 1 All N L.R. 71, this Court held that where a contract is not ex facie illegal, and the question whether or not it is illegal depends on the circumstances, as a general rule, the court will not entertain arguments on the question of illegality unless it was raised on the pleadings. That translates, in this case, to the necessity for the plaintiff to plead (a) the rate of interest charged by the defendant, (b) the rate chargeable or ceiling lay under any statutory guidelines and (c) the difference between the interest charged and the approved rate. A mere averment that the rate of interest charged is not the same rate approved under statutory guidelines for the kind of loan given will not meet the standard required. See also *Re Robinson's Settlement* [1912] 1 Ch. 724. Quite apart from the above, a perusal of the evidence called before the trial court amply demonstrates that the plaintiffs' case on the impropriety of the interest charged by the defendant never really got off the ground. The plaintiff tendered in evidence as exhibit \A\ the letter by which it sought for an increase in his overdraft facility by N7million. The defendant sent a reply exhibit \B\ to the plaintiff approving the loan request on stated terms or conditions. Exhibit \B\ reads:

\FIRST BANK OF NIGERIA LIMITED,
2, Asa Road, P. M. B. 7103, ABA

ABA (MAIN BRANCH) Our ref: 101/OUK/eio
22nd September, 1989

The Managing Director,
M. O. Kanu, Sons & Company Limited,
75 Hospital Road,
Aba.

Dear Sir,

APPLICATION FOR A LOAN OF N7 MILLION

We are pleased to advise you that approval have been received in principle, on your application for a loan of N7million subject to the following conditions:-

- 1) Submission of Cash flow projection which will clearly demonstrate your company's ability to pay back by 31/12/89.
- 2) The understanding that sourcing of Foreign Exchange will not be entirely tied to First Bank of Nigeria Limited.

- 3) Drawdown not being allowed before 3/10/89 and full settlement being made by 31/12/89.
- 4) Interest being charged at our BLR + 141/2% opportunity cost = 361/2 & p.a.
- 5) Your company\'s written undertaking being obtained to cover conditions \'2, 3 and 4\' above.

Upon your full compliance of the above, we shall revert to our Head Office for the necessary approval for drawdown.

Yours faithfully,

For: FIRST BANK OF NIGERIA LIMITED.

(sgd.) O.U. Kalu
Manager\"

There is no gainsaying that exhibit \'B\' above in clause 4 thereof states clearly the rate of interest to be charged on the loan granted to the plaintiff. The plaintiff vides a letter exhibit \'C\' communicated its acceptance of the conditions stated in Exhibit \'B\'. Exhibit \'C\' reads thus:

\"Sept. 22, 1989.

The MANAGER,
First Bank (Nig) Ltd.
Aba Main,
Aba.

Dear Sir,

We refer to your letter of the 22nd instant oh the facility of N7, 000,000.00 now approved by your Head Office subject to the conditions contained in your letter.

In response therefore please find as attached our Cash flow projection on the loan ending 31st December 1989. We shall definitely payback the loan accordingly.

On the second paragraph of your letter, please be assured that we shall secure our foreign exchange both from you; Union Bank and UBA, and that will not present any problem.

On paragraph three, we agree to commence the draw-down from the (third) 3rd October 1989 and we shall repay same back in full to you by 31st October 1989.

On the fourth paragraph of your letter, we have noted the special interest charged on this loan.

Thanking you for your entire endeavour in appro\'ing the above loan.

Yours faithfully,

M.O. KANU, SONS & CO. Ltd.

