IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

(APPELLATE DIVISION)

HOLDEN AT HIGH COURT NO. 8, MAITAMA, ABUJA

ON FRIDAY, 8TH DECEMBER, 2023

BEFORE THEIR LORDSHIPS:

HON. JUSTICE OLUKAYODE A. ADENIYI:PRESIDING JUDGE

HON. JUSTICE BABANGIDA HASSAN: HON. JUDGE

APPEAL NO: CVA/1586/2016

BETWEEN:

TIJANI MUHAMMED ……. APPELLANT

AND

1. ARCHITECT HAFSA A.ALIYU
2. M.A.GAJI, ESQ.

} RESPONDENTS

JUDGEMENT

This is an appeal from the Judgment of the District Court of Federal Capital Territory, Wuse Zone 6, Abuja delivered by His Worship, **A.M. Abdullahi,** on the 5th September 2018, in Suit No: AB/CDCII/CV/1586/2016 as contained at **pages 109-208 of the Records of Appeal** wherein the

learned trial Magistrate entered judgment in favour of the 1st Respondent as Plaintiff against the Appellant (as 1stDefendant). The 1st Respondent (as Plaintiff) instituted this suit by way of Plaint and claimed sundry reliefs against the Appellant (as 1st Defendant) and the 2nd Respondent (as 2nd Defendant). The kernel of the 1st Respondent's claim before the trial Court is for the recovery of arrears of rent, cost of renovation and repairs of damages occasioned to the *res* (apartment) by the Appellant, and cost of prosecution of the action as contained **at pages 1-6** of the **Records of Appeal.**

In response to the Originating Process, the 2nd Respondent filed a Preliminary Objection to the claim on 10th March 2017 (**see pages 7-12 and pages 32-38** of the **Records of Appeal),** by which he asked the Court to strike out his name from the suit for being wrongly joined as party thereto. The Court however dismissed the 2nd Respondent's preliminary objection as shown in the ruling of captured at **pages 83-90** of the **Records of Appeal**.

The learned trial Magistrate delivered judgment on the substantive suit in favour of the 1st Respondent (as Plaintiff) on the 30th August 2018 as contained **at pages 109-214 of the Records of Appeal.** The 1st Defendant (nowAppellant), being aggrievedby the decision, filed the instant appeal, by Notice of Appeal, filed on the 23rd April 2019, containing four grounds of appeal as contained **at pages 217-220** of the **Records of Appeal.** An amended Notice of Appeal was later filed 15th July 2020 containing **five** grounds of appeal. The Appellant's Brief of Argument was filed on the 23rd October 2020. In turn the 1st Respondent filed his Brief on the 22nd December 2021. The Appellant filed a Reply Brief on the 24th May 2022.

The Appellant formulated five issues for determination, they are reproduced as follows:

1.) *Whether or not it does not amount to fundamental irregularity and unprofessional conduct for the Plaintiff/Respondent's Counsel to appear as a Counsel, as a Witness for the Plaintiff/Respondent and as a representative of the Plaintiff/Respondent*

throughout the trial and whether it does make the entire proceedings a nullity?(distilled from ground No. 1).

2.) *Whether or not the document known as Memorandum of Understanding admitted and marked Exhibit P9 by the trial lower Court was voidable regards being had to the fact that the 1st Appellant was not a party in the said document?(Distilled from ground No. 2).*

3.) *Whether or not the trial lower Court had properly evaluated all the evidence adduced by both sides before giving its judgment? (Distilled from ground No. 3).*

4.) *Whether or not the trial lower Court was right when it struck out the application for preliminary objection filed and argued by the 2nd Appellant challenging his joinder as a 2nd Defendant in the matter regards being had regards being had (sic) to the facts that he does not have any interest in the matter and he was acting as a Counsel for the 1st Defendant/Appellant? (Distilled from ground No. 5).*

The learned Counsel for the 1st Respondent on the other hand formulated 4 issues as for determination as follows:

1.) *Whether a Counsel can perform the dual role of giving evidence and advocating for a party in one proceeding?*

2.) *Whether a trial Court can issue a judgment on a document tendered and admitted in evidence before it during trial?*

3.) *Whether the trial Court is under any obligation not to admit any evidence tendered before it that was not opposed to by the opposite party taking into consideration that the said Court is a Court of summary jurisdiction?*

4.) *Whether the trial lower Court had a discretionary power to grant or refuse an application for instalmental payment of the judgment sums brought for the first time after judgment and whether this ground 4 of the notice of appeal offends the doctrine*

of justice and equity to approbate and reprobate at same time?

