KHALED BARAKAT CHAMI

V.

UNITED BANK FOR AFRICA PLC
(By order of substitution granted on 10th June, 2009)

SUPREME COURT OF NIGERIA

SC.257/2003

ALOYSIUS IYORGYER KATSINA-ALU, C.J.N. *(Presided)*
ALOMA MARIAM MUKHTAR, J.S.C
WALTER SAMUEL NKANU ONNOGHEN, J.S.C. *(Read the Leading Judgment)*
CHRISTOPHER MITCHELL CHUKWUMA-ENEH, J.S.C.
MUHAMMED SAIFULLAHI MUNTAKA-COOMASSIE, J.S.C

THURSDAY, 25TH FEBRUARY, 2010

APPEAL – Issues for determination – Need to arise from grounds of appeal – Respondent who did not file cross – appeal or respondent's notice – Whether can formulate issues outside appellant's ground of appeal.

APPEAL – Counsel involved in appeal – Need to always remember basic principles guiding appeals.

APPEAL – Finding of facts by court – Where court made principal findings on an issue and auxiliary finding thereon – Party appealing – Duty on to appeal against principal finding before questioning validity of ancillary finding.

APPEAL – Findings of court – Whether every finding of court is appealable.

APPEAL – Ground of appeal – Need to attack only ratio decidendi of judgment.

APPEAL – Ground of appeal – Need to relate to issues joined I the trial of case.

APPEAL – Grounds of appeal – Foundation of – Principles guiding appeals.

CONSTITUTIONAL LAW – Fair hearing – Denial of – Party failing to utilize opportunity to be heard – Whether can subsequently complain of denial of fair hearing.

COURT – Finding of facts by court – Where court made principal findings on an issue and auxiliary finding thereon – Party appealing – Duty on to appeal against principal finding before questioning validity of ancillary finding.

COURT – Findings of court – Whether every finding of court is appealable.

COURT – Raising issue suo motu – Need to call for counsel's address thereon – Issues raised suo motu by court without address of counsel –Findings made thereon – Treatment of.

EVIDENCE – Proof of case – Where defendant fails to call evidence – Burden of proof placed on plaintiff thereby.

EVIDENCE – Standard of proof – Civil matter – Standard of proof required therefor.

FAIR HEARING – Denial of fair hearing – Party failing to utilize opportunity to be heard - Whether can subsequently complain of denial of fair hearing.

FUNDAMENTAL RIGHTS – Fair hearing – Denial of – Part failing to utilize opportunity to be heard – Whethercan subsequently complain of denial of fair hearing.

GUARANTEESHIP – "Guarantee" – Meaning of.

GUARANTEESHIP - Contra of guarantee – Nature and meaning of – Obligation imposed upon guarantor – Whether guarantor can be sued alone without joinder of principal debtor – Liability of guarantor – When crystallizes

LEGAL PRACTIONER – Counsel involved in appeal – Need to always remember basic principles guiding appeals.

PRACTICE AND PROCEDURE – Finding of facts by court where court made principal finding on an issue and auxiliary finding thereon – Party appealing – Duty on to appeal against principal finding before questioning validity of aucillary finding

PRACTICE AND PROCEDURE – Ground of appeal – Need to attack only ratio decidendi of judgment.

PRACTICE AND PROCEDURE – Ground of appeal – Need to relate to issues joined in the trial of case.

PRACTICE AND PROCEDURE – Issues for determination – Need to arise from grounds of appeal – Respondent who did not file cross-appeal or respondent's notice – Whether can formulate issues outside appellant's ground of appeal.

PRACTICE AND PROCEDURE – Proof of case – Where defendant fails to call evidence - Burden of proof placed on plaintiff thereby.

PRACTICE AND PROCEDURE – Appeal – Grounds of appeal – Principles guiding appeals

PRACTICE AND PROCEDURE – Raising issue suo motu – Duty on court to call for counsel's address thereon – Failure to so do – Effect – Findings made thereon by court – Treatment of.

WORD AND PHRASES – "Guarantee" - Meaning of.

Issues:

1. Whether the learned justices of the Court of Appeal were not right in striking out the sole issue formulated by the appellant as respondent before the court and argument canvassed thereon, on the ground that the issue had no nexus with the ground of appeal.
2. Whether the Court of Appeal was wrong in its finding that Rasha Enterprises Limited was not a necessary party to this suit.
3. Whether non-stamping or non-registration of guarantee agreement or form renders same inadmissible and/or lacking in probative value, and whether the Court of Appeal was wrong by holding that the issue of non-registration and non-certification were raised *suo motu* by the trial court

Facts:

One Rasha Enterprises Ltd was given overdraft facilities on its application by the respondent. As condition thereof, the respondent requested the company to provide a guarantor for the credit facilities. The company then provides the appellant

who also was a customer of the respondent bank. The appellant executed a guarantee agreement in favour of the respondent on the strength on which the company was allowed by the respondent to overdraw its account.

As at 25th October, 1999 the respondent claimed that the principal debtor, Rasha Enterprises Ltd. Was indebted to it in the sum of N171,452,649.52k (One Hundred and Seventy One Million, four Hundred and Fifty two thousand, six hundred and forty nine naira, fifty two kobo) as a result of credit facilities aforementioned. According to the respondent, the company had refused and neglected to pay the money despite several demands.

On 20th July, 1999, the respondent's solicitor wrote the appellant asking him to pay the aforesaid indebtedness in honour of his pledge under the guarantee agreement. The appellant also refused to pay, which resulted in this suit, wherein the appellant sought to recover the money.

The case of the appellant in his statement of defence was that he never acted as a guarantor in the overdraft arrangement between the respondent and the principal debtor, Messrs Rasha Enterprises Ltd. he then put the respondent to the strictest proof of all the allegation. He further pleaded that the principal debtor company, Rasha Enterprises Ltd, was not duly incorporated and that the credit facility was not secured. However, the appellant did not testify in proof of his averments in the statement of defence.

The respondent, in proof of its case tendered in evidence the guarantee form or agreement which the appellant signed.

At the conclusion of trial. the trial court held that the respondent failed to prove its case and that the debt could not he proved against the guarantor without joining the principal debtor. Rasha Enterprises Ltd. as a party to the suit. The trial court also went ahead to hold that the guarantor form was not completed in the presence of a lawyer and that there was no stamp on it. As for the statement of account the trial court held that it commanded no probative value as it was prepared during the pendency of the case.

The respondent was dissatisfied with the judgment and appealed to the Court of Appeal, which allowed the appeal and granted judgment in favour of the respondent in the sum claimed in the trial High Court.

The appellant, aggrieved by the judgment of the Court of Appeal, appealed to the Supreme Court.