(Sgd.) Chief (Sir) M. O. KANU, KSC.
Chairman/Managing Director.\"

The plaintiffs Chairman/Managing Director on 6/11/96 at page 152 of the record testified under cross-examination that he knew the rate of interest being charged. The relevant portion of the proceedings went thus:

\'(Ques.): Before the loan was made available to your company - the plaintiffs, the bank told them or you the applicable rate of interest'

(Ans.): I don't dispute the liability I undertook with the defendants. We agreed on it and signed in respect thereof.\''

In view of the evidence available, I have the impression that the plaintiffs standpoint in the court below and this Court is clearly an after'thought which is not supported by either the pleadings filed by parties or the evidence called at the trial. The court below at page 420 of the record reacted to the contention in these words:

\'The averment in sub-paragraph (b) refers to two respective accounts for which interest were unilaterally charged not based on approved Central Bank of Nigeria Guidelines. There is no averment challenging the interest rate in respect of the over'draft facilities to cover the importation of the stockfish. The PW2, Chief Sir Maxwell Onuiri Kanu, the Managing Director of the appelland Company while testifying under cross-examination at page 152 of the record stated thus:

\'I don't dispute the liability I undertook with the defendants. We agreed on it and signed in respect thereof.\'

Earlier, in evidence at page 148 of the record he had stated:

\'The nature of the interest granted to me by the defence was an opportunity interest. It was a special interest.\'

My conclusion from all I have quoted above is that the question of whether the interest charged on the loan facility was above the rate permitted by the Central Bank was not an issue before the trial court and therefore it cannot be the basis of an issue for loan facility. Accor'dingly, I strike out the first issue in the appelland's brief as improper. I also discountenance the arguments therein.\''

I entirely agree with the reaction of the court below as expressed in the above passage. I would decide issues 1 and 2 against the plaintiff.

Under its issue 3, the plaintiff queries whether the defendant ought not have been deemed by the court below to have waived the terms of the initial agreement between the parties by exhibit'V' written by the defendant to the plaintiff on 28/3/91. The said Exhibit'V' reads thus:

\'FIRST BANK OF NIG. LTD.
2, Asa Road, P.M.B. 7103, ABA,
Nigeria.
ABA (MAIN) BRANCH

Our ref: 101 /OUK/NMU 28th March, 1991.

Chief (Sir.) M.O. Kanu, KSC,
Chairman & Managing Director,
M.O. Kanu, Sons & Company Limited,
P.O. Box 802,
Aba.

Dear Sir,

YOUR COMPANY DEBT OF n1I, 996,533.00

We refer to your letter of 18th March 1991, and are pleased to advise that the Management has taken decision on it as follows:

(a) The original agreement must be met, that is payment of the sum of N11, 996,533.00 in full and final settlement of the outstanding debt must be effected on or before 31st March, 1991.

(b) In the alternative, you must submit a repayment schedule and must be prepared to pay interest at our base lending rate of 20% per annum.

Yours faithfully,
For: FIRST BANK OF NIG. LTD.
(Sgd.) O.U KALU
MANAGER."

In the above exhibit 'V', there is no doubt that the defendant offered the plaintiff an opportunity to pay less than was due from plaintiff to the defendant. The letter however did not convey an open-ended opportunity. It was an offer conditioned upon the plaintiff paying the sum of NI 1,996,533.00 instead of N16, 724, 961.47 on or before 31st March, 1991. The plaintiff did not meet the condition attached to the offer. This was an offer to the plaintiff and the acceptance expected from the plaintiff in the nature of the offer stated, was a performance. It is settled law that if time is made the essence of an agreement and the time frame is not met by performance or acceptance within the time stipulated, the offeror will not be held to a contract. Further, an offer may only be accepted in the manner and terms attached to the offer. See *College of Medicine v. Adegbite* [1973] 5 SC. 149. In determining whether there has been an acceptance, the total circumstances surrounding the offer must be taken into consideration. See *Majekodunmi v. National bank of Nigeria* [1978] 3 SC. 119 at 126 -127. In the letter exhibit 'V' written to the plaintiff by the defendant, there could be no doubt that the form of acceptance which the defendant expected from the plaintiff was the payment of N11, 996,533.00 on or before 31-3-91. This Court cannot hold the defendant to an agreement to accept from the plaintiff, the sum of N 11,996,533.00, the plaintiff not having paid that sum by 31-3-91. A contract ought to be strictly construed in the light of the terms agreed by the parties. See *Niger Dam v. Lajide* [1973] 5 SC.2007 at 222 and *Mobil v. Johnson* [1961] 1 ALLN.L.R. 93. I would decide issue No. 3 against the plaintiff.

