IN THE COURT OF APPEAL
LAGOS JUDICIAL DIVISION
HOLDEN AT LAGOS
ON FRIDAY, THE 29TH DAY OF MAY, 2020

BEFORE THEIR LORDSHIPS

OBANDE FESTUS OGBUINYA — JUSTICE, COURT OF APPEAL
GABRIEL OMONIYI KOLAWOLE — JUSTICE, COURT OF APPEAL
BALKISU BELLO ALIYU — JUSTICE, COURT OF APPEAL

CA/L/188/2018

BETWEEN:

APPELLANT

MULTICHOICE NIGERIA LIMITED = =

VS.

RESPONDENT

MUSICAL COPYRIGHT SOCIETY NIGERIA LTD/GTE = =

JUDGMENT

(DELIVERED BY OBANDE FESTUS OGBUINYA, JCA)

This appeal is an offspring of the decision of the Federal High Court, Lagos Division (hereinafter abridged to "the lower court"), *coram judice*: **M.B. Idris, J.** (now JCA), in Suit No. **FHC/L/CS/1091/2011**, delivered on **19th January, 2018.** Before the lower court, the appellant and the respondent were the plaintiff and the respondent respectively.

The facts of the case, which transformed into the appeal, are amenable to brevity and simplicity. The appellant, a subscription management company, grants its service subscribers access to programming and content on Digital Satellite Television (DSTV) bouquet via an enabled decoder. The programming is transnational and obtainable from BBC, CNN, Al Jazeera,

NTA, AIT, *et cetera*. The appellant asserted that only licenced collecting society, by Nigerian Copyright Commission (NCC), demands and receives royalties on behalf of copyright owners. It claimed that the respondent, whose licence has been revoked by the NCC, had been demanding outrageous sums as payment for licencing musical works contained and broadcast in different channels and programming carried on DSTV bouquet. It alleged that the respondent accompanied the demands with threats to pay the sums, as royalties on behalf of the copyright owners it represents, or face unstated repercussions. It further asserted that the respondent was intent on harassing, intimidating or using threats to disturb its operations and business and those of its affiliates to ensure that the demands were met

Sequel to that, the appellant beseeched the lower court, via a writ of summons filed on 20th September, 2011, and tabled against the respondent the following reliefs:

> **i. A declaration that the plaintiff is not obliged, under the laws of Nigeria, to pay any monies or otherwise to the Defendant, as royalties or other payment for material used in programming or content on the DSTV bouquet, unless the Defendant is licensed a collecting society for that purpose by the Nigerian Copyright Commission, under the aforestated laws.**
>
> **ii. A declaration that the Defendant cannot demand, collect and/or receive monies from the plaintiff, being payments for the use of**

material on programming and content on the DSTV bouquet, as a collecting society or otherwise, unless the Defendant is licensed as a collecting society by the Nigerian Copyright Commission under the enabling laws of Nigeria.

iii. A declaration that any demand now made to the plaintiff by the Defendant, not being a licensed collecting society, under the laws of Nigeria, for the payment of royalties, in any manner or under any guise, for material used in programming or content on the DSTV bouquet is illegal, ultra vires and fraudulent.

iv. A perpetual injunction restraining the Defendant by herself, her agents, privies, assigns, affiliates, successors in title from demanding, collecting and/or receiving from the plaintiff, her agents, privies, assigns and affiliates, monies or any other form of payment for the use of material on programming and content on the DSTV bouquet.

In reaction, the respondent joined issue with the appellant and denied liability by filing a defence. It asserted that it was the owner, assignee and exclusive licencee of body of some musical works over the Nigerian territory. The musical works were assigned to it by two international

organisations, Performing Rights Society (PRS), and Mechanical Copyright Protection Society (MCPS), by dint of two reciprocal representation agreements. It alleged that the appellant infringed/exploited the musical works, which made up its repertoire, by communicating them to the public, upon a fee, through Satellite and Pay TV broadcasting, without licence from nor payment of royalties to it. As a result, the respondent counter-claimed and solicited, against the appellant, the following reliefs.

> **(i) the sum of ₦5, 490,652,125.00 (Five Billion, Four Hundred and Ninety Million, Six Hundred and Fifty Tow Thousand, One Hundred and Twenty Five Naira) only as special Damages.**
>
> **(ii) ₦4, 509,347,875.00 (Four Billion, Five Hundred and Nine Million, Three Hundred and Forty Seven Thousand, Eight and hundred and Seventy Five Naira) only as general and aggravated damages for the plaintiff's various and flagrant use of works forming part of the Respondent's Repertoire between 6th of January 2006 to 5th January 2012.**

Following the rival claims, the lower court had a full-scale determination of the case. In proof of the case, the appellant fielded one witness, PW1, who tendered documentary evidence: exhibits A-D. In disproof of the case, the respondent called a single witness, DW1, who tendered documentary evidence: exhibits E-L. At the closure of evidence, the parties, through their respective learned counsel, addressed the lower

court in the manner required by law. In a considered judgment, delivered on 19th January, 2018, found at pages 1722 – 1797, volume IV, of the record, the lower court struck out the appellant's suit and granted the respondent's counter-claim.

The appellant was dissatisfied with the decision. Hence, on 19th January, 2018 and 6th April, 2018, the appellant filed 2 – ground and 20 – ground notice of appeal copied at pages 1808 – 1810, volume IV, of the record and 1 – 24 of the additional record respectively. Subsequently, the appellant, with the leave of this court, filed an amended notice of appeal on 10th September, 2018 and deemed properly filed on 19th September, 2018, which houses 20 grounds, wherein it prayed the court for:

1. **An order allowing this appeal and setting aside the Judgment and others of the Honourable Justice M.B. Idris of the Federal High Court, Lagos Judicial Division in Suit No. FHC/L/CS/109/2011, delivered on the 19th day of January 2018 against the Appellant.**

2. **An order striking out or dismissing the Respondent's Counter-claim with substantial costs.**

Thereinafter, the parties, through their counsel, filed and exchanged their respective briefs of argument in line with the procedure governing the hearing of civil appeals in this court. The appeal was heard on 12th March, 2020.