Held *(Unanimously dismissing the appeal):*

1. *On Meaning of "guarantee" –*
Guarantee has been defined as a written undertaken made by one person to another to be responsible to that other if a third person fails to perform a certain duty, e.g. payment of debt. Thus, where a borrow (i.e. the third party) fails to pay an outstanding debt the guarantor (or surety as he is sometimes called) becomes liable for the said debt. In the instant case, the respondent proved by exhibit 1, **the existence the contract of guarantee executed by the appellant to secure the debt of Rasha Enterprises Ltd. By exhibit** 4, **the respondent proved the principal loan to that company. The evidence of P.W.** 1-3 **also went to establish the existence and indebtedness of the principal debtor to the respondent which was guaranteed by the appellant. It is important to note that the evidence as presented are not challenged rebuttal.** *(P. 501, paras. F-H)*

2. *On Nature and effect of contract of guarantee –*
Where a person personally guarantees the liability of a third party by entering into a contract of guarantee or suretyship, a distinct and separate contract from the principal debtor's is thereby created between the guarantor and the creditor. (P. *501, paras. B-C)*

3. *On Whether guarantor can he sued in recovery of debt without joining the principal debtor –*
A contract of guarantee can be enforced against the guarantor directly or independently without the necessity of joining the principal debtor in the proceedings to enforce the guarantee. Thus, a surety may be proceeded against without demand from him and without first proceeding against the principal debtor. [*Olujitan v. Oshatoba* **(1992) 5 NWLR (Pt. 241) 326;** *Ekrehe v. Efeznrmor II* **(1993) 7 NWLR (Pt. 307) 588 referred to.] (***P. 501. paras. C-E)*

4. *On When liability of guarantor crystallizes* -
When the principal debtor fails to pay his debt, as in the instant case, the" liability of the guarantor (appellant in the instant case) under (he guarantee

crystallizes. The right of the creditor is therefore not conditional as he is entitled to proceed against the guarantor without or independent of the incident of the default of the principal debtor ***[F.I.B.C. Pic. v. Pegasus Trade Office*** **(2004) 4 NWLR (Pt. 863) 369;** ***African Insurance Development Corporation v. Nigerian Liquified Natural Gas Ltd.*** **(2000) 4 NWLR (Pt. 653) 494 referred to.] (Pp.** ***501-502. paras. H-B)***

5. *On Whether party who failed to utilize opportunity of being heard can later complain of denial affair hearing –*

Fair hearing is based on opportunity to meet the case of the other party. Where a party decides not to utilize the opportunity so offered, he cannot later he heard to complain of lack of fair hearing. In the instant case, to argue that the striking out by the Court of Appeal of the sole issue formulated by the appellant, who was the respondent in the Court of Appeal, resulted in a breach of the appellant's right to fair hearing when he had the opportunity to answer the respondent's (appellant in the Court of Appeal) issue 2 as formulated in the Court of Appeal but decided not to do so by formulating his own issue which turned out to be outside the 18 grounds of appeal filed in the Court of Appeal when there was no cross-appeal or respondent's notice, is a clear misconception. (*P. 497, paras. D-F*)

6. *On Treatment of findings on issue raised suo motu* by *court without calling on parties to address it thereon-*

Where a trial court raised an issue *suo motu* **without asking the parties to address on it, and went ahead to base its judgment thereafter, then such a finding or holding would not stand on appeal as same must be set aside.** ***(P. 500, paras. D-H);***

Per ONNOCHEN, J.S.C. at page 500, paras. D-H)

> **"It should be noted that the issue as to the joining of the principal debtor in an action to enforce a guarantee against a guarantor did not arise from the pleadings of the parties evidence and**

addresses of counsel before the trial court. The matter was thus raised *suo motu* **by the trial court and without calling on learned counsel for the parties to address it on it before basing its decision thereon. This caused the present appellant to appeal against that holding and decision to the lower court which court found and held that the matter was not only raised** *suo motu* **in the circumstances that should not have been, but that the joinder of the said company in the circumstances of the instant case is not necessary as the same is not a condition precedent. I hold the view that an appeal against the decision of the lower court with regards to the above holding must first of all attack the holding that the issue was raised** *suo motu* **before contesting any other matter, if it is true that the issue was never raised by the parties nor did their counsel address** *the* **court on same but the trial Judge raised same in its judgment without calling on counsel for both parties to address it on it and proceeded to base its judgment on it. (hen the law, which is now very settled, is that such a finding or holding cannot be sustained upon appeal as the said holding must be set aside."**

7. *On Whether every finding of court is appellable –*
It is not every holding or finding by a lower court that would give rise to a ground of appeal. (*P.492, para. F***)**

8. *On Burden of proof on plaintiff where defendant offers no defence –*
Where a party offers no evidence in defence of the case of the plaintiff, the burden placed on the plaintiff is minimal, since there is no evidence to challenge the case of the plaintiff, and the plaintiff can use the unchallenged evidence to establish his case. In the instant case, the appellant failed to utilize the opportunity given to him to refute the case of (he respondent. Therefore, there was nothing to

be placed on the other side of (he scale to balance the case of the parties. It became an uphill task for the appellant to show how, upon the weight of evidence, the appellant who called no evidence to meet the case of the respondent ought to have been given a more favourable consideration *vis-a-vis* **the respondent. [***Osun Slate Government v. Dalami Nig. Ltd.* **(2003) 7 NWLR (Pt. 818) 72 referred to.]** ***[****Pp. 496-497, paras.*

9. *On Standard of proof in civil matter –*

Civil cases are proved on preponderance of evidence, and balance of probability. In this cases the respondent proved his case, and having done that the onus shitted on (he appellant. **[Elias v. Omo-Bare** (1982) 5 S.C. 25; **Akinlemibola v. CO.P.** (1976) 6 S.G 205 referred to.] (p. ***505.*** **para G)**

10. *On Principles guiding formulation of grounds of appeal –*

Grounds of appeal must be based on the reasons for the decision reached by the lower court, which should in turn be based on the issues joined by the parties in their pleadings, evidence adduced in support thereof and submission of counsel on the applicable law to the facts so established by evidence. In the instant case, the trial court completely went outside the case pleaded by the parties, the evidence on record and applicable law to raise issues suo motu upon which it proceeded to decide the matter with-; out recourse to counsel for (he parties to address it on same. The Court of Appeal, under that circumstances allowed the appeal. It was therefore a misconception for the appellant to argue the appeal as if the issues so raised suo motu were properly raised and ought to be sustained. (P. 502, paras. C-E; G)

11. *On Need for issue for determination to arise front, grounds of appeal and for ground of appeal to attack ratio decidendi* **-**

Issues for determination must be distilled from grounds of appeal, which grounds must attack the, *ratio decidendi* **of the judgment, not anything said by the way, or** *obiter dicta,* **or be formulated in vacuum.** (P. 493, paras. E-F)

12. *On Need for grounds of appeal to relate to issues joined in the trial of a case –*

Per ONNOGHEN, J.S.C. at page 492 paras. B-E:

> **"It should also be noted that appellant never testified at the trial court to deny his alleged execution of the guarantee, exhibit 1 which was tendered by the respondent. It follows therefore that though appellant can legally challenge the finding or holding by the lower court that he is liable to pay the debt in his capacity as guarantor, he cannot challenge that holding on the ground that the respondent granted unauthorized, unsecured facilities to customers including Rasha Enterprises Ltd or that the manner of the grant of the said facilities constitute criminal offence under the Banks and other Financial Institutions Deecree. etc. since those were not the issues before the lower courts, arising from the pleadings and evidence thereon. In the circumstance I hold that the question of the manner in which the credit facilities were granted Rasha Enterprises Ltd by (he respondent not being the issues in the case cannot ground any ground of appeal before this court. The same applies to the holding by the lower court that appellant is a Director of Rasha Enterprises Ltd which was done by the way and not based on the pleadings of the parties."**

13. *Whether respondent who did not file cross-appeal or respondent's notice can formulate issues outside appellant's ground of appeal –*

Where a respondent filed neither a cross appeal nor respondent's notice, he does not have an unrestrained or unbridled freedom to raising issues for determination which have no bearing or relevance to the grounds of appeal filed by the appellant. [*Ezukwii* ***v.*** *Ukachiikwu* **(2004) 17 NWLR (Pt. 902) 227;** Ojaho v. Inland Bunk Nigeria Pic **(1998) 11 NWLR (PL 574) 433 referred to.]** (P. 496. paras. F'-G)

14. *On Duty on appellant to appeal against principal finding of court before questioning validity of ancillary finding –*

Per ONNOGHEN, J.S.C. at pages 500-501, paras. H-B:

> *"***It follows therefore that before the appellant in this case can contest the issue of joinder or non joinder of the principal debtor in the proceedings giving rise**

to this appeal and the legal effect(s) of that joinder or non joinder, he must first question the finding/holding that the issue never arose for determination before the trial court hut was raised *suo motu* and without address of counsel thereon. In the instant case, there is no ground attacking that finding/holding. What the appellant is attacking is the consequence of the non-joinder as if it was an issue properly brought for determination before the courts.