And finally is the issue whether or not the defendant had been negligent in the manner it handled the shipment process of the stockfish imported by the plaintiff. It is settled law that negligence is a matter of fact not law. See *Kala v. Jarmakani Transport Ltd.* [1961] All N.L.R. 747. Before a court finds a defendant liable in negligence to plaintiff's claim, the court must carefully consider the evidence called in order to ascertain whether or not negligence is established. The trial court, in this case, meticulously considered the facts pleaded and the evidence led by the plaintiff in its attempt to establish negligence against the defendant. At pages 318-31, the trial court observed:

"But there again, is exhibit 'F', which shows that the plaintiffs' suppliers confirmed to standard Chartered Bank, London, the receipts of the letters of credit on 23 November, 1989.

There is no evidence by the plaintiffs that the consignment must reach Nigeria before Christmas period. The cross-examination and answer in this regard are also important and relevant.

Q.: If the shipment date was 30/12/89, it will not get to Nigeria before Christmas, 1989.

Ans.: Yes. I agree that it will not get here...'

Now D.W. 1, under cross-examination.....

Q.: How did the plaintiff demonstrate its ability to repay the money before 31st December, 1989?

Ans.: They demonstrated their ability to pay from their past records which we had. Secondly, we were satisfied that the business would be self-liquidating i.e. it would pay itself. Thirdly they offered securities, which were satisfactory to us. Fourthly, they submitted their balance sheet and their cash flow projections."

And at pages 322 -333, the trial court in reaching its conclusion on the evidence called in support of the allegation of negligence said:

"In the end result, on a calm view of the pleadings the evidence of the parties and the submissions of their learned counsel, the court is satisfied that no case of negligence has been established by the plaintiffs against the defendants. The plaintiffs have failed woefully on the solid facts before the court, to prove, even on balance of probabilities, or preponderance of evidence or to establish the lone claim in negligence or the alternative claim. Each fails and, is accordingly, dismissed."

The court below equally gave consideration to the issue of negligence in its judgment at pages 420 to 421 of the record of proceedings where it said:

"On the 2nd issue the learned counsel for the appellant submitted that the respondent caused a delay in the shipment of the stock fish with the result that the stockfish did not arrive before Christmas 1989 and could not be sold. He said that the letters of credit were not forwarded in good time to enable the early shipment of the goods.

In reply to this the learned Senior Advocate for the respondent submitted that there was no negligence on the part of the respondent. He said that even if there was delay with regard to the letters of credit, the stockfish did in fact leave the port of export on the 22nd of November 1989 which was much earlier than the 30th of December 1989, which the appellant projected as the latest date for the shipping of the stock fish from Iceland. He said that what actually caused the loss was the hoarding of the commodity by the appellant from the time it arrived in January 1990 up to April 1991. He said that there was evidence that the appellant on taking delivery of the stockfish sold off 7,100 bales and stored up 2,900 bales from the 12th of January, 1990 up to the 9th of April, 1991 when the stockfish was confiscated by the Health Authorities and destroyed.

A party suing for negligence must show that the defendant owed him a duty of care and that he suffered damage in consequence of the defendant's failure to take care. See the case of *Agbonmagbe Bank Ltd. v. C.F.A.O.* (1966) 1 All NLR 140.

In this case the appellant did not sue for any breach of contract rather it chose to sue for negligence. There was clear evidence that the projected date set by the appellant for the stockfish to leave Iceland was the 30th of December, 1989 and the stockfish actually left on the 22nd of November, 1989. The appellant therefore cannot attribute any negligence to the respondent for late arrival of the stockfish in Nigeria. There is no evidence whatsoever to support any negligence on the part of the respondent. The main responsibility of the respondent was to provide the loan facility to enable the appellant import the stockfish. The appellant from the evidence before the trial court was the cause of its own loss by hoarding the stockfish over a long period of time. What stopped the appellant from selling the stockfish by December of 1990? The appellant hoarded the stockfish with the hope that the price would rise in the market. It cannot hold the respondent responsible for its own failure or miscalculation.