During its hearing, learned counsel for the appellants, M.I. Igbokwe, SAN, adopted the further amended appellant's brief of argument, filed on 21st November, 2018 and deemed properly filed on 27th November, 2018, and the appellant's 2nd further amended reply brief of argument, filed on 6th March, 2020 and deemed properly filed on 12th March, 2020, as representing his arguments for the appeal. He urged the court to allow it. Similarly, learned counsel for the respondent, N.I. Quakers, SAN, adopted the respondent's further amended Brief of argument, filed on 26th June, 2019 and deemed properly filed on 12th March, 2020, and the respondent's reply to appellant's response to the respondent's notice, filed on 26th June, 2019, as forming his reactions against the appeal. He urged the court to dismiss it.

In the further amended appellant's brief of argument, learned counsel distilled nine issues for determination to wit.

1. **Whether the learned trial Judge should not have struck out the Respondent's counter-claim for being a nullity instead of assuming jurisdiction over granting it?**
2. **Whether after striking out the Appellant's claim, the lower court was wrong in failing to consider the Appellant's claim on the merits for the benefit of this Court on appeal?**
3. **Whether not having proved that it has a legal personality, the Respondent was competent to make the counter-claim against the Appellant and the lower court was right in granting the reliefs sought by it in the said counter-claim?**

4. Whether the learned trial court lacked jurisdiction to entertain and grant the Respondent's counter-claim as a result of the Respondent's want of *locus standi* and the court's want of competence?
5. Whether the Respondent not having obtained the approval or licence or exemption from the Nigerian Copyright Commission to operate the business of a Collecting Society or a Collecting Management Organization and so operating the business of Collecting Society unlawfully, the learned trial Judge was right in holding that the Respondent's copyright were infringed by the Appellant and the Respondent was entitled to damages for same?
6. Whether the Appellant's fundamental and constitutional right to fair hearing was breached by the lower court ignoring and not applying the binding case cited to it and the issues raised for determination and argued by the Appellant?
7. Whether the damages awarded against the Appellant for infringement of copyrights were wrong and unjustifiable and should be set aside?

8. **Whether the learned trial Judge was right in admitting and acting on inadmissible and probative valueless documents and in not discountenancing or expunging them from his record?**
9. **Whether the judgment is against the weight of evidence?**

In the respondent's further amended Brief of argument, learned counsel crafted six issues for determination *videlicet*:

1. **Was the counter-claim invalidated by the incurable failure of the Appellant to sign his writ of summons?**
2. **Whether the legal personality of the Respondent was an issue at the lower court?**
3. **Whether there was any miscarriage of justice caused to the Appellant in the decision of the learned trial Judge?**
4. **Was the learned trial judge right to hold that the Respondent could sue and enforce her right as owner, assignee and exclusive licensee of the body of works reposed in her irrespective of her not having a licence to carry on as a collecting society?**

5. **Whether in the consideration of the case at the trial court the learned trial court admitted any evidence which was inadmissible and relied upon same with a resultant effect of a miscarriage of justice when there was no objection to the admissibility and no contrary evidence produced before him.**

6. **Whether the learned trial Judge was not right when in following the principle for award of damages in "breach of copyright" cases awarded the damages in the judgment of the lower court.**

A close look at the two sets of issues shows that they are identical in substance. In fact, the respondent's six issues can, conveniently, be subsumed under the appellant's. For this reason of sameness, I will decide the appeal on the issues formulated by the appellant: the undisputed owner of the appeal.

Arguments on the issues:

Issue One

The learned counsel for the appellant submitted that the lower court ought not to have heard the counter-claim when the writ of summons was struck out because it collapsed with it. He relied on ***Dekan v. Asalu (2015) 13 NWLR (Pt. 1475) 47***. He noted that the counter-claim was not one of the four ways of commencing civil suits as enumerated in Order 3 rule 1 of the Federal High Court (Civil Procedure) Rules, 2009 (the FHC Rules). He

stated that all the processes filed in respect of the counter-claim would not be maintained since issue could not be joined. He cited ***Hamzat v. Sanni (2016 21 WRN 77***. He reasoned that all the lower court's considerations and findings, based on the void pleadings, were a nullity. He referred to ***Aberuagha v. Oyekan*** (unreported) Appeal No. **CAL/L/647/2012**, delivered on 12th January, 2018.

On behalf of the respondent, learned counsel submitted that a counter-claim was separate and independent from the main claim. He relied on ***Kayode v. Ogundokun (2017) 18 NWLR (Pt. 1596) 152; Oroja v. Adeniyi (2017) 6 NWLR (Pt. 1560) 138; Susainah (Trawling Vessel) v. Abogun (2007) NWLR (Pt. 1016) 456; Order 3 rule 1 of the FHC Rules; Atiba Iyalamu Savings & Loans v. suberu (2018) 13 NWLR (Pt. 1637) 387; Order 10 rule 3 (1), (2) and (3), order 13 rule 3 (2), Form 14 of the FHC Rules.*** He took the view that the Form 14 served as the writ for the counter-claim and that was why the appellant filed a memorandum of appearance to it. He insisted that the counter-claim was independent as it was filed in compliance with the FHC Rules. He referred to ***Dimacon Ind. Ltd v. Ajayi – Bembe*** **(unreported)**, Appeal No. **CA/L/421/2013**, delivered on 19th May, 2017

Issue Two

Learned counsel for the appellant contended that the lower court caused it a miscarriage of justice when it failed to consider its claim on the merits after striking out the writ. He relied on ***Glencore Energy Uk Ltd v. FRN (2018) LPELR-43860 (CA); Akpan v. FRN (2012) 1 NWLR (Pt. 1281) 403; John v. State (2011) 18 NWLR (Pt. 1278) 353***.