5.) *Considering the Appellant's Notice of Preliminary Objection, affidavit in support and the Respondent Counter affidavit with the written address in support, as contained in pages 7 to 10 and 13 to 24 of the Records of Appeal, whether the trial Court was right when it overruled the Appellant notice of Preliminary Objection?*

APPELLANT'S SUBMISSION

Before we proceed to consider the submissions of the Appellant, it should be noted that the names of the parties in the Notice of Appeal and the Amended Notice of Appeal before this Court have not been diligently captured, as it ought to be. As it can be seen from the originating process as well as in the Judgment of the trial Court, there are three (3) parties. The 1st Respondent as the "Plaintiff". The Appellant and the 2nd Respondent are the "1st Defendant" and 2nd Defendants, respectively. Surprisingly, in both the Notice of Appeal and the

Amended Notice of Appeal, only the names of the Appellant and the 1st Respondent were captured, leaving out the name of the 2nd Respondent. This ought not to be so. In the circumstances thereof, we have included the name of the 2nd Defendant as the 2nd Respondent in this Judgment, in the manner as they ought to appear. We did so, because it is assumed that the 2nd Defendant did not appeal against the Judgment of the trial Court. However, we need to statethat the 2nd Respondent, who is a Lawyer and also a Counsel for the Appellant at the trial Court and in this Appeal ought to know better. We should leave it at that.

ON ISSUES ONE AND TWO

Learned counsel for the Appellant contended that the 1st Respondent'slearned counsel acted in dual capacity, nay acting as counsel for the 1st Respondent and testified as a witness for the same 1st Respondent in the same proceeding at the trial Court. He further posited that the conduct of the 1st Respondent's Counsel in this regard amounted to a fundamental breach of the Rules of

Professional ethics. He referred the Court to **Rules 20 (1-4) of the Rules of Professional Conduct for Legal Practitioners, 2007** and relied on the case of *Garan vsOlomu [2013] 54 (Pt. 2) NSCQR 659 at P 687*. The Appellant fortuitously canvassed further that the 1st Respondent's counsel failed to lay any foundation in the course of giving evidence to demonstrate that his case falls within the exceptions provided for under the **Rule 20 sub-rule (2)** *(supra)*. The Appellant therefore urged this Court to resolve issue number one in his favour.

With respect to **issue No. 2**, the Appellant contended that the **Exhibit P9-** the "Memorandum of Understanding" is voidable against the 2nd Respondent. He argued that the **Exhibit P9**was not signed by the Appellant but by the 2nd Respondent, who acted as the Counsel for the Appellant. He argued that the **Exhibit P9** was not signed with the Appellant's authority or consent. Learned counsel further argued that the Appellant, who is not a party to **Exhibit P9** cannot be held liable thereunder; and that a contract affects only the parties thereto and cannot be enforced by or against a person who is not a party to it. Learned

counsel cited in support, the authorities of *A-G Federation vs A.L.C Ltd.[2000] 10 NWLR(Pt. 4) 675; Makwe vs Nwakor [2001] 14 NWLR (Pt. 733) 356 @ 372; and Agbareh vs Mimra [2008] 2 NWLR (Pt. 1071) 378 SC @ 412.*Learned counsel for the Appellant therefore urged this Court to resolve issue number two in his favour.