15. *On Duty on appellant to appeal against principal finding of court before questioning validity of ancillary finding* –

Counsel should always bear in mind the elementary principles of law governing appeals, such as formulation of grounds of appeal and issues arising therefrom, as it is not every statement made by A lower court that is appeallable. In the instant case, counsel for the appellant did not challenge the finding and/or holding by the Court of Appeal that exhibit I was duly executed by the appellant to guarantee (he debt of Kasha Enterprises Ltd. No ground of appeal attacked that holding w Inch was fundamental to the liability of the appellant under the said guarantee. (*P. 502, paras B-F)*

Nigerian Cases Referred to in the Judgment:

Africann Insurance Development Corporation v. Nigerian Liquified Natural Gas Ltd. (2000) 4 NWLR (Pt. 653) 494
Akilu v. Fawehinmi (No. 2) (1989) 2 NWLR (Pt. 102) 122
Akinlemibola v. CO.P. (1976) 6 SC 205
Bamaiyi v. State (2001) 8 NWLR (Pt. 715) 270
Fkrebe v. Efeizomore 11 (1993) 7 NWLR (Pt. 307) 588
Elias v. Omo-Bare (1982) 5 SC 25
Ekukwu v. Ukachukwu (2004) 17 NWLR (Pt. 902) 227
FI B. Pie v. Pegasus Trading Office (GMBH) (2004) 4 NWLR (Pt. 863) 369
I.D.S. Ltd. v. Add). Ltd. (2002) 4 NWLR (Pt. 758)660
Kotoye v. C.B.N (1989) 1 NWLR (Pt. 98) 419
Momoh v. Vab Petroleum Inc. (2000) 4 NWLR (Pt. 654) 534
Moses Ola & Sons (Nig.) Ltd. v.Bank of the North Ltd. (1992) 3 NWLR (Pt. 229) 377
Odebunmi v. Abdullahi (1997) 2 NWLR (Pt. 489) 526

Offor v.State (1999) 12 NWLR (Pt. 632) 608
Ojabo v. Inland Bank (Nig.) Plc. (1998) II NWLR (Pt. 574) 433
Olujitan v. Oshatoba (1992) 5 NWLR (Pl.241) 326
Osasona v. Ajayi (2004) 14 NWLR (Pt. 894) 527
Osun State Government v. Dalami (Nig.) Ltd. (2003) 7 NWLR (Pt. 818) 72
Saraki v. S.G.N. (1995) I NWLR (Pt. 371) 326
U.B.N. Ltd. v. Nwaokolo (1995) 6 NWLR (Pt. 400) 127

Nigerian Statute Referred to in the Judgment:
Banks and Other Financial Institutions Decree. 1991

Book Referred to in the Judgment:
Chitty on Contract 24th Ed. Vol. 2 paragraph 4831

Appeal:
This was an appeal against the decision of the Court of Appeal allowing the respondent's appeal, setting aside the judgment of the trial High Court and granting all the reliefs claimed by the respondent. The Supreme Court, in a unanimous decision, dismissed the appeal and affirmed the judgment of the Court of Appeal.

History of the Case:

Supreme Court:
Names of Justices that sat on the appeal: Aloysius Iyorgyer Katsina-Alu, C.I.N *(Presided):* Aloma Mariam Mukhtar. J.S.C., Walter Samuel Nkanu Onnoghen, J.S.C., *(Delivered the Leading Judgment):* Christopher Mitchell Chukwuma Eneh, J.S.C.. Muhammad Saifullahi Muntaka-Commassie, J.S.C.
Appeal No: SC. 257/2003
Date of Judgment: Thursday. 25"' February. 2010
Names of Counsel: S.E. Elema. E/sq -*for the Appellant*
Yusuf O. Ah. Esq. SAN *(with him.* Bayo Oyagbola. E. Onah. S.Oke: I.O. Atofarati: M. Abdullahi) - *for the Respondent*

Court of Appeal:
Division of the Court of Appeal from which the appeal was brought: Court of Appeal. Kaduna.
Names of Justices that sat on the appeal: Isa Ayo Salami J.C.A. {Presided): Dalhatu Adamu. J.C.A.

(Read the leading Judgment): Joseph Jeremiah Umoren. J.C.A
Appeal No: CA/K/93/2001
Date of Judgment: Monday. 14th April. 2003
Names of Counsel: Yusuf Alli. SAN - *for the Appellant*
N. A. Hakeem Habecb. Esq. - *for the Respondent*

High Court:
Name of the High Court: High Court of Kano State, Kano
Name of the Judge: Adamu, J
Suit No: K/S49/99
Date of Judgment: Wednesday. 19th July. 2000

Counsel:
S.E. Elema, Esq -*for the Appellant*
Yusuf O. Alli. Esq. SAN (with him, Bayo Oyagbola, E. Onah, S.Oke: I.O. Atofarati: M. Abdullahi) - *for the Respondent*

ONNOGHEN, J.S.C. (Delivering the Leading Judgment): This is an appeal against the judgment of the Court of Appeal, holden at Kaduna in Appeal No. CA/K/93/2001. delivered on the 14th day of April. 2003 in which the court allowed the appeal of the present respondent against the judgment of the High Court of Kano State in suit No. K/849/99 delivered on the 19"'day of July. 2000 dismissing the case of the plaintiff/respondent herein.

The suit started by way of an undefended list procedure in which the original plaintiff. Trade Bank Plc claimed the sum of one hundred and seventy-one million, four hundred and fifty-two thousand, six hundred and forty-nine naira and fifty-two kobo (171,452,649.52) being the debt owed by Rasha Enterprises Ltd to it and guaranteed by the appellant. Following the filing of the necessary processes, the suit w as. by order of court, transferred from the undefended list to the General Cause List to be dealt with accordingly. Pleadings were consequently filed and exchanged. The case of the plaintiff was that Rasha Enterprises Ltd. was its customer at its Kano Branch and that credit facilities were extended to the company upon its application: that the said company provided collateral security by way of Bill of Sales Agreement and a personal guarantee executed by the appellant in favour of the plaintiff sometime in 1996 that as

at the 25th day of October. 1999 the account of the said company had a debit balance of N 1 71.452.649.522: that in spite of repealed demands made on (he said company, the debt remained unpaid, hence the action: that when the principal debtor failed to pay. plaintiff made a demand on the appellant being the guarantor but he refused to respond as a result of which the action was instituted to enforce the guarantee.

On his part, appellant totally denied the transaction: that he never executed any guarantee in favour of the plaintiff on behalf of the company in question: that the plaintiff, and Rasha Enterprises Ltd were not duly incorporated and that the credit facility extended to Rasha Enterprises Ltd was not secured by any collateral.