For the respondent, learned counsel contended, *per contra*, that the facts of the case did not necessitate the consideration of the claim because it would amount to an academic exercise. He cited ***Oguntayo v. Adelaja (2009) 15 NWLR (Pt. 1163) 150; Olagbenro v. Olayiwola (2014) 17 NWLR (Pt. 1436) 313; APGA v. Al-Makura (2016) 5 NWLR (Pt. 1505) 316***. He noted, in the alternative, that the lower court considered the appellant's claim while considering the counter-claim and there was no miscarriage of justice.

Issue Three

Learned counsel for the appellant submitted that only a legal personality, which had the burden to prove it, could sue or be sued in court. He relied on ***Kwara Hotels Ltd v. Ishola (2002) 9 NWLR (Pt. 733) 604; Thomas v. L.G.S.B. (1965) 1 All NWLR 168; The GOC v. Fakayode (1994) 2 NWLR (Pt. 329) 744***. He claimed that the appellant challenged the legal personality of the respondent, which it failed to prove by production of its certificate of incorporation, so it lacked the capacity to sue in the counter-claim. He cited ***Randle v. Kwara Breweries Ltd. (1986) 6SC 1, Dairo v. Registered Trustees of the Anglican Diocese of Lagos (2018) 1 NWLR (Pt. 1599) 62; Apostolic Church v. A-G., MidWestern State (1972) 7 NSCC 247; Bank of Baroda v. Iyalabani Ltd. (2002) 7 SCNJ 287; Nigeria Nurses Association v. AGF (1981) 11-12 SC 1.*** He concluded that due to lack of proper parties, the lower court lacked the jurisdiction to hear the counter-claims. He referred to ***PPA v. INEC (2011) 11-12 SC (Pt. 111) 40; Madukolu v. Nkemdilim (1962) 11 All NWLR 587***.

On the side of respondent, learned counsel argued that the appellant admitted the legal personality of the respondent when it sued it. He asserted that the legal personality of the respondent was not an issue

before the lower court. He described the appellant's traverse on the legal personality of the respondent as insufficient in law. He cited ***Ladgroup Ltd v. FBN Plc (2017) 12 NWLR (Pt. 1580) 464; Meridien Trade Corp. Ltd v. Metal Const. (W.A.) Co. (1998) 4 NWLR (Pt. 544) 1; Ajibulu v. Ajayi (2014) 2 NWLR (Pt. 1392) 483; Lewis & Peat (N.R.I.) v. Akhimien (1976) 7 SC 157; Melwani v. Chanhira Corp (1995) 6 NWLR (Pt. 402) 447; Orianzi v. A-G; Rivers State (2017) 6 NWLR (Pt. 1561) 224; Balogun v. UBA Ltd. (1992) 6 NWLR (Pt. 247) 336***. He persisted that the general traverse placed no burden of proof in the respondent. He referred to ***Jukok Int'l Ltd v. Diamond Bank Plc.*** (2016) 6 NWLR (Pt. 1507) 55; ***UBN Plc. V. Chimaeze*** (2014) 9 NWLR (Pt. 1411) 166. He postulated, in the alternative, that the certified true copies of the respondent's memorandum and articles of association, before the court, could be looked at to show its legal personality. He cited ***Nuhu v. Ogele*** (2003) 18 NWLR (Pt. 852) 251; ***West African provincial Insurance Co. Ltd v. Nigeria Tobacco Co. Ltd.*** (1987) 2 NWLR (Pt. 56) 299.

On points of law, learned appellant's counsel noted that the appellant in a motion of 10th September, 2018 and granted on 27th November, 2018, it obtained the leave of the court to argue fresh point on non-juristic personality of the respondent. He reasoned that suing the respondent was not an admission of its juristic personality but, at best, suing a non-juristic person. He stated that the memorandum and articles of associations could not serve the same purpose of certificate of incorporation. He cited ***NNPC v. Lutin Invest.*** (2006) 2 NWLR (Pt. 965) 506; section 36 (5) and (6) of companies and Allied Matters Act (CAMA). He persisted that the general traverse did not amount to admission. He relied on Jimmons v. N.E.C.C.

Ltd (1976) 1 All NLR 122; ***Attah v. Nnecho*** (1965) NNLR 28; ***Osafile v. Odi*** (supra).

Issue Four

Learned counsel for the appellant submitted that the applicable laws to the counter-claim were the Copyright Act, 2010 and the Copyright (Collective Management Organisation) Regulations 2007 (the Regulations). He described the respondent's business as negotiating and granting of licences, collection and distribution of royalties on copyright works of rights of owners and representing between 50 and 100 owners of copyright in musical category. He stated that the respondent lacked the *locus standi* to sue as a collection society without an approval or exemption by the Nigerian Copyright Commission (NCC). He classified the approval or exemption as a condition- precedent to the constitution of the action. He cited sections 17 and 39 of the Act and section 1 of the Regulations; ***NCC v. MCSN Ltd/Gte*** (2016) LPELR – 42264 (CA); ***Compact Disc Technology Ltd. v. MCSN Ltd/Gte*** (2010) LPELR – 40006 (CA); ***Madukolu v. Nkemdilim*** (supra).