The 3rd issue has been answered in my conclusion reached under the second issue because whether or not the respondent should be held responsible for the delay in procurement of foreign exchange from Central Bank of Nigeria and remittance of same to the beneficiaries of letters of credit is completely irrelevant as the importation of the stockfish was not delayed and no negligence could be attributed to the respondent."

It is not the suggestion of plaintiff's counsel before us that the trial court made its findings of fact on evidence which was not called before it or that the findings made did not flow from the evidence called. Those findings were affirmed by the court below. Before me therefore, I have concurrent findings of the two courts below to the effect that no case of negligence was established against the defendant. In *Enang v. Adu* [1981] 11-12 SC. 17 at 27 (Reprint), this Court per Nnamani JSC restated its attitude to concurrent findings of fact thus:

"The task of the appellants on this ground of appeal is made more difficult by the fact that there are before us concurrent findings of fact by both the learned trial Chief Judge and the learned Justices of the Court of Appeal. It is settled law that such concurrent findings, where there is sufficient evidence to support them, should not be disturbed.

Kefi v. Kofi 1 WACA 284. This rule of practice can only be obviated if there is some miscarriage of justice and violation of some principle of law or procedure. The Privy Council in *The Stool of Abinabina v. Chief Kojo Enimadu* [1953] 12 WACA 171 at 173 quoted with approval, a definition of the miscarriage of justice necessary for such a purpose previously given by Lord Thankerton in *Scrimati Bibhabati Devi v. Kumar Ramendre Narayan Roy* 62 TLR 549. This is that:-

'The violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the findings cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect.'

There is no such violation of any proposition of law or any principle of procedure in the instant case. This ground of appeal must also fail."

The inevitable result is that I must decide issue 4 against the plaintiff, the two courts below having found that on the evidence called, no negligence was established against the defendant.

In the final conclusion, this appeal fails. It is dismissed. I award against the plaintiff in favour of the defendant, costs assessed and fixed at N10, 000.00.

Judgment delivered by
Idris Legbo Kutigi, J.S.C.

I have had the privilege of reading in advance the judgment just delivered by my learned brother Oguntade J.S.C. He has meticulously dealt with the issues canvassed in the appeal. I agree with his reasoning and conclusions. I find no merit in the appeal. The record clearly shows that the Plaintiff was the cause of its own loss by hoarding the stockfish over a long time with the hope that the price would rise in the market. Meanwhile, the stockfish deteriorated in quality and later condemned as unfit for consumption, confiscated and destroyed by the Health Authorities. Clearly the Plaintiff cannot hold the Defendant liable for its own failure. The appeal is dismissed. I endorse the order for costs.

Judgment delivered by
Aloysius Iyorgyer Katsina-Alu, J.S.C.

I have had the advantage of reading in draft the judgment delivered by my learned brother Oguntade, JSC. I entirely agree with his reasoning and conclusion. There is nothing I can usefully add.

Judgment delivered by
Sunday Akinola Akintan, J.S.C.

I had the privilege of reading the draft of the leading judgment written by my learned brother, Oguntade, JSC which has just been delivered. All the issues raised in the appeal have been fully discussed. I entirely agree with his reasoning and conclusion that the appeal lacks any merit. I hold the same views and conclusions and I also dismiss the appeal with costs as assessed in the leading judgment.

Judgment delivered by
Aloma Mariam Mukhtar, J.S.C.