ISSUE NO. 3

The Appellant referred to the testimonies of the **PW1** as contained in **Pages 2-11** of the **Supplementary Records of Appeal** and the testimonies given by the **DW1** as contained in **Pages 95-100** of the **Records of Appeal** as well as the testimonies of the **DW2** as contained in **pages 101-107** of the **Records of Appeal,** to submit that the learned trial judge arrived at a conclusion that cannot be supported by the evidence before it.Learned counsel further argued that **Exhibits P1-P10** tendered by the 1st Respondent are all computer-generated evidence which the 1st Respondent failed to comply with the condition precedent stipulated under the **s. 84(1) and (2) (a) – (d) of** the **Evidence Act 2011,** when those documents were

tendered. Appellant therefore argued that by the infraction of the **s. 84** (supra), the documents were inadmissible in evidence. Appellant therefore urged this Court to resolve issue number three in his favour.

ISSUE FOUR

Learned counsel for the Appellant argued that the learned trial Magistrate was wrong in his ruling delivered on the 12th June 2017 on the 2nd Respondent's Preliminary Objection whereby he refused to strike out the 2nd Respondent as the 2nd Defendant in the suit. Appellant further argued that the trial Magistrate ought to have struck out the 2nd Respondent from the suit knowing the legal implications of his joinder as a party in the suit while also acting as a Counsel for the Appellant in the same suit. He further relied on the arguments and authorities cited in support of the **issue No. 1**above.The Appellant therefore urged this Court to resolve issue number four in his favour.

SUBMISSIONS OF COUNSEL FOR THE RESPONDENT

ISSUE ONE

Learned counsel for the 1st Respondent contented that the Appellant never raised the issue of dual role of the 1st Respondent's Counsel (**Arinze F. Anaakwe**), who acted as Counsel and also gave oral evidence as a witness for the 1st Respondent at the trial Court. He argued that it was wrong for the Appellant to raise the point for the first time in this appeal. He referred the Court to the cases of: *Fadiora vs Gbadebo[1978] NSCC (Vol. 1) 121 @ 131; Garuba vs Omokhodion [2011] 6 (Pt. 111) MJSC (P. 149)*.

Learnedcounselfurther argued that the trial Court is known as a Court of summary jurisdiction thus, the 1st Respondent's Counsel may be allowed to act as a Counsel and as a witness for the 1st Respondent in certain circumstances. Learned counsel relied on the authorities of *UFP (Nig.) Ltd.vsOpobiyi[2017] 6 NWLR 407-607. CA 429; FRN vsDariye [2011]LPELR 4151 (CA) @ 28-29*.Counsel urged the Court to resolve this issue in favour of the 1stRespondent.

ISSUE TWO

Learned counsel submitted that the trial Court was right in its conclusion that the **Exhibit P9** which was executed by the Appellant's learned counsel is binding against the Appellant. He referred to the **Pages 96** and **106**of the **Records of Appeal** to submit that the Appellant himself had admitted under cross examination that he authorized his lawyer (2nd Respondent) to sign the document on his behalf and that the 2nd Respondent also admitted under his examination in chief that he had the prior permission of the Appellant when he signed the document, **Exhibit P9.** Learned counsel further argued that it was the Appellant that has the burden of proof to show why the trial Court ought not to rely on **Exhibit P9,** whichhe had failed to discharge. Learned counsel relied on the authorities of*Dumez vs Nwakhoba [2008] 18 NWLR (Pt. 1119) 361; Emenike vs PDP [2012] 12 NWLR (Pt. 1315) 556,* and urged the Court to resolve this issue in favour of the 1stRespondent.

ISSUE THREE

On issue three the 1st Respondent's learned counsel had contended that the onus lies on the Appellant to demonstrate that if the error complained of had been corrected, the conclusion reached by the trial Court would have been different and that the Appellant has failed to discharge the burden. He argued that the issues in relation to the improper evaluation of evidence by the trial Court were new or fresh issues raised on appeal by the Appellant which were never raised before the trial Court. He further argued that it is the responsibility of the trial Court that saw and heard witnesses to evaluate the evidence and pronounce on their credibility or probative value not the duty of the appellate Court to substitute its own views for the views of the trial Court. He referred the Court to the cases of*Mogaji vs Odofin [1979]1SC 91; Odofin vs Ayoola [1984] II SC 72; Ezukwu vs Ukachukwu [2004] 17 NWLR (Pt. 902) 227*.