For the respondent, learned counsel posited that the documents that evidenced the rights of the respondent were executed between 1986-1990 when the regime of collecting society was not in existence. He explained that sections 17 and 39 of the Copyright Act were introduced by Decree Nos. 42 of 1999 and 98 of 1992 respectively by which time the respondent's right (choses in action) had been reposed and vested. He cited ***Halbury's Laws of England***, 4th Edition, Vol. 35 paras 1104 and 1105 page 611. He maintained that the Act could not retrospectively remove those rights from the respondent. He referred to ***Adesanoye v.***

Adewole (2000) 9 NWLR (Pt. 671) 127; ***Afolabi v. Gov., Oyo State*** (1985) 2 NWLR (Pt. 9) 734; section 52 (3) of the Act. He said that exhibits G and G1 were examples of saved contracts. He emphasized that section 52(3) of the Act was not considered in the cases cited by the appellant. He took the view that the word "notwithstanding" was used in sections 17 and 52(3) of the Copyright Act and the latter one covered the former. He referred to ***N.E.C.O. v. Tokode*** (2011) 5 NWLR (Pt. 1239) 45. He insisted that sections 17 and 39 of the Act were inapplicable. He relied on ***MCSN v. Adeokin Records*** (2007) 13 NWLR (Pt. 1052) 616; ***PMRS Ltd/Gte v. Skye Bank Plc.*** (unreported) Appeal No. CA/L/846/2009, delivered on 27th October, 2017; ***Adeokin Records v. MCSN*** (2018) 15 NWLR (Pt.1643) 530; ***MCSN Ltd/Gte v. Compact Disc Technology Ltd.*** (unreported), Appeal No. SC/425/2010.

Issue Five

Learned counsel repeated that section 17 of the Act, which began with the word "Notwithstanding," applied to the case. He cited ***NNPC v. Lutin Invest Ltd.*** (2006) 2 NWLR (Pt. 965) 506. He faulted the lower court's reliance on section 52(3) of the Copyright Act. He posited that the respondent failed to prove the infringement of its musical works as provided in section 15 of the Copyright Act. He asserted that there was causal connection between one copyright work and the infringed work as required by law. He relied on ***Francis Day & Hunter Ltd. v. Bron*** (1963) Ch 587; section 131 of the Evidence Act, 2011; ***OAACG Farming Society v. NAC Bank Ltd.*** (1999) 2 NWLR (Pt.590) 234. He said that the appellant's quarterly tariff and revenue base were not proved. He stated that the open court infringement shown on 17th January, 2017 was not pleaded and

proved and the lower court descended into the arena when it held otherwise. He relied on **Eze v. Lawai** (1997) 2 NWLR (Pt. 487) 333; ***State v. Aibangbe*** (1988) 2 NSCC vol. 19 192; ***Suberu v. State*** (2020) 8 NWLR (Pt. 1197) 586.

Learned counsel submitted that the respondent was a stranger to the agreements in exhibits G and G1 and could not benefit from them on basis of privity of contract. He cited ***Ogundare v. Ogunlowo*** (1997) 6 NWLR (Pt. 509) 360. He noted that the oral evidence of DW1, as to its status, could not alter the exhibits. He referred to section 128 of the Evidence Act, 2011; ***Yadis (Nig.) Ltd v. G.N.I.C. Ltd.*** (2007) 14 NWLR (Pt. 1055) 584. He described the respondent's operation, as a collecting society, without approval or exemption by NCC as statutory illegality and made it unenforceable. He referred to section 39 of the Copyright Act; ***Total Nig. Plc v. Ajayi (2004) 3 NWLR (Pt. 860) 270. A-G., Ekiti State v. Saramola (2003) 10 NWLR (Pt. 827) 104; St. John Shipping Corporation v. Joseph Rank Ltd. (1957) 1 Q B. 267; Fasel Services Ltd. V. NPA (2009) 9 NWLR (Pt. 1164) 400; Dennis of Co. Ltd. V. Munn (1949) 2 KB 327/(1949) 1 All ER 616; Haseldine v.Hosken (1933) KB 822; Cleaver v. Mutual Reserve Fund Life Association (1892) 1QB*** He claimed that since the illegality was *ex facie*, the lower court ought not to have acted on it whether it was pleaded or not. He cited ***North-Western Salt Co. Ltd. v. Electrolytic Alkali Co. Ltd.*** (1914) AC 461; ***Fasel Services Ltd v. NPA*** (supra).

On the part of the respondent, learned counsel contended that the respondent was incorporated in 1984 and exhibit G1 made in 1986 under the Companies Decree 51 of 1968 which predated the Companies and

Allied Matters Act, 1990 (CAMA). He explained that sections 2(b) and 3 (a) (1) of the Companies Decree, 1968 allowed companies Limited by guarantee to put limited in its name. He insisted that the evidence of DW1 was right, on the point, and that the respondent was the beneficiary of the agreements in exhibits G and G1.

Issue Six

Learned counsel for the appellant submitted that the lower court failed to follow the decision in *Compact* case-exhibit B. He stated that it had a duty to pronounce on all issues and bound by *stare decisis*. He relied on ***NCC v. MCSN*** (supra); ***A.G. Leventis Nig. Plc. V. Akpu*** (2007) LPELR – 5 (SC); ***Fatola v. Mustafa*** (1985) 2 NWLR 1438 (sic); ***Okeke v. Okoli*** (2000) 1 NWLR (Pt. 642) 641; ***Okonji v. Odje*** (1985) 10 SC 267. He asserted that the failure was a denial of the appellant's right to fair hearing which made the decision nullity. He cited ***Ndukanba v. Kolomo*** (2005) 4 NWLR (Pt. 915) 411.

On behalf of the respondent, learned counsel argued that the lower court rightly followed the latest decision, ***PMRS Ltd v. Skye Bank Plc*** (supra), on the conflicting decisions cited to it on the point. He cited ***Alao v. Unilorin*** (2008) 1 NWLR (Pt. 1069) 421; ***Iwunze v. ARN*** (2013) 1 NWLR (Pt. 1334) 119; ***Osakwe v. F.C.E., Asaba*** (2010) 10 NWLR (Pt. 1201) 1; ***Mkpedem v. Udo*** (2000) 9 NWLR (Pt. 673) 631. He stated that the lower court's position had been confirmed in ***Adeokin Records v. MCSCN*** (supra); ***MCSN Ltd. Gte v. Compact Disc Technology Ltd***. (supra).