At the conclusion of the trial, the learned trial Judge entered judgment against the plaintiff *resulting;* in an appeal by the present respondent which was allowed and judgment entered in favour of the respondent as per their statement of claim. The instant appeal is against that judgment.

The case of the parties as pleaded in their pleadings are as follows:

In the statement of claim, paragraphs:

"8. The defendant agreed to stand as guarantor for all the sums to be overdrawn by Rasha Enterprises in the latter's account with the plaintiff: the said defendant executed a guarantee agreement in favour of the plaintiff in January 1996.

9. Subsequently, Rasha enterprises Limited was allowed to overdraw its account with the plaintiff based on the guarantee executed by the defendant.

10. Rasha Enterprises Limited failed to repay the sums it overdrew m the account with the plaintiff.

11. By 25th October. 1999. Rasha Enterprises Limited had overdrawn its account to the tune of N171,452,649.52k. The statement of account of Rasha Enterprises Limited with the plaintiff is pleaded

12. All demands by the plaintiff to Rasha Enteprises to defray its indebtedness to the plaintiff was to no avail

13. On 20/7/99 the plaintiff's solicitor wrote to the defendant asking him to honour his pledge under the guarantee agreement by paying the outstanding balance in the account of Rasha Enterprises Limited. The said letter is pleaded.

14. The defendant has since then refused or neglected to honour his pledge under the guarantee agreement."

What is the appellant's answer to the ease of the respondent as pleaded supra in the statement of claim. The answer can be found in paragraphs 8-10 of the statement of defence as follows-

"(8) The defendant denies paragraph 9 of the statement of claim and states specifically that he never executed art: guarantee agreement to pay the plaintiff on account to Rasha Enterprises Limited

(9) The defendant denies all the allegation contained in paragraphs 10,11. and 12 of the statement of claim and thereby puts the plaintiff to the strictest proof of all the allegations.

(10) The defendant denies ever receiving any letter from the plaintiff's solicitors and thereby puts the plaintiff to the strictest proof of its allegation in paragraph 13 of the statement of claim."

It must be noted that appellant called no evidence in proof of his averments in the statement of defence which in effect means that the defence, as pleaded, was abandoned by the appellant. That notwithstanding and strangely enough, the trial court made the following findings: -

a. That no single cheque of Rasha Enterprises Ltd. which was used in withdrawing money was shown to court and documents completed before the account of Rasha Enterprises was opened too was not tendered.
b. That three witnesses called by the plaintiff were not in Kano branch w hen the loan w as granted or when Mr. Akinlaso was removed from office.
c. That the plaintiff failed to prove that after the purported signing of the guarantor's form any amount had been withdrawn so as to make the purported guarantor liable.
d. That the amount which the defendant might have been liable to pay has not been ascertained and the court, not being a charitable organization cannot grant any amount not claimed or debt not proved.
e. That failure to join Rasha Enterprises Ltd as a defendant was fatal to the case of the plaintiff, which wars an indication that the plaintiff had abandoned any claim against the defendant and Rasha Enterprises Ltd.
f. That without Rasha Enterprises Ltd the exact amount of debt, if any to be paid by guarantor, cannot be assessed or ascertained; that the fact that Rasha Enterprises Ltd.

failed to pay the debt can only be established when it is made a party to the action.

g. That the guarantor's form was not completed in the presence of or with the know ledge of a legal practitoner- there is no stamp on the form, no witness before the court or any officer of the plaintiff who knew or saw when the guarantor's form (exhibit 1) was executed.

h. That exhibit 4. the statement of account, had no probative value as the same was prepared during the pendency of the action by a person interested in its outcome.

i. That the plaintiff did not satisfactorily discharge the burden of proving the debt against Rasha Enterprises Limited and the defendant.

j. That the guarantor form-exhibit 1 having not been made under seal and supported by valuable considerations is not binding on the plaintiff.

k. That the plaintiff failed to prove the liability of Rasha Enterprises Ltd neither has it proved that the company defaulted to pay the debt, if any existed.

l. That the defendant can only be liable after the debt of Rasha Enterprises and its failure to pay same have been proved by evidence.

The court therefore dismissed the claim of the plaintiff.

It is very clear that the above findings by the trial court has no relationship whatsoever with the case as presented by the parties both in their pleadings and the evidence, is what the present appeal seeks to sustain or defend

In the appellant's brief of argument filed on 20/6/05 by S.E. Elewa Esq.. the following issues have been identified for determination:

a. Whether the lower court was right to have struck out of the 25 pages of the brief of argument filed on behalf of the appellant at the lower court on the ground that they were irrelevant and at the same lime proceed to make findings on the same issues addressed by struck out pages on the basis of the respondent's brief (appellant's brief at the lower court) alone which amounted to a denial of lair hearing. (Grounds 1 and 2 of notice of appeal).

b. Whether the lower court was right to have held the appellant liable as a guarantor to repay an outstanding debt of about N225 million allegedly owed the respondent by a company called Rasha Enterprises Ltd when the alleged credit facilities were disturbed in a manner that announced to a criminal offence even though the appellant was

neither a signatory to the account nor did he benefit from the said loan. (Ground 3 and 7 of the notice appeal).

c. Whether the lower court was right to hold that Rasha Enterprises Ltd was not a necessary party too the proceedings at the court of first instance (Ground 4, notice appeal)
d. Whether the lower court was right to hold the appellant liable to pay about N225 million to the respondent on the basis of a purported guarantee which was unstamped, undated, not sealed, not registered, which was tendered as exhibit 1 (Ground 5,6,8 and 9) of the notice of appeal.
e. Whether the lower court was right to have given judgment to the respondent for the sum of about N225 million instead of remitting the case back to the court of first instance for a retrial."

Learned counsel for the respondent. R.O. Balogun Esq. in the respondent's brief filed on 10/8/05 has raised and argued preliminary objections to some of the grounds of appeal and the issues distilled therefrom and has urged the court to strike same out. The grounds of appeal in contention are grounds 2. 3. 7 and 9 while the issues in nos. 2. 4 and 5. It is important to note that issue No 2 is grounded on grounds 3 and 7 of the grounds of appeal.

I had earlier reproduced issue 2 in this judgment. It is the contention of learned counsel for the respondent that though ground 3 of the grounds of appeal challenges the finding of the lower court that appellant is liable to pay the debt in his capacity as guarantor of the credit facilities when the respondent granted unauthorized. Unsecured facilities to customers including Rasha Enterprises Ltd which manner of grant thereof constitute a criminal offence under the Banks and other Financial Institution Decree and when no application for credit facility and letter of grant of same was tendered at the trial: that the above issues newer arose at the lower court neither did that court make any pronouncement on same: that the same issues were also not canvassed before the trial court which equally had no opportunity in determining same; that appellant never cross appealed at the lower court nor filed a respondent's notice.

On ground 7 counsel submitted that the issue whether the appellant is a Director of Rasha Enterprises Ltd was not a life issue before the lower court; that what the lower court held was that appellant being the guarantor of the loan facility to Rasha Enterprises Ltd, he was liable to settle the debt, that

the issue as to whether it is necessary to tender the particulars of directors were not canvassed in the lower court neither did that court decide the same.

On his part, learned counsel for the appellant in the reply brief filed on 26/10/05, in relation to ground 3 of the grounds of appeal submitted that the focal point of the ground of appeal is on the fact that appellant was held liable as a guarantor of the credit facility "on the basis of an irregular transaction which could not have been contemplated by a guarantee; that the issue of criminality was merely buttress the irregularity of the said transaction as an irregular transaction cannot ground a regular guarantee.