Learned counsel further contented that the Appellant who did not object to the non-certification of those electronic documents admitted at the trial has waived all his rights of complain against the procedural defects affecting the

admissibility of those documents and failure to so object at that time could not be a ground of appeal. In support of this, he cited the cases of *Oke vs Aiyedun[1989] 2 NWLR (Pt. 23) 458 @ 565 Okike vs LPDC[2005] 10 MJSC 40.* Learned counsel thereforeurged the Court to resolve this issue in favour of the 1st Respondent.

ISSUE FOUR

Learned counsel contented that the Appellant who raised this issue four in his Notice of Appeal never addressed it in his Brief of Argument. Appellant argued that having failed to do so the issue four is deemed abandoned by the Appellant and should be struck out. Learned counsel referred the Court to *Aro vs Aro [2000] 3 NWLR (Pt. 649) 443;Ikuku vs Ikuku([991] 5 NWLR (Pt. 193) 571* andurged the Court to resolve this issue in favour of the 1st Respondent.

ISSUE FIVE

Learned counsel referred the Court to **pages 7-10** and **13-24** of the main Records of Appeal to submit that the trial

Magistrate overruled the Appellant's preliminary objection because the point could not be decided without evidence being led. He referred to the case of *Elebanjo vs Dawodu [2006] 15 NWLR(Pt. 1001) PG. 76 @ 137*.

Learned counsel further contented that where a party has adopted a procedure by conduct, he will not be heard on appeal that the procedure he adopted is prejudicial to him or had occasioned a miscarriage of justice. He referred the Court to these cases: *Akhiwu vs Principal Lotteries Officer, Mid-West State [1972] 1 All NLR (Pt. 1) 229; Ilodibia vs Nigerian Cement Company Ltd. [1997] 7 NWLR (Pt. 512) 174.*

Learned counsel urged the Court to resolve this issue in favour of the Respondent.

APPELLANT'S REPLY

The Appellant's learned counsel, in reply to the 1st Respondent's learned counsel's submissions with respect to **issue one**, argued by distinguishing the case of *UFP (Nig.) Ltd. vsOpobiyi(supra)*cited by the 1st Respondent's

learned counsel in his brief of argument from the Supreme Court decision in the case of *Garan vs Olomu [2013] 54 (Pt.2)N.S.C.Q.R 659 @ P 687*, to submit that the evidence of the 1st Respondent's counsel who acted as both a counsel and a witness for the 1st Respondent apart from being unprofessional is also unreliable and ought not to be relied upon by the trial Court.

On **issue two**, the Appellant replied that admissibility of evidence is not the same as the weight to be attached upon such document. He contended that since the **Exhibit P9** was not signed personally by the Appellant, the trial Court ought not to place any reliance on the piece of evidence to uphold his finding against the Appellant. He cited the case of *Agbareh vs Mimra(supra)@ 412*.

In his reply to the **issue three**, learned counsel submitted that the evidence tendered the 1st Respondent's learned counsel as a witness for the 1st Respondent is inadmissible and unreliable and the trial Court ought not to have based his decision on such evidence; that the trial Court acted in error by relying solely on the testimony of the

1st Respondent's learned counsel without taking into account or giving appraisal to the evidence led by the Appellant. He therefore urged this Court to re-evaluate the Appellant's evidence *vis-à-vis* the evidence given by 1st Respondent.

Finally, in his reply to the **issue five**, Appellant argued that there is not proliferation of issues in that the issue No. 5 is situated in the ground 5 of the Amended Notice of Appeal. In his further reply, he stated that the issue about the misjoinder of the 2nd Respondent was never a fresh or new issue that is raised in this appeal. He stated that the issue was canvassed by the 2nd Respondent in his preliminary objection which the trial Court dismissed and proceeded with the matter.