On points of law, learned appellant's counsel distinguished the cases of *Adeokin and Compact* cases from the case in hand. He relied on

Joseph Rhz, *The Authority of Law*, Bryan A. Garner *et al*, *The Law of Judicial Precedent*, pages 970104. He postulated that cases should be read in the light their facts. He referred to ***Adegoke Motors v. Adesanya*** (supra); ***Clement v. Iwuanyanwu*** (1989) 3 NWLR (Pt. 107) 39; ***Emeka v. Okadigbo*** (2012) 18 NWLR (Pt. 1331) 55.

Issue Seven

Learned counsel for the appellant submitted that the issues of contracting party, retransmission or broadcast in televisions and radio channels in terms of dates, duration and times, high similarity between the two works, motivation by glitters of profit, broadcast logs, broadcast tariffs royalty and 20,000 decoders were not pleaded and/or proved as required by law. He explained that some were not pleaded, without evidence and others the evidence at variance with pleading and went to no issue. He urged the court to expunge them. He relied on ***Okagbue v. Romaine*** (1982) 5 SC 133; ***Stag Eng. Co. Ltd. v. Sabalco Nig. Ltd.*** (2008) LPELR – 8485 (CA); Laddie, Prescott and Vitoriain *The Modern Law of Copyright and Designs*, 4th Edition, vol. 1 page 1099. He added that the total sum was unproved as the evidence of DW1 was full of contradictions and exaggerations and unreliable. He cited ***C & C Const. Co. Ltd. v. Okhai*** (2003) 18 NWLR (Pt. 851) 79.

Learned counsel posited that the respondent did not strictly prove special damages as required by law. He relied on ***SPDC (Nig.) Ltd. v. Tiebo VII*** (2005) 9 NWLR (Pt. 931) 439; ***X.S. (Nig.) Ltd v. Taisei (W.A.) Ltd.*** (2006) 15 NWLR (Pt. 1003) 533; ***Ajigbotosho v. RCC Ltd.*** (2008) LPELR – 3716 (CA). He stated that the lower court not only wrongly lumped special and aggravated damages together but miscalculated the

total sum. He said that the computation should have been under section 15 of the Copyright Act. He reasoned that the lower court's assessment of the damages was not in the light of the evidence but based on its speculative, emotional and sentimental disposition contrary to the law. He referred to ***Olokunlade v. Ademiloyo*** (2011) LPELR – 3943; ***Abiara v. Reg. T.M. C.N.*** (2017) 11 NWLR (Pt. 1045) 280; ***Gari v. Seirafina (Nig.) Ltd.*** (2008) 2 NWLR (Pt. 1070); ***West African Shipping Agency v. Kalla*** (1978) 3 SC 21; ***Odumosu v. A.C.B.*** (1976) 11 SC 55, ***Osuji v. Isiocha*** (1989) 3 NWLR (Pt. 111) 623) ***UBN Plc. v. Ajabale*** (2011) LPELR – 8239 (SC); ***Dumez (Nig.) Ltd v. Ogboli*** (1972)/All NLR 24; ***United Cement Co. of Nig. Ltd. v. Isidor*** (2016) LPELR – 41148 (CA); ***Adekunle v. Rockview Hotel Ltd.*** (2004) 1 NWLR (Pt. 853) 161; ***Effiong v. A.I. S.A.S. Ltd.*** (2010) 6 NWLR (Pt. 1243) 266. He observed that the respondent should have attempted to mitigate the damages. He referred to ***Onwuka v. Omogui*** (1992) 3 NWLR (Pt. 230) 392; ***Okongwu v. NNPC*** (1989) sic (Pt. 115) 296. He stated that the lower court did not hear in mind preview award of damages in comparable cases. He cited ***Ighosewe v. Delta Steel Co. Ltd.*** (2007) LPELR – 8577 (CA). He asserted that the respondent did not satisfy the conditions in section 16(4) of the Copyright Act. He claimed that the appellant had shown reasons for the court to interfere in the award of damages. He cited ***Agaba v. Otubusin*** (196) 2 SCNLR 13; ***Obere v. Board of Management Eku Baptist Hospital*** (1978) 6/7 SC 15; ***Uwa Printers Ltd. v. Invest Trust Ltd.*** (1988) NWLR (Pt.92) 110; ***Diamond Bank Ltd. v. Pamob WA. Ltd.*** (2014) LPELR – 24337 (CA); ***Ijebu Ode L.G. v. Adedeji Balogun & Co. Ltd.*** (1991) 1 NWLR ((Pt. 166) 136; ***UBN Ltd. v. Odusote Bookstores Ltd.*** (1995) 9 NWLR (Pt. 421) 558; ***Allied Bank Nig. Ltd. v. Akubueze*** (1997) LPELR – 429 (SC).

For the respondent, learned counsel contended that the principles in award of damages for breach of copyright were different. He relied on *Halbury's Laws of England*, 4th Edition, vol. 9 page 612, para. 947; ***Mcgregor on Damages***, 18th Edition, 40-042; ***Plateau Publishing Co. Ltd v. Adophy*** (1986) 4 NWLR (Pt. 34) 205 at 225; ***Obe v. Grapevine Communication Ltd.*** (2003-2007) 5 I.P.L.R. 354; ***Ladan v. Shakallo Publication*** (1917-1976) 1 I.P.L.R. 270; ***Exchange Telegraph Co. v. Gregory & Co.*** (1896) 1 Q. B. 154; 74 L.I. 85; section 16(4) of the Copyright Act. He stated that the lower court considered the proper principles and an appellate court would not interfere. He cited ***Akinkugbe v. Ewulum Holdings Nig. Ltd.*** (2008) 12 NWLR (Pt. 1098) 375. He asserted that the respondent pleaded the works that were illegally used by the appellant and the minimum tariffs for their use. He noted that infringement was shown in court on 17th January, 2017. He said that exhibits G, G1, F1 – F14, L – L4, J were unchallenged evidence of ownership of the works and their infringement and rightly acted on by the lower court. He relied on ***Godsgift v. State*** (2016) 13 NWLR (Pt. 1530) 444; ***Okeke v. State*** (2016) 5 NWLR (Pt.1505) 107. He said that the presumption in section 43 of the Act, which was not rebutted, favoured the respondent.