At the High Court of Abia State Holden at Aba, the plaintiff, (now the appellant) being the customer of the defendant/respondent obtained an increased overdraft facility of N7,000,000.00 from it for the purpose of importing stockfish. The plaintiffs' case was that the defendant delayed the processing of the plaintiffs documents for the importation of stockfish, as a result of which the stockfish did not arrive before Christmas to meet the Christmas festivities, as projected. The defendant's negligence caused the delay, and so the price of the stockfish fell. The stockfish was not sold and it became bad, until the health authority ordered its destruction; and the bales of stockfish were destroyed as a result of which the plaintiff suffered loss and damages. Consequently the plaintiff claimed the following special damages:-

- '1. Loss of 1900 bales of stockfish NI 0,805,000.00
2. Loss of profits on 1900 bales of stockfish at N2900.00 profits per bale N5, 510,000.00.
3. Loss of profit on 1000 bales of stockfish at N3, 035.00 profit per bale N3035, 000.00

Total = N19, 350,000.00'

The learned trial court dismissed the plaintiffs claim, and unhappy with the decision it appealed to the court below, and the court found no merit in the appeal and dismissed it. Again dissatisfied, the plaintiff has appealed to this court. In its brief of argument the appellant counsel formulated four issues for determination which are as follows:-

- '(1) Whether the Respondent's charging of 361/2% on the Loan given to the Appellant as against the CBN's approved lending rate was proper in the circumstance.
- (2) Whether the contract of loan entered into by the parties was not illegal considering the fact that same was not within CBN's lending rate.
- (3) Whether considering Exhibit V the Respondent could not be deemed to have waived the initial contract agreement between the parties.
- (4) Whether the Respondent was not negligent in the way and manner he handled the Appellant's shipment process.'

The learned S.A.N. for the Respondent in their brief of argument disagreed with the above issues (1) - (3) for the reasons that no such contentions were advanced/canvassed on the pleadings or at the trial, and raised the following issues in their stead :-

- '(i) Whether there was any negligence established on the part of the respondent on the transaction'
- (ii) Whether any of the losses or damages claimed if proved could properly be referable to the negligence alleged'
- (iii) Was the lower court right in affirming the award of the counter claim''

As much as I agree with the learned S.A.N that the issues (1) & (3) raised by the appellant were not issues in the trial court, I am of the view that they cannot be completely ignored, because they were raised in the lower court and the submissions covering them were dealt with in the court's judgment, but the court eventually struck out the issue, which covers issues (1) and (2) in the present brief of argument. In a situation like this, one expects that notice of preliminary objection urging the court to strike out the issues and the grounds covering them would have been filed and moved either by way of a separate process or in the brief of argument by the learned S.A.N for the respondent. But this is not so in this case. If the learned S.A.N. had raised the objection, it would have been a straight forward striking out. This does not however mean that this court is precluded from striking out the issues where it deems it necessary to do so. See Sha Jnr. V. Kwam 2000 8 NWLR part 670 page 685.

However, the issues raised in the respondent's brief of argument are competent issues that are covered by the grounds of appeal, so I find them more relevant and valid for the argument of the appeal. Issue (3) will conveniently be covered by grounds (1) and (2) of appeal.

Learned counsel for appellant's complaint on the rate of interest awarded by the courts below revolves around the interest being above the interest rate fixed by the Central Bank of Nigeria, by virtue of the power vested in it by Section 15 of the Banking Act in respect of such lending rates. To appreciate this discussion I will reproduce the defendant/appellant's counter claim and the reply thereto.

Another issue I would like to emphasize is that of negligence asserted by the plaintiff/appellant. In its statement of claim the plaintiff/appellant pleaded the following particulars of negligence:-

'12(a) Failure to submit all the necessary letters that should accompany the plaintiffs bidding document on 23rd October, 1989 to the Defendant's Head Office in Lagos.

(b) Late dispatch of all the plaintiffs letters of credit to Standard Chartered Bank, London.

(c) Late arrival of plaintiff s letters of credit at Standard Chartered Bank, London.

(d) Failure to take any or any adequate steps to advise the plaintiffs' supplier in Iceland on time upon the arrival of some of the letters of credit.

13. The plaintiffs Managing Director on being notified by the Defendant in Lagos that the letters of Credit which were opened on 31/10/89 were about to be dispatched to London had to travel to Iceland to await the arrival of the letter of credit and to facilitate the shipment of the stockfish in order to avoid any delay that will -further jeopardize the cash flow projection but discovered that the Standard Chartered Bank London has not advised the plaintiffs suppliers in Iceland as at 17/11/89 which said advice was further delayed until after 23 days and this mitigated against the early shipment of the stockfish.