RESOLUTION

We have carefully examined the Records of Appeal, the issues raised and we have also given careful consideration to the submissions canvassed by the respective learned counsel. Before we proceed, it is considered apt at this point to recapitulate briefly the facts of this case. The

Appellant was a yearly Tenant of a house situate at Block B, 19 Road, 16, Bricks City Estate Phase 1, Kubwa, Abuja (hereinafter described as the property). The rental value of the property is **One Million, Three Hundred Thousand Naira (₦1,300,000)***per annum*. It was contended that the 1st Respondent was in unpaid arrears of rent calculated to the sum of **₦6,024,999.95 (Six million, twenty-four thousand nine hundred and ninety-nine Naira and ninety-five Kobo)** only. In an attempt to settle the unpaid arrears of rent, the Appellant entered into a Memorandum of Understanding ("MOU") with the 1st Respondent, but the MOU was signed on behalf of the Appellant by the 2nd Respondent, who acted as counsel for the Appellant, and at the same time guaranteed the performance of the terms under the MOU. As a result of the non-compliance with the terms of the MOU, the 1st Respondent took out a Plaint against the Appellant and joined the 2nd Respondent. At the end of the trial, judgment was given in favour of the 1st Respondent. It is against the Judgment of the trial Court that the Appellant filed this appeal.

We believe that the four (4) issues formulated by the Appellant with some modifications, can dispose of this appeal.

ISSUE ONE:

In dealing with issue (1) in Appellant's brief, we shall consider it along with issue (1) in Respondent's brief since they are related or seemingly analogous, in that both deals with the effect of the rules of the Professional ethics.

In considering the issue of the effect of**Rules 20 (1-4)** of the **Rules of Professional Conduct for Legal Practitioners, 2007** (hereinafter referred to as "RPC"),where a lawyer is found to have acted in "dual capacity," as in the instant case, we had carefully examined the totality of the judgment of the learned trial Magistrate but failed to see how this ground of appeal related to or was borne out of the judgment. It is therefore evident that the learned trial Court was not availed the opportunity to first determine this issue. This is not supposed to be so. It is firmly settled in law that appeal is a continuation of the trial. See *A.I.B Ltd. vsI.S.S Ltd.[2012] 17 NWLR (Pt. 1328) 1 (SC)*,where

the Supreme Court held that:***"an appeal must necessarily relate to the facts or law decided by the Court whose decision is appealed against."***

In applying the foregoing principle as enunciated in this case, it should not be difficult to hold the issue is incompetent and it is hereby accordingly struck out.

Nevertheless, in the event that it is held that we are wrong, we have proceeded to determine the merit of the issue.

By our understanding, "dual capacity" is a term or a phrase used commonly amongst the lawyers in Nigeria, when a lawyer is said to be acting as a counsel for a client and also giving evidence as a witness for the same client in the same suit. It seems to us that both counsel for the Appellant and the 1st Respondent are not in disagreement as to whether the 1st Respondent counsel acted in dual capacity for the 1st Respondent at the trial Court. However, the pith of this issue is whether the oral evidence or testimony given by the 1st Respondent counsel in the circumstances of the case is admissible by the trial Court given the effect of the **Rules 20 (1-4) of the**

RPC*(supra)*.The Appellant's position is that such evidence given by the 1st Respondent learned counsel at the trial court ought not to be admissible by the trial Court whilst the 1st Respondent's learned counsel argued c*ontra*.

Having perused the above provisions of the **RPC** and in considering the application of the above **Rule,** we have no doubt that the 1st Respondent's counsel acted in dual capacity for the 1st Respondent in this case and we so hold. This view is evidenced by **pages 1-220** of the **Records of Appeal** and **pages 1-11** of the **Supplementary Records of Appeal**.

It is without gainsaying that the 1st Respondent's counsel (**Arinze F. Anakwe, Esq.**) acted as a counsel for the 1st Respondent and also gave evidence as a witness for the same Client (as 1st Respondent). The question however is whether the conduct of the 1st Respondent'slearned counsel in acting in dual capacity in the proceeding at the trial Court can be said to be tantamount to violating or desecrating the moral codes of the legal profession as enunciated in the **Rule 20 (1-4)** ofthe **RPC**?