Learned counsel posited that the appellant failed, despite the *subpoena duces tecum* served on it, to produce the broadcast logs and demography of its subscribers, as required by section 140 of the Evidence Act, 2011, and the lower court rightly applied section 167(d) of the Evidence Act, 2011. He cited ***Diamond Bank Ltd. v. Ugochukwu*** (2008) 1 NWLR (Pt. 1067) 1. He explained that the exhibit J proved the infringement of the works and exhibits H – H5 showed the appellant's refusal to

negotiate. He reasoned that the broadcast of 17th January, 2017 warranted aggravated and exemplary damages. He insisted that the lower court had the right to determine the compensation under section 9(3) of the Copyright Act. He concluded that award of damages in breach of copyright cases were *sui generis* and not the same with general principles of award of damages.

Issue Eight

Learned counsel for the appellant enumerated the three conditions for admissibility of documents as noted in ***Udoro v. Gov. Akwa Ibom State*** (2008) LPELR – 4094 (CA); ***Okonji v. Njokanma*** (1999) 14 NWLR (Pt. 638) 250. He said that exhibit J was not pleaded and frontloaded. He submitted that exhibits J (2 compact discs with audio and video), F1 – F14 and L – L7 were wrongly admitted and acted upon by the lower court. He drew the definition of compact disc from Online Audio English.org and www.big.com. He listed the machines for the application of the contents of exhibits J. He reasoned that exhibit J was a computer or other device generated documents. He asserted that the respondents did not satisfy the condition in section 84(2) of the Evidence Act, 2011 before tendering them thereby making them inadmissible. He relied on ***Kubor v. Dickson*** (2014) 4 NWLR (Pt.1345); ***P.D. Hallmark Contractors Nig. Ltd. v. Gomwalk*** (2015) LPELR – 24462 (CA); Alaba Omolaye-Ajileye, ***Guide to Admissibility of Electronic Evidence***, pages 111, 170 and 171; ***Electronic Evidence*** by Stephen Mason. He outlined the reasons for authentication of e-documents. He listed the two ways of authenticating video pictoral foundation and silent witness foundation. He stated that the respondent failed in all. He cited ***Wagner v. State*** 707 So. 2d 827, 829

(Fla. 1st DCA 1998); ***Lerner v. Halegua*** 154 So. 3d 445 (Fla. 3 DCA 2014). He added that they were not tendered by their maker thereby making them inadmissible. He referred to ***Omega Bank Plc v. OBC Ltd.*** (2005) 1 SCNJ 150; ***Uwa Printers (Nig.) Ltd. v. Investment Trust Co. Ltd.*** (1988) 5 NWLR (Pt. 92) 110.

It was further submitted that court would not act on inadmissible evidence. He stated that since those documents were wrongly admitted, the lower court or the appellant had the power to expunge them. He urged the court to expunge them. He cited ***Okulade v. Alade*** (1976) 1 ALL NLR 67; ***Alashe v. Ilu*** (1964) 1ALL NLR 310; ***Raimi v. Akintoye*** (1986) 3 NWLR (Pt. 26) 97, ***Anyaebosi v. R.T. Briscoe Nig. Ltd.*** (1987) 3 NWLR (Pt. 59) 84; ***Shija v. Fari*** (1986) 2 NWLR (sic) 147; ***Stag. Engn. Co. Ltd. v. Sabalco Ltd.*** (2008) LPELR – 8485 (CA); ***Owoyin v. Omotosho*** (1969) 1 ALL NLR 304; ***Odusanmi v. Asarah*** (1978) 1 ALL NLR 137.

For the respondent, learned counsel contended that facts contained in exhibit J were pleaded. He noted that the failure to frontload it did not affect the rules of admissibility which were governed by the Evidence Act, 2011. He cited ***Duralin Inv. Ltd. v. BGL Plc*** (2016) 18 NWLR (Pt. 1544) 262, ***Okonji v. Njokanma*** (supra). He described the non-frontloading as an irregularity which was waived by the non-objection to its admission.

Learned counsel conceded that exhibit J was a document under section 258 of the Evidence Act, 2011 and admissible on fulfillment of section 84 of the Evidence Act, 2011. He added that if the conditions were not fulfilled and it was admitted without objection, the adversary would not ask for it to be jettisoned. He cited ***Emeka v. Rawson*** (2000) 10 NWLR (Pt. 722) 723. He posited, in the alternative, that even without exhibit J, other

evidence, showed that the appellant infringed the on the respondent's music works. He relied on the proceedings of 17th January, 2017 attached to the affidavit of M.U. Mustapha deposed on 25th April, 2018 in line with the decision in ***Ehikioya v. COP*** (1992) 4 NWLR (P. 233) 57. He added that the appellant did not deny the infringement but claimed that the respondent was a collecting society. He repeated that the exhibits were admitted by consent without a right to objection on appeal. He said that a court must evaluate and give probate value to legally admissible evidence. He referred to ***Ipinlaiye II v. Olukotun*** (1996) 6 NWLR (Pt. 453) 154. He claimed that the section 84(2) of the Evidence Act, 2011 could be orally complied with as did DW1 on 17th January, 2017. He referred to ***Dickson v. Silva*** (2016) LPELR – 41257 (SC). He concluded that the documents were legally admissible and rightly admitted by the lower court.