On grounds 7 and 9, learned counsel submitted that they relate to the decision of the lower court as that court held at page 215 of the record that the witnesses called by the respondent at the trial were unanimous that appellant was a Director in Rasha Enterprises Ltd.

It should be noted that the case presented by the appellant at the trial court as evidenced in his pleading is a complete denial of ever executing the guarantee in issue, which the respondent said was executed by the appellant to guarantee the credit facilities extended by the respondent to Rasha Enterprises Ltd. It was never pleaded In the respondent that appellant was a director of their company. There is equally no pleading as to the irregularity of the said guarantee neither did the trial court or lower court determine same.

It should also be noted that appellant never testified at the trial court to deny his alleged execution of the guarantee, exhibit I which was tendered by the respondent. It follows therefore that though appellant can legally challenge the finding or holding by the lower court that he is liable to pay the debt m his capacity as guarantor, cannot challenge that holding on the ground that the respondent granted unauthorized, unsecured facilities to customers including Rasha Enterprises Ltd or that the manner of the giant of the said facilities constitute criminal offence under the Banks and other Financial Institutions Decree, etc. since those were not the issues before the lower courts, arising from the pleadings and evidence thereon. In the circumstance I hold that the question of the manner in which the credit facilities were granted Rasha Enterprises Ltd by the respondent not being the issues in the case cannot ground any ground of appeal before this court. The same applies to the holding by the lower court that appellant is a Director of Rasha Enteprises Ltd which was done by the way and not based on the pleading of the parties. The holding is not, in anyway,

relevant to the determination of the main issues before the courts, to wit; whether appellant guaranteed the credit facilities in issue and therefore liable to pay the debt as there is no claim against the appellant as a director of the company in question but as a guarantor of the credit facilities extended by the respondent to that company upon the guarantees of same by the appellant. It is not every holding or finding by a lower court that would give rise to the founding of a ground of appeal in the circumstance, it is very clear that issue B supra distilled from grounds 3 and 7 is incompetent and irrelevant and is consequently struck out together with the grounds on which it was based i.e grounds 3 & 7 of the grounds of appeal.

With respect to ground 2. I find no merit whatsoever in that respect in view of the pronouncement of the lower court at page 231 of the record.

As regards ground 9, learned counsel for the respondent contends that the question as to the validity of the guarantee from did not arise before the trial court and that what was determined by lower court was not the form a valid guarantee should take but the raising of eh issue of stamping and registration of the guarantee, exhibit I. suo motu by the trial court as was canvassed in issue No, before that court.

In his reaction, learned counsel for the appellant stated that the ground arose from the pronouncement of the lower court in the course sits consideration of issue 2 before it.

Again, it is clear from the record that no issue was joined between the parties on the issue as to the proper form which exhibit ought to take-nothing on the competence or validity of the guarantee in question as the case of the appellant is a complete denial of the execution of any guarantee relevant to the facts of this case. Again the issue before the lower court and which was duly decided by that court is concerned with the raising of the issue of stamping and registration of the guarantee *suo motu* by the trial court which issue was determined by that court. If appellant is not satisfied with that resolution his ground of appeal ought to have attacked the decision on the basis that the trial court was right in so raising the issue *suo motu* or that it was not so raised I have gone through the grounds of appeal filed in this appeal and have found no ground from which issue 3 could have been distilled, neither has the learned counsel for the appellant in his reply brief referred this court to any such ground of appeal. It is settled law that issues for determination must be distilled from grounds of appeal which ground(s) must attack the *ratio decidendi* of the judgment not anything said by the

way, or *obiter dicta* or be formulated in *vac quo,* as issue 5 in the instant case.

In conclusion, I hold the view that the preliminary objection is meritorious only in relation to grounds 3. 7 and 9 of the grounds of appeal and issues 2, 4 and 5 of the issues for determination which are accordingly struck out while ground 2 of the grounds of appeal is competent and valid and is hereby sustained.

Having regards to the ruling on the preliminary objection, the issues for determination in this appeal are therefore issues A and C as formulated by the appellant.

On the part of the respondent, the following 5 issues have been formulated in the respondent's brief, viz:-

1. Whether the learned Justices of the lower court were not right in striking out the sole issue formulated by the appellant as respondent before the lower court and argument canvassed thereon, on the ground that the issue had no nevus with the grounds of appeal.
2. Whether the court below was wrong in finding that Rasha Enterprises Limited was not a necessary party to this suit.
3. Whether non stamping or non-registration of guarantee agreement or form render same inadmissible and/or lacking in probative value and whether the court below was wrong by holding that the issue of non-registration and non-certification were raised *suo motu* by the trial Judge.
4. Whether the ease of the appellant tit the trial court was hinged on the alleged illegality in the manner of disbursement of loan facilities to Rasha Enterprises Limited by the respondent to warrant its being considered now and whether the alleged illegality was proved by the appellant as required by law?
5. Whether the lower court was wrong by not reporting this case to the court of first instance for retrial having regard to the acts and circumstances."

It can be seen clearly that the issues as formulated by learned counsel for the respondent are virtually the same with the original 5 issues formulated for determination by counsel of the appellant though differently couched. The relevant issues of the respondent; having regards to the.

ruling on the preliminary objection are issues1, 2 and 3 though the aspect of that issue relating to ground 9 of grounds of appeal has been struck out in the ruling supra. The resolution of issue 3 will therefore, under the circumstances be limited to a consideration of the issue as to whether exhibit 1, the guarantee, has been established as constituting the basis for the award judgment to the respondent by the lower court.

On issue 1, learned counsel for the appellant stated that though the respondent, as appellant before the lower court formulated five issues out of the 18 grounds of appeal it filed, the present appellant, who was the respondent before that court, formulated a single issue to the effect, whether from die totality of the evidence at the court b first instance, onus of proof had shifted to the defendant; that the, lower court agreed with the submission of counsel for the respondent that the issue does not relate to any of the 18 grounds of appeal and1 struck out the arguments in the respondent's brief covering pages 4-5of the brief; that the single issue formulated In the respondent in the lower court was the same with issue No. 2 formulated by the appellant therein as both raised the question as to whether the plaintiff case was proved on the preponderance of evidence before the trial court; that the lower court proceeded to consider only the argument put forward by learned counsel for the appellant at the lower court in coming to the conclusion, haven struck out the relevant arguments of the counsel for the respondent on the mailer; that by ting so the lower court denied the appellant herein his right to fair hearing, as the appellant was thus not given the full benefit of his counsels written or oral address w here required, relying on the case of *Offor v. State* (1999) 12 NWLR (Pt. 632) 608 and urged the court to resolve the issue in favour of the appellant.

On his part, learned counsel for the respondent referred to the issue as formulated by counsel for the respondent in the lower court and grounds of appeal and submits that the issue so formulated does not relate to any of the grounds of appeal as upheld by the lower court; that any issue not based

on any ground of appeal is incompetent and is liable to be struck out, relying on ***Momah v. Vab Pet. Inc.*** (2000) 4 NWLR (Pt. 654) 534 at 556; ***Akilu v. Fawehinmi*** (No. 2) (1989) 2 NWLR (Pt. 102) 122 at 161; that appellant never cross appealed nor filed a respondent's notice at the lower court and as such was incapable of raising any issue outside the grounds of appeal, relying on Moses Ola & Sons (Nig.) Ltd. v. Bank of the Northern ltd (1992) 3 NWLR (Pt. 229) 377 at 388; ***Ojabo v. Inland Bank Nigeria Plc*** (1998) 11 NWLR (Pt. 574) 433 at 438: that respondent's ale issue at the lower court is not the same with appellant's issue Id. 2 as contended by learned counsel for the present appellant, as there was no challenge on the onus of proof and shifting burden of proof since there was no ground of appeal in support of same. It is the further submission of learned counsel for the respondent that the pile of fair hearing is baseless because appellant, as the respondent before the lower court, responded to all the five issues formulated by the respondent as appellant before that court: that the tower court considered arguments of both counsel on issue No. 2 before coming its conclusion.