14. In consequence of the aforesaid delays the stockfish imported by the plaintiff from Iceland meant for Christmas sales arrived Nigeria after the Christmas sales of 1989 and New Year of 1990.

15. The plaintiff avers that at the time the said stockfish arrived the Christmas festivities have passed and this led to the fall in prices of stockfish.

22. Notwithstanding the efforts of the plaintiff to preserve the stockfish, the Health Authority visited the plaintiffs' warehouse on 7th April and found the stockfish stored therein as unfit for human consumption and ordered for the immediate destruction of the said stockfish, which said destruction was carried out on the 9th day of April, 1991.'

In reply to the above averments the defendant/respondent denied paragraphs (12) and (13) supra.

The plaintiff/appellant adduced evidence in support of their pleading, but did not adduce satisfactory evidence to buttress the fact that it was the delay in the arrival of the letters of credit to its suppliers that caused it such loss and damages. The stockfish did arrive in January, 1990, but instead of the appellant taking steps to immediately sell the stockfish, it stored them in its warehouse, because (as the witness said) there was a fall in the price of the commodity. In its bid to probably maximize its profit it kept the goods, knowing very well that by the nature of the commodity they could easily go bad and eventually become unfit for human consumption, (considering the fact that the company has been trading in the commodity for sometime and through experience should be aware of the consequence of hoarding the stockfish.) The appellant in my view is responsible for whatever misfortune that has befallen it in respect of its loss. The eventual destruction of the stockfish in April 1991 is not the fault of the respondent and cannot be linked to it for it did not advise or instruct the appellant to keep the stockfish for almost 3 months in its warehouse, when the consignment could have been sold on arrival, as was done by other importers of the same commodity who also imported same around the same time. If the appellant had sold the bales of stockfish immediately they arrived, the loss if at all there was any would

have been minimal. For the action on negligence to be sustained party asserting such must establish that the party against which the allegation is made owed the other party a duty of care and there must be connection between the carelessness and the damages or loss suffered.

The authors of Clerk and Lindsell on Tort, 14th Edition stated the requirements of the tort of negligence as follows:-

"The tort is traditionally described as damage, which is not too remote, caused by a breach of a duty of care owed by the defendant to the plaintiff. This formula yields six ingredients of liability.

- (1) A duty of care situation, i.e. recognition by law that the careless infliction of the kind of damage in suit on the type of person to which the plaintiff belongs by the type of person to which the defendant belongs is actionable.
- (2) Foresee ability that the defendant conduct would have inflicted on the plaintiff the kind of damage in suit. This is what is implied in the statement that the duty of care has to be "owed" to the plaintiff.
- (3) Proof that the defendants conduct was careless, i.e. that it failed to measure up to the standard and scope set by law: breach of duty.
- (4) There must be a casual connection between the defendant's carelessness and the damages. As long as these four requirements are satisfied, the defendant is liable in negligence. Only then do the remaining considerations arise, namely,
- (5) The extent of the damage attributable to the defendant; and
- (6) The monetary estimate of that extent of damage".

A careful perusal of the evidence adduced by the appellant does not disclose and prove the above ingredients. The onus of proving that the above factors existed was on the plaintiff appellant and it is after the onus has been discharged by uncontroverted and admissible evidence that the burden will shift. See Jack v. Whyte 2001, 6 NWLR part 709, page 266, Military Administrator, Benue State v. Ulegede 2001, 17 NWLR part 741, page 194, and Imana v. Robinson 1979 3-4 S.C.I. It is in this vein that I agree with the finding of the court below which reads:-

"There was therefore neither negligence nor damage or loss occasioned the appellant for which the respondent could enter in law ' or simple rationality be called to question in the transaction between the parties."

I am in full agreement with the lead judgment delivered by my learned brother Oguntade, JSC. that the appeal is devoid of merit and ought to be dismissed. I hereby dismiss the appeal in its entirety and affirm the judgment of the Court of Appeal. I abide by the consequential orders made in the lead judgment.