On points of law, learned counsel posited that the non-objection to the documents would not prevent the objection on appeal. He relied on ***Dagaci of Dere v. Dagaci of Ebwa*** (2006) 7 NWLR (pt. 979) 382; ***Aiyetoro Comm. Trad. Co Ltd. v. NACB Ltd***. (2003) 12 NWLR (Pt. 834) 34; ***Etim v. Ekpe*** (1983) 1 SCNJ 120; ***Alao v. Akano*** (2005) 4 SC 25. He asserted that inadmissible document and pleadings and evidence on it should be jettisoned. He cited ***Dada v. Dosunmu*** (2006) 9 SCNJ 31; ***Fasade v. Babalola*** (2003) 4 SCNJ 287; ***Ayanwale v. Atanda*** (1988) 1 SC 1. He claimed, in the alternative, that even if those documents were admissible, they were of no probative value. He cited section 34(1) of the Evidence Act, 2011. He took the view that secondary evidence of immovable original document could be given under section 89(d) of the Evidence Act, 2011 and thereby making the presumption of broadcast logs, under section 167(d) of the same Act, inapplicable.

Issue Nine

Learned counsel for the appellant submitted that the lower court ignored the evidence of PW1 on negotiation that it failed because the respondent was a collecting society without licence from NCC as required by *compact* case, exhibit B. He stated that it failed to evaluate exhibits H, D, K, H2 and H5 and it ignored the evidence that the appellant's parent company in South Africa had paid the collecting societies that the respondent represent. He said that the respondent did not prove compensations. He asserted that the respondent had the onus to prove broadcast logs under section 131 of the Evidence Act, 2011. He explained that the duty of a party who served notice to produce was, in default, to produce secondary evidence of the document. He cited ***Buhari v. Obasanjo*** (2005) 13 NWLR (Pt. 910) 241; ***Gbadamosi v. Kabo Travels Ltd.*** (2000) 8 NWLR (Pt. 668) 243; ***Ainoko v. Yunisa*** (2008) LPELR – 3663 (CA); ***Nweke v. State*** (2017) LPELR – 42103 (SC). He noted that it failed to prove infringement and "glitters of profit" as found by the lower court. He observed that exhibit J was not pleaded nor how, when and who it was played given in evidence. He repeated that it was inadmissible under section 84 of the Evidence Act, 2011. He claimed that the respondent did not prove transmission by the appellant. He explained that the deposition of 18th June, 2015, exhibit E – E2 was not deemed and so irregular and incompetent to base findings. He persisted that the lower court's findings were against the weight of evidence, perverse and caused a miscarriage of justice and should be set aside and rehear the case under section 15 of the Court of Appeal Act. He cited ***Sanusi v. Amoyegun*** (1992) NWLR (Pt. 237) 527; ***Pam v. Mohamed*** (2008) 16 NWLR (Pt. 1112) 1; ***Anyakora v. Obiakor*** (2005) 5 NWLR (Pt. 919) 507; ***Fabunmi v. Agbe*** (1985) 1 NWLR

(Pt. 2) 299; ***Bunyan v. Akingboye*** (1999) 7 NWLR (Pt. 609) 31; ***Sankey v. Onyifeke*** (2013) LPELR – 21997 (CA); ***Atuyeye v. Ashamu*** (1987) 1 NWLR (Pt. 49) 267; ***Anyaoka v. Adi*** (1966) 3 NWLR 731 (Sic); ***Stag. Engn. Co. Ltd. v. Sabalco Nig. Ltd.*** (supra).

For the respondent, learned counsel contended that exhibit K showed that appellant should pay to the respondent. He stated that party would not rely on a document partly. He cited ***Sodimu v. NPA*** (1975) 4 SC 15. He explained that the appellant had business in Nigeria and regulated by National Broadcasting Commission (NBC) and by chapter II of it, it should pay for transmissions and broadcasts in Nigeria not South Africa. He conceded that the lower court's failure to pronounce on uplink with South Africa was an error, but minimal to reverse the judgment. He cited ***Nguma v. A.-G., Imo State*** (2014) 7 NWLR (Pt. 1405) 119; ***Nwavu v. Okoye*** (2008) 18 NWLR (Pt. 1118) 29; ***Akpagher v. Gbungu*** (2015) 1 NWLR (Pt. 1440) 209. He reasoned that the lower court rightly presumed, under section 167(d) of the Evidence Act, 2011, that the broadcast logs were unfavourable to the appellant because, it failed to produce them despite service of *subpoena duces tecum* on it when it was mandated to have them by Chapter 1 para. 1.9 of NB Code 2006 and 2012 made pursuant to NBC Act, Cap NII, Laws of the Federation of Nigeria, 2004. He posited that the lower court's use of the expressions, "it would not cost more than money" and "glitters of profit" were borne out of evidence. He stated that facts about exhibit J were to be pleaded not the evidence of those facts. He relied on ***Lasun v. Awoyemi*** (2009) 16 NWLR (Pt. 1168) 513; order 13 rule 4(1) of the FHC Rules. He maintained that even if the DW1's further deposition was not deemed, the appellant took fresh steps and waived its right to object to it. He referred to order 51 rule 2(1) of the FHC Rules. He

added that the further deposition carried no "proposed" on it. He insisted that the lower court's findings were not perverse nor caused miscarriage of justice to the appellant.

On points of law, learned appellant's counsel stated that the error was material, prejudicial and caused miscarriage of justice to the appellant's case. He cited ***Anka v. Lokoja*** (2001) 4 NWLR (Pt. 702) 178; ***Bababe v. FRN*** (2019) 1 NWLR (Pt. 1652) 100. He maintained that documents must be specifically pleaded. He cited Sadhwani v. Sadhwani (1989) 2 NWLR (Pt. 101) 72; ***Dike v. Obi Nzeka II*** (1986) 4 NWLR (Pt. 34) 136; ***Bruce v. Oldhams Press Ltd.*** (1938) 1 KB 697. He said that the failure to properly evaluate the evidence had direct effect on the decision. He referred to ***Okonkwo v. Onovo*** (1999) 4 NWLR (Pt. 597) 110.