By way of an alternative submission, learned counsel submitted that the striking out of the sole issue did not result in any miscarriage of justice relying on ***Osasana v. Ajayi*** (2004) 14 NWLR (Pt. 216) 443at460: (2004) 14 NWLR (Pt. 894) 527 ***U.B.N. Ltd. v. Nwaokolo***(1995) 6 NWLR (Pt.400)127. ***Kotoye v.*** *C.B.N.* (1989) 1 NWLR(Pt.98)4I9: ***Bamaiyi v.State*** (2001) 8 NWLR (Pt. 7 15) 270. Learned counsel urged I he court to resolve the issue against the appellant.

There is no reaction to the argument of the respondent on issue 1 in the reply brief tiled on the 26th day of October. 2005.

The issue formulated by learned counsel for the respondent in the court below is as follows:-

> "Whether considering the totality of evidence led by the appellant at the lower court the appellant sufficiently proved their case thereby shifting the onus of proof on the respondent."

Learned counsel for the appellant before this court has submitted that the above issue is the same with issue No. 2 formulated by learned counsel for the appellant in the court below, which issue if as follows:-

> "Whether the learned trial Judge given the fact circumstances of this case was right to have dismissed the claim of the appellants when the evidence led as were was one way."

When one looks at the two issues one may be tempted to say that they are the same hut in reality they are not. Whereas issue 2emphasize on the absence of any evidence to the contrary, issue No. 1 included the issue of shilling onus of proof which is not supported by any ground of appeal. It is important to note that learned counsel for the appellant has not pointed to any of the 18 grounds of appeal filed at the lower court from which their issue No. I was distilled particularly as they neither cross appealed nor filed any respondent's notice in the appeal. It is settled law that where a respondent filed neither cross appeal nor respondent's notice, he does not have aft; unrestrained or unbridled freedom to raising issues for determination which have no bearing or relevance to the ground(s) of appeal filed.; See *Ezukwu v. Ukachukwu* (2004) All FWLR (Pt. 224) 2137at 2149; (2004) 17 NWLR (Pt. 002) 227; *Ojabo v. Inland Bank NigeriaPlc (*1998) 11 NWLR (Pt. 574) 433 at 438.

It is not in dispute that appellant's case at the trial, both on the pleadings and evidence of the only witness he called, is a complete denial of the execution of exhibit 1 as against the pleading and evidence of the respondent in proof of the case against the appellant li is settled law that where the party offers no evidence in defence of the case of the plaintiff, the burden placed on the plaintiff is minimal, Since there is no evidence to challenge the case of the plaintiff and the plaintiff can use the unchallenged evidence to establish his case- See *Osun State Government v. Dalami (Nig.*) *Lid.* (2003) 7 NWLR (Pt. 8I8) 72 at 99. Incase learned counsel for the appellant has hoi denied that appellant had the opportunity to call evidence to Challenge the case of the respondent which he failed to utilize.

Learned counsel for the appellant has also not demonstrated how the striking out of the sole issue in question occasioned any miscarriage of justice as required by law. In view of the fact that evidence in the case is one sided as there is nothing to be placed on the oilier side of the scale to balance the case of the parties, it becomes an uphill task for the appellant to show how. upon the weight of evidence, the appellant who called no evidence to meet the case of the respondent ought to have been given a more favourable consideration *vis-a-vis* the respondent.

To argue that the striking out of the sole issue of the respondent before the lower court resulted in a breach of the respondent's right to fair hearing when the respondent had the opportunity to answer the appellant's issue No 2 as formulated before the lower court but decided not to do so by formulating his own issue which turns out to be outside the 18 grounds of appeal filed by the appellant when the respondent never cross appealed not filed a respondent's notice, is a clear misconception. Fair hearing is based on opportunity to meet the case of (lie other party. Where a party decides not to utilize the opportunity so offered, he cannot later be heard to complain of lack of fair healing as in the instant case.

Most importantly, it is not correct to say that the lower court did not consider arguments of counsel for the respondent therein relevant to the resolution of appellant's issue No. 2 in its judgment. After summarizing arguments of counsel for the appellant, the lower court at the last paragraph of page 217 to page 219 of the record, commenced a summary of the respondent's argument in relation to the issue thus:

> "In reply to above submission (he respondent's brief refers to (be appellant's argument that it was the duty of the respondent to lead evidence to show that he did not execute Exhibit 1. It was stated in the respondent's brief that this requirement is contrary to the law of evidence which enjoins that "he who asserts must prove." It is contended that apart from this denial of ever

executing exhibit I. the respondent will only be required to lead evidence in denial after the appellant has discharged it burden of proof. It is contended that since the appellant failed to discharged (sic) its burden of proof on the issue of execution of exhibit I. it was rightly rejected or disregarded by the trial court. The case of *Odebunmi v. Abdullahi* (supra) cited in the' appellant's brief, is said to be applicable to the present case and does not support the appellant's ease because the appellant in that ease has led sufficient evidence to f discharge his burden of proof and the respondent failed to give evidence in rebuttal of the allegation leveled against him.... On the credibility of DW1, the respondent's brief submits that he is a witness of truth' and very credible because he did not give inconsistent evidence. It is observed in the brief that the mere fact that D\V I as the Legal Secretary of Rasha Enterprises Ltd said that he did not know all the Directors of the company.... Should not be a ground to classify him as an untruthful witness or to impeach his credibility. It is pointed out in the brief that it is the appellant's evidence or the testimonies of its witnesses that was filled with inconsistencies from the evidence of the appellant's witnesses entitled the learned trial Judge to reject or disregard the appellant's witnesses as he rightly did-the respondent's brief so contends."

The lower court then proceeded thus:-

"In resolving issue No. 2 as per the above submissions in the two briefs, we have to resort to the law of evidence and some decided cases in order to find out on whom the burden of proof lies and whether it was discharged in accordance with the required standard..."

Thereafter the lower court went into the pleadings of the parties. The evidence adduced in support of same where available, the laws applicable and concluded at page 225 of the record as follows:-

> "The principle enunciated in the above pronouncements of our apex court is germane to the present case in which judgment should have been entered in favour of the appellant upon the failure of the respondent to cull or give evidence to rebut the evidence adduced by the appellant. Thus, the appellant's uncontradicted evidence should have been relied upon by he learned trial Judge, for my above considerations of issue No. 2 of the appellant's brief, the said issue and its related ground(s) of appeal (ground 3. 4. 10 and 18) must be resolved in favour of the appellant and against the respondent. 4 hey are hereby accordingly so resolved by me."

From the above. I need not to say more on the matter except, that in presenting the argument on breach of the appellant's right of fair hearing in the circumstances of this case, learned counsel for the appellant was being very economical with the truth. The issue is therefore resolved against the appellant.