This issue had been long settled by the Supreme Court in *Elabanjo vs Tijani[1986] 5 NWLR (Pt. 46) 952 @ 961-962(paras H-D)*, where the erudite **Oputa, JSC** (of blessed memory), held as follows:

> ***"The position then is that counsel appearing should not ordinarily act as counsel and witness. But if it becomes necessary for such counsel to give evidence, his evidence is not rendered inadmissible by the mere fact that he has acted or is acting as counsel in the case. There can therefore be no doubt that counsel is not by the mere fact of being counsel for a party to a dispute, incompetent to give evidence in the same case. He is competent."***

It is not in doubt that the provision of **Rule 20(4)** of the **Rules of Professional Conduct for Legal Practitioners** forbids a lawyer to act as witness in the same matter he is counsel, where the matter is contentious; however, the learned **Karibi-Whyte, JSC,** in his contributions in the same authority of *Elabanjo vs Tijani*, equally held that counsel is a competent witness in the case he is conducting on behalf of his client and can give evidence in that case; but

cautioned that, in deference to the rule of practice, it is desirable for counsel to withdraw as counsel before appearing as witness, depending on the nature of the case. See also *First Trustees Nigeria Limited &Ors vs Intels (Nig.) Ltd. &Ors.[2022] LPELR-44312(CA)*.

What is to be underscored is that a legal practitioner can act as witness for his client in a matter he is counsel, where the action is not contentious. We are of the view that in the circumstances of the instant case, which is a simple landlord and tenant relationship, no serious or contentious matters have been thrown up of which the 1st Respondent's learned counsel should not be competent to give evidence on behalf of his client, whilst also acting as counsel in the matter. We so hold.

Flowing also from the Supreme Court authority cited (supra), the evidence of the 1st Respondent's learned counsel before the trial magistrate's Court cannot, on the basis of counsel acting in dual capacity, be held to be inadmissible. This is more so in that nowhere in the provisions of the **RPC** cited or any other provisions under

the **RPC**is it specifically provided that any evidence, oral or documentary, given by counsel in violation of the **RPC** would be inadmissible, as the Appellant's learned counsel seemed to have contended. The **RPC** is a rule guiding the professional conduct of Lawyers in Nigeria and not rules that determine the admissibility or otherwise of evidence in the Nigerian Courts. See the unreported Supreme Court decision *Emmanuel NnabuikeNwite vs Peoples Democratic Party &Ors*. *SC/CV/1353/2022*), *per***Mohammed Lawal Garba, JSC,** in delivering the lead judgment held thus:

> ***"…any evidence, oral or documentary, on relevant fact/s given is admissible, unless excluded in accordance with the Act or any other Act/ Law or legislation validly in force in Nigeria. The Rules of Professional Conduct for Legal Practitioners, 2007 made pursuant to the Legal Practitioners Act, LFN 2004, constitutes any other law or legislation mentioned in the Evidence Act. Rule 20 (1), (4) and (6) prohibits a legal Practitioner from being a witness for his client in a case in which he appears as counsel for such client…particularly where contentious issues are involved. Although the Rules do no render evidence***

deposed to by a legal practitioner in a client's case in which he appears as a counsel, inadmissible in evidence in the proceedings of Court, they render such legal practitioner liable for unprofessional conduct in contravention of the Rules."

On the whole, we hereby resolve issue one against the Appellant.

ISSUE TWO:

It is not in contention that **ExhibitP9**, the Memorandum of Understanding, was signed on behalf of the 1st Respondent by his learned counsel.It is also crystal clear that the same document was signed on behalf of the Appellant by the 2nd Respondent **(Mustapha Abba Gaji, Esq.)**, who acted as counsel for the Appellant at the trial Court. At pages **95-96 of the Records of Appeal,** during the examination in chief of the 2nd Respondent as learned counsel for the Appellant at the trial Court, he said:

"My name is Mustapha Abba Gaji. I am a Legal Practitioner of NLIC Yonuua Street, Area 2, Garki Abuja...

I was contacted by my client sometime in August 2016 that he was given notice to vacate the premises and also hand over the property to his landlord…

…the plaintiff Counsel drafted a letter which he term as emergency M.O.U wherein he cost for the repairs…I called my client the 1st Defendant and ask for his consent to sign the emergency M.O.U on his behalf which I signed….”

Under cross-examination, the same learned counsel for the Appellant he said thus:

“Q. Look at the last page is that yours (sic) signature?

“A. Yes, is my signature signed on behalf of my client.”

From the excerpt of the above proceedings, it becomes clear to us that the Appellant’s learned counsel had the ostensible authority to negotiate the settlement of the unpaid arrears of rent on behalf of the Appellant and that the M.O.U was signed on behalf of the Appellant by his Counsel (**Mustapha Abba Gaji, Esq.**), with the Appellant’s consent and we so hold.

We must further hold that **Exhibit P9** signed by the Appellant on his behalf is clearly binding on him. This reasoning is given credence by the Supreme Court decision where the scope of the authority of Counsel was well elucidated upon by,*per***Eso, JSC**in*Festus L. Adewunmi vs Plastex Nig. Ltd. [1986] 6 SC 214, 273*,where His Lordship held thus:

> ***"…once a matter is within the ordinary authority of Counsel, he does not need the client's consent. Such is the authority of Counsel. How about a settlement by Counsel of an action or compromise by the Counsel out of Court? In England doubt is expressed on the authority of Counsel to reach a settlement or a compromise out of Court without the approval of his instructing solicitor or for such settlement or compromise both embodied in a Court of law. I hold the view that such problem does not arise in this country where there is no dichotomy in the profession. A lawyer can settle his client's case out of court. He can compromise it in Court or out of Court…."***
>
> ***"See further A.O Menakaya v. Dr. F.H. Menakaya supra at page 267, ratio 11 that: "the general principle of law is that …any procedure consented to by the counsel***

equally binds his client. It is a matter of law which counsel cannot share with his client. He also has the professional authority to enter into a compromise which could bind the client."

Since the MOU, **ExhibitP9**, was signed on behalf of the Appellant by his Counsel, it is enough, and thus binding on the Appellant, more so that the Appellant did not adduce any evidence to challenge or controvert the document. We totally agree with the decision of the learned trial Magistrate on this issue.

Even if **ExhibitP9** was not signed with the authority of the Appellant, the position would still have remained the same, in that the Appellant would still be estopped in law from shirking or avoiding his responsibility under the document. The doctrine of estoppel, although a common law doctrine of the law of estoppel by conduct has been enacted into the body of our law in Nigeria, nay **s. 169** of the **Evidence Act 2011** (as amended). The Section provides:

"When a person has either by virtue of an existing Court Judgment, deed or agreement or by declaration, act or omission, intentionally caused or permitted

another person to believe a thing to be true and to act upon such believe, neither he nor his representatives in interest shall be allowed in any proceeding between himself and such person or such person's representatives in interest to deny the truth of that thing."

In effect, this type of estoppel limits the capacity of a person (that is the Appellant) to after making another person (that is the 1st Respondent) to shift his position or make some consideration to the latter's detriment and later seek to recline or withdraw from the position (that is the MOU), he took or to call evidence to the contrary. The doctrine of estoppel by conduct forbids the Appellant from doing that, eternally. See. *Attorney General of Rivers State vs Attorney General of Akwa Ibom State [2011] AllFWLR (Pt. 570) 1023 @ 1054-1055 (SC),* where the Supreme Court,*per***Kastina-Alu, JSC,** illustratively held thus:

"The doctrine of estoppel by conduct, though a common law principle has been enacted into the body of laws in Section 151 of the Evidence Act. Also called estoppel in pais, this common law principle which

as shown around has gained statutory acceptance in Nigeria forbids a person from leading his opponent from believing in and acting upon a state of affairs, only for the former to turn around and disclaim his act or omission…neither he nor his representatives in interest shall be allowed."

See also *Iga vs Amakiri [1976] 11 SC 1;Ondo State University vs Folayan [1994] 7 NWLR (Pt.354) 1.*

Now, with respect to the weight attached to **ExhibitP9** by the trial Court, the settled position of the law on evidence in this respect is that the Court is bound to accept and act upon such uncontroverted evidence. In *Ozeigbu Engineering Co. Ltd. vs Iwuamadi [2009] 16 NWLR (Pt. 1166)44, 63D-F,*wherethe Court of Appeal,*per***Garba, JCA**(as he then was)held that:

"Another settled principle of law is that the court is entitled to accept (and in some situations bound to) credible evidence that was not challenged or controverted on any issue calling for the decision of the court."