On the issue C-Whether the lower court was right to hold that Rasha Enterprises Limited was not a necessary party to the proceedings at the court of first instance, learned counsel for the appellant submitted that Rasha Enterprises Ltd is a necessary party to the proceedings to make same competent and that failure to join the company m the proceedings in the trial court was a fatal omission which made it impossible in law for the court to determine the alleged indebtedness of the company to the respondent, which determination was a condition precedent to any liability under a guarantee, relying on Saraki v. S.G.N. (1995)1 NWLR (Pt. 371) 326; I.D.S. Ltd. v. A.I.B Ltd. (2002) 4 NWLR (Pt. 758) 660.

Even though it is clear from the pleadings and the record that appellant does not represent he interest of Rasha Enterprises Ltd which the contends in his pleadings that does not exist or imported in law learned counsel for the appellant proceeded to submit that the said company is "bound and affected by a determination of the question whether the said company is indebted to

the respondent and if so, how much then the fan hearing rule of *audi alteram partem*requires that Rasha Enterprises Limited deserves to be heard before such a determination can he made..."

In his reaction to the said issue, learned counsel for the respondent submitted that the case of the respondent at the trial court hinged on the contract of guarantee entered by the appellant in favour of the respondent in 1996 to secure the account of Rasha Enterprises Ltd; that the respondent led evidence to prove the indebtedness of the said company and tendered exhibit 4, the statement of account of the company: that exhibit I is the contract of guarantee entered into by the appellant: that there is evidence that the principal debt or failed or refused and/or neglected to pay the debt as secured by till; appellant making it necessary for the solicitors to the respondent. to write exhibit 2 to the appellant demanding payment; that the issue of non-joinder of Rasha Enterprises Ltd was never raised by the appellant cither as a preliminary point nor in his statement of defend nor even counsel's written address: that the issue was raised *suo motu* by the learned trial Judge in his judgment which decision was set aside by the lower court for being perverse: that it is not incumbent to join the principal debtor in an action to enforce the obligation of the appellant in respect of exhibit I. relying on *Olujitan v. Oshatoba* (1992) 5 NWLR (Pi. 241) 326 at 329: *Ekrebe v. Efeizomor* II, (1993) 7 NWLR (Rt. 3071 588 at 601: Chitty on Contract. 24thEd; Vol. 2 paragraph 4831; *F.I.B. Plc v. Pegasus Trading Office* (2004) 4 NWLR (Pt. 863) 369 at 388-389.

It should be noted that the issue as to the joining of the principal debtor in an action to enforce a guarantee against a guarantor did not arise from the pleadings of the parties, evidence and addresses of counsel before the trial court. The matter was thus raised suo motu by the trial court and without calling on learned counsel for the panics to address it on it before basing its decision thereon. This caused the present appellant to appeal against that holding and decision to the lower court which court found and held that the matter was not only raised suo motu in the

circumstances that should not have been, but that the joinder of I he said company in the circumstances of the instant case is not necessary as the same is not a condition precedent. I hold the view that an appeal against the decision of the lower court with regards to the above holding must first of all attack the holding that the issue was raised suo motu before contesting any other matter. If it is true that the issue was never raised by the parties nor did their counsel's address the court on same but the trial Judge raised same in its judgment without calling on counsel for both parties to address it on it and proceeded to base its judgment on it, then the law, which is now very settled, is that such a finding or holding cannot be sustained upon appeal as the said holding must be set aside. If the holding is in the circumstance set aside, it goes with every related issue or sub-issue. It follows therefore that before the appellant in this case can contest the issue of joinder or non-joinder of the principal debtor in the proceedings giving rise to this appeal and the legal effect(s) of that joinder or non-joinder, he must first question the finding/holding that the issue never arose for determination before the trial court but was raised *suo motu* and without address of counsel thereon. In the instant case, there is no ground attacking that finding/holding. What the appellant is attacking is the consequence of the non-joinder as if it was an issue properly brought for determination before the courts.

In the circumstance, it is clear that issue 3 is very irrelevant and incompetent in the determination of the appeal.

The above notwithstanding, it is settled law that where a person personally guarantees the liability of a third party by entering into a contract of guarantee or surety ship, a distinct and separate contract from the principal debtor's is thereby created between the guarantor and the creditor.

The contract of guarantee so created can be enforced against the guarantor directly or independently without the necessity of joining the principal debtor in the proceedings to enforce same- See *Olujitan v. Oshatoba* (1992) 5 NWLR (Pt. 241) 326 at 329*: Ekrebe v. Efeizormor* 11

(1993) 7 NWLR (Pt. 307) 588 at 601. In Chitty on contract. 24th Ed. Vol. 2 paragraph 4831, the law is stated thus:-

> "...*prima facie* the surety may be proceeded against without demand against him. and without first proceeding against the principal debtor." See also *Moschi v. Lep Air Service Ltd.* (1973) A.C 331 at 348; *Esso Pet C. Ltd. v. Alastonbridge Properties* (1975) WLR 1474.

The above position of the law becomes clearer when one understands what a guarantee is. The term has been defined as a written undertaking made by one person to another to be responsible to that other if a third person fails to perform a certain duty e.g. payment of debt, the guarantor (or surety as he is sometimes called) becomes liable for the said debt.

In the instant case, the respondent proved by exhibit I the existence of the contract of guarantee executed by the appellant to surety the debt of Rasha Enterprises Ltd. By exhibit 4, the respondent proved the principal loan to that company. The evidence of PWL3 also go to establish the existence and indebtedness of the principal debtor to the respondent which was guaranteed by the appellant. It is important to note that the evidence as presented are not challenged in rebuttal. I hold the considered view that with the failure of the principal debtor to repay the credit facility the liability of the appellant as guarantor under the guarantee thereby crystallized.

The right of the creditor is therefore not conditional as he entitled to proceed against the guarantor without or independent of the incident of the default of the principal debtor-See *F.I.B. Plc v. Pegasus Trailing Office* (2004)4 NWLR (Pt.863) 369 at 388-389; *African Insurance Development Corporation v. Nigerian Liquefied Natural Gas Ltd.* (2000) 4 NWLR (Pi. 653) 494 at 505-506.

So, either way one looks at the issue it must fail and is consequently resolved against the appellant.

It is important to note that counsel should always bear in mind the elementary principles of law governing appeals such as formulation of grounds of appeal and issues arising therefrom as it is not every statement made by the lower court that is appealable. The grounds of appeal must he based always on the reasons for the decision reached by the lower court which should in turn be based on the issues joined by the parties in their pleadings, evidence adduced in support thereof and submission of counsel on the applicable law to the facts so established by evidence. In the instant case, the trial court went completely outside the case pleaded by the parties, the evidence on record and applicable law to raise issues suo motu upon which it proceeded to decide the matter without, recourse to learned counsel for the parties to address it on same. The appeal under the circumstances was allowed by the lower court, Learned counsel for the appellant has not challenged the finding and//or holding by the lower court that exhibit I was duly executed by the appellant to guarantee the debt of Rasha Enterprises Ltd. No. ground of appeal attacked that holding which is fundamental to the liability of appellant under the said guarantee.

I expected the instant appeal to have attacked the holding, primarily that the trial court based its decision in the matter on issues it raised *suo motu* in its judgment. This is because if it is true that the issues were so raised in the circumstances complained of, that is the end of the appeal as such a decision must be set aside. It is therefore a misconception for appellant to argue the appeal as if the issues so raised *suo motu* were properly raised and ought to be sustained.

In conclusion. I find no merit in this appeal, the two surviving issues haven been resolved against the appellant. The appeal is therefore dismissed with N50.000 costs against the appellant.

The judgment of the lower court delivered on the 14thday of April, 2003 is hereby affirmed by me.

Appeal dismissed.