In any case, it is the clear position of the law that the veracity of any oral evidence is anchored by documentary evidence so that in the instant case where **Exhibit P9**clearly accords with the case put forward by the 1st Respondent against the Appellant and the 2nd Respondent, the trial Court is duty bound to act upon it. In *Kotun & 2 Ors. vs Olasewere& 2 Ors. [2010] 1 NWLR (Pt. 1175) 411 @ 437*,the Court of Appeal *per***Rhodes-Vivour, JCA** (as he then was), held that:

> ***"The position of the law is that documentary evidence always serves as a hanger from which to assess oral testimony, consequently when documentary evidence supports oral testimony as in this case, oral testimony becomes more credible."***

In the circumstances, we cannot therefore fault the decision of the trial Court to act upon the **Exhibit P9**, contrary to the argument of the Appellant. Consequently, we hereby resolve the issue in the negative, against the Appellant.

ISSUE THREE:

On the Appellant'slearned counsel's contention that the learned trial magistrate improperly evaluated evidence of the Appellant vis-à-vis the evidence of the 1st Respondent, before reaching his decision, it is well settled in law that evaluation is primarily the function of the trial Judge. It is only where and when he fails to evaluate such evidence properly or at all, that the Court exercising appellate jurisdiction can intervene and itself re-evaluate such evidence; otherwise, where the Court of trial has satisfactorily performed its primary function of evaluating evidence and correctly ascribing probative value to it, the appellate Court has no business interfering with its finding on such evidence. See *Abisi vs Ekwealor [1993]6 NWLR (Pt. 302) 643.*

We had examined the Records, with particular focus on the portion of the evidence under contention. We cannot agree with the Appellant's learned counsel that the trial Magistrate was guilty of improper evaluation of evidence. As such, we see no reason to disturb the findings of the learned trial Judge in this respect.

With regards to the admissibility of the computer-generated evidence as admitted by the trial Court which the Appellant has now decided to challenge in this appeal; it appears to us that the Appellant is only attempting to *close the stable door after the horse has bolted*. It is trite law that a document, which, of itself, is not inadmissible, but for fulfilling certain conditions, and which is tendered without any objection by the opposing party cannot be challenged on appeal. See. *Alhaji Bello Nasir vs Civil Service Commission [2010] AllFWLR(Pt. 515) 195*. From the Records of Appeal before us, it is obvious that the Appellant never raised an objection the admissibility of the computer- generated evidence. *A fortiori*, the Appellant is disallowed by law to argue on appeal the proprietary or otherwise of the admissibility of those particular documents and we so hold. I therefore resolve this issue against the Appellant and in favour of the 1st Respondent.

ISSUE FOUR:

This issue relates to an interlocutory decision of the trial Court that was made 12th June 2017, in which the learned

trial Judge was alleged to have failed to exercise his discretion favourably to the Appellant, by refusing to expunge or strike out the 2nd Respondent as the 2nd Defendant in the suit at the trial Court. From the phraseology and tenor of the trial Court order, it is a quintessence of an interlocutory decision and I so hold. That being the case, it is trite law that any appeal against an exercise of Court's discretion is a mixed law and facts which requires leave of Court before appealing against such decision and the same rendered it incompetent by the failure to obtain leave. See. *Ekemezie vs Ifeanacho[2019]LPELR-46518 (SC)*. It is evident that the Appellant had failed to obtain the leave of Court before appealing against that specific decision of the trial Court thereby rendering this issue incompetent and we have no difficulty in striking out the same.

In the final analysis, our decision is that this appeal lacks in merit and in substance. It is hereby accordingly dismissed.We award costs of **₦200,000.00(Two Hundred Thousand Naira)** only, against the Appellant in favour of the 1st Respondent.

HON. JUSTICE OLUKAYODE A. ADENIYI
(Presiding Judge)
08/12/2023

HON. JUSTICE BABANGIDA HASSAN
(Hon. Judge)
08/12/2023

***Legal representation*:**

G. E. Amule, Esq. – *for the 1st Respondent*