KATSINA-ALU, C.J.N.: I have had the advantage of reading m draft the judgment of my learned brother. Onnoghen. JSC. In the appeal. I agree with it and. for the reasons given therein I also dismiss the appeal. I also abide by the consequential orders made in the lead judgment.

MUKHTAR. J.S.C.: In its statement of claim in the Kano State High Court, the plaintiff who is the respondent herein, claimed the following reliefs:

"1. The sum of NI71,452,649.52k (One Hundred and Seventy One Million. Four Hundred and Fifty Two Thousand. Six Hundred and Forty Nine Naira, Fifty Two kobo) being the debit balance in Messrs Rasha Enterprises Limited's account with the plaintiff, as at 18th of November, 1999, which was as a result of credit facilities granted to Messrs Rasha Enterprises Limited by the plaintiff at the request of Rasha Enterprises and on the personal guarantee of the defendant.
2. The plaintiff also claims interest at the rate of 30% per annum from 18th of November. 1999, to the date of judgment and thereafter interest at the court rate of I0T from the date of judgment until the judgment debt is liquidated.
3. The plaintiff further claims the cost of this action."

At the conclusion of the hearing, the learned trial court dismissed the plaintiff's claim, a decision which the Court of Appeal. Kaduna Division upturned on appeal to it by the plaintiff. Dissatisfied, with the judgment of the Court of Appeal, the defendant appealed to this court. As is the practice in this court parties exchanged briefs of argument which were adopted at the hearing of the appeal. Five issues for determination were formulated in the appellant s brief of argument. The issues have been reproduced in the lead judgment of this court. The learned counsel for the respondent raised a preliminary objection on some of the grounds of appeal and the issues distilled

from some of the grounds. This notice of preliminary objection has been dealt with in the lead judgment, hence I need not go into the arguments covering the objection.

The grave men of this case is that the appellant stood as guarantor for another and it remained liable to the respondents. The pertinent question here is, did the plaintiff plead and prove the liability? In its statement of claim the plaintiff pleaded thus:-

"6. The plaintiff avers further that sometime in 1966 Rasha Enterprises Limited applied or the enhancement of the credit facility granted to it by the plaintiff and the application was granted.

7. The plaintiff states that Rasha Enterprises Limited was asked to provide security for all the sum to be borrowed from the plaintiff through the overdraft facility as a result of which Rasha Enterprises Limited provided the defendant who was also a customer to the plaintiff as its guarantor

8. The plaintiff avers that the defendant agreed to stand as the guarantor for all the sum to be overdrawn by Rasha enterprises in its account with the plaintiff consequent upon which the defendant executed a guarantee agreement in favour of the plaint ill in January. 1996. The plaintiff hereby pleads the said guarantee agreement.

9. The plaintiff subsequently allowed Rasha Enterprises Limited to overdraw its account with the plaintiff after the defendant had executed the guarantee agreement to pay to the plaintiff upon demand, should Rasha Enterprises Limited refuse to pay back, all the sums overdrawn.

10. The plaintiff avers that Rasha Enterprises Limited has failed to pay back all the sums overdrawn (sic) in its account No. 04372028301-74 with the plaintiff.

15. Whereof the plaintiff claims against the defendant for:

    1. The sum of N171,452,649.52k (One hundred and seventy-one million, four hundred and fifty-two thousand, six

hundred and forty-nine naira, fifty-two kobo) being the debit balance in Messrs Rasha Enterprises Limited's account withthe plaintiff, as at 18th of November. 1999, which was as a result of credit facilities granted to Messrs Rasha Enterprises Limited by the plaintiff at the request of Rasha Enterprises and on the personal guarantee of the defendant." In reply to the above averments the defendant denied the averments thus in its statement of defence: -

"(6) The plaintiff denies paragraphs 7 & 8 of the statement of claim and stales that he was never provided as a guarantor lot he plaintiff by Messrs Rasha Enterprises Limited.

(7) Further to paragraph 6 hereof: the defendant denies ever executing any guarantee agreement in favour of the plaintiff.

(8) The defendant denies paragraph 9 of the statement of claim and states specifically that he never executed any guarantee agreement to pay the plaintiff on account of Rasha Enterprises Limited.

(9) The defendant denies all the allegations contained in paragraphs 10, 11 and 12 of the statement of claim and thereby puts the plaintiff to the strictest proof of all the allegations".

The plaintiff's adduced evidence included the said guarantee agreement document admitted and marked exhibit 1 duly signed by III defendant. The said exhibit 1 contains inter alia the following:-

"I/we ... the undersigned, hereby jointly and severally guarantee lo you the payment of and undertake on demand in writing made on the undersigned or any one or more of the undersigned by you or any of your Director or Manager to pay to you all sums of money which may now be or which hereafter may from time-lo-lime become due or owing to you anywhere from or by the principal or surety……."

The said guarantee was signed by the defendant, as is reflected therein, with the name Mr. K.B. Chami. To my mind, the plaintiff proved its case, and having done so the onus shifted to the defendant appellant. A cardinal principle of law is that cases are proved on preponderance of evidence, and balance of probability. See *Elias v. Omo-Bare* (I982) 5 SC 25 and *Akinlemibola v. C.O.P.* (1976) 6 SC 205.

The guarantee agreement was the pivot of the claim in the High Court and having been admitted in evidence, it formed part of the case before the court, and it ought to have been considered as part of the material proof by the plaintiff. The defendant did not disprove the evidence by adducing credible evidence to discredit it. The court below was thus in tandem with the appellant/plaintiff when Adamu JCA in the lead judgment made the following observation: -

> "I agree with the learned counsel for the appellant submission, in the appellant's brief, having regard the issue joined on the pleadings on the issue guarantee, exhibit 1 that the only evidence that could dislodge the appellant's evidence on the execution of the surety ship was that of the surety himself or some other person who is familiar with his writing or signature. It can certainly not be misplaced by the evidence of a person such as the only defence witness who, though, claims to be the company secretary and legal adviser knew next to nothing, about the affairs or operation of the company. The evidence of the two plaintiff witnesses is unchallenged and uncontroverted and ought to have been accepted and acted upon on issue or point of existence or otherwise of guarantee agreement...."

The learned Justice, in the event, correctly found that the appellant's evidence that Rasha Enterprises Limited was indebted to the appellant and the respondent guaranteed the loan by exhibit I remains unshaken and unchallenged.

For the foregoing reasoning and the fuller ones in the lead judgment of my learned brother. Onnoghen, JSC I also find no merit whatsoever in the appeal.I am in full agreement with my learned brother that the appeal be dismissed, and 1 so dismiss it. I abide by the consequential orders made in the lead judgment.

CHUKWUMA-ENEH, J.S.C.: I have read before now the judgment of my learned brother, Onnoghen. JSC just delivered and I agree with his reasoning and conclusion that the appeal should be dismissed for want of any merit. I also dismiss it and endorse the order on cost as in the lead judgment.

MUNTAKA-COOMASSIE, J.S.C.: I have read in draft the illuminating lead judgment of my learned brother. Walter Onnoghen, JSC, and I agree entirely with his lordships reasoning and conclusion to the effect that the appeal herein lacks merit. There is no pressing need for me to further elaborate or improve on the lead judgment. That being the case, I also agree that the appeal at hand is devoid of substance same is dismissed by me. There is no doubt that the lower court has done a good job, its judgment delivered on the 14/4/2003 is hereby affirmed. I endorse the order as to cost made by me learned brother, Walter Onnoghen, JSC.

Appeal dismissed.