Respondent's Notice

On 19th December, 2018, the respondent filed a Respondent's Notice contending that the decision of the lower court be varied as follows:

a. **₦5,450,152,125.00 (Five Billion Four Hundred and Fifty Million, One Hundred and Fifty Two Thousand, One Hundred Twenty Five Naira) only as Special Damages.**
b. **₦200,000,000 (Two Hundred Million Naira) only as general damages.**
c. **₦309,347,875.50 (Three Hundred and Nine Million, Three Hundred and Forty Seven Thousand, Eight Hundred and Seventy**

Five Naira, Fifty Kobo) only as aggravated damages.

In the respondent's further amended brief of argument, learned counsel nominated a single issue for determination of the Notice, namely:

> **Whether this court can vary the judgment of the lower court to reflect the sum of ₦5, 450,152,125.00 (Five Billion, Four Hundred and Fifty Million, One Hundred and Fifty Two Thousand, One Hundred and Twenty Five Naira only as special damages awarded to the Respondent.**

Submissions on the issue

Learned counsel for the respondent submitted that special damages must be pleaded and proved. He relied on ***Alhaji Otaru & Sons Ltd. v. Idris*** (1999) 6 NWLR (Pt. 606) 330. He stated that parties were bound by their pleadings. He cited ***Emegokwue v. Okadigbo*** (1973) 4 SC 113; ***Williams v. Williams*** (1974) 10 SC 237. He said that the respondent pleaded and particularised its special damages. He reasoned that the lower court applied the correct principles in awarding the damages but miscalculated the total sum which ought to be ₦5,450,152,125.00 (Five Billion Four Hundred and Fifty Million, One Hundred and Fifty Two Thousand, One Hundred Twenty Five Naria only). He urged the court to vary the sum in line with the pleaded and proved sum under section15 of the Court of Appeal Act. He opined that not every error would lead to reversal of judgment. He referred to ***Tsokwo Motors (Nig.) Ltd. v. UBA***

Plc (2008) LPELR – 3266 (SC); ***Onyemaizu v. Ojiako*** (2010) LPELR – 2738 (SC). He took the view that the miscalculation was a slip or mistake that would not affect the decision.

On behalf of the appellant, learned counsel contended that the respondent was seeking to correct errors or vary the judgment and introduce fresh case on appeal which were not permitted by Respondent's Notice. He cited ***Emeka v. Okadigbo*** (2012) 18 NWLR (Pt. 1331) 55; ***Govt. of Imo State v. Greeco Const. & Engn. Associated Ltd.*** (1985) 3 NWLR (Pt. 11) 71; ***FRN v. Obegolu*** (2006) 16 NWLR (Pt. 1010)188; ***Ibe v. Onuorah*** (1999) 14 NWLR (Pt. 638) 430. He added that the respondent was dissatisfied with the damages awarded, findings on damages, some parts of the damages and asking the court to set them aside which were not permitted by Respondent's Notice. He referred to ***B.E.O.O. Ind. Nig. Ltd. v. Maduakoh*** (1975) 12 SC 91; ***NNPC v. Klifco Nig. Ltd.*** (2011) 10 NWLR (Pt. 1255) 209; ***Liba v. Koko*** (2017) 11 NWLR (Pt. 1576) 335; ***NNPC v. Famfa Oil Ltd.*** (2012) 17 NWLR (Pt. 1328) 148; ***Eliohim Nig. Ltd. v. Mbakwe*** (1986) 1 NWLR (Pt. 14) 47; ***UBA v. CAC*** (2016) LPELR – 40569. He held the view that the respondent's request could only be made through a cross-appeal. He referred to ***Eze v. Obiefuna*** (1995) 6 NWLR (Pt. 404) 638; ***Ede v. Mba*** (2011) LPELR – 8234 (SC); ***Gwede v. INEC*** (2014) 18 NWLR (Pt. 1438) 56. He described the "Respondent's Reply to Appellant's Response to Respondent's Notice" as a process unknown to law and similar to reply brief. He urged the court to strike it out.

On points of law, learned counsel for the respondent insisted that the respondent's notice, not a cross-appeal, was the proper procedure. He

cited ***Nsirim v. Amadi*** (2016)5 NWLR (Pt. 1504) 42; ***Emirate Airline v. Aforka*** (2015) 9 NWLR (Pt. 1463) 80; ***Eze v. Obiefuna*** (supra).

Respondent's affidavit to correct the record.

The respondent filed a 9 – paragraph affidavit, on 25th April, 2018, challenging the correctness of the record of the lower court, precisely, its proceedings of 17th January, 2017. It, also, filed a 6 – paragraph further affidavit on 21st May, 2018 to buttress it. Both affidavits, sworn to by M.U. Mustapha, Esq., had annexures, exhibits MUM 1 – 5, attached to them. In reaction, the appellant filed a 10 – paragraph counter- affidavit and an 18 – paragraph further counter- affidavit, both sworn to by O.P. Uwalaka, Esq., on 17th May, 2018 and 23rd May, 2018 respectively. The counter- affidavit has two annexures, exhibits A and B.

It cannot be gainsaid that a party, in any proceedings, who seeks to impugn the record of a court must satisfy the following steps: (a) File an affidavit challenging the record which must be served on the presiding officer of the court/tribunal in question for his reaction. (b) File a formal application (motion on notice) in the court with a supporting affidavit which would not include the presiding *Judex* as a party, see ***Garuba v. Omokhodion*** (2011) 15 NWLR (Pt. 1629) 145; ***Adegbuyi v. APC*** (2015) 2 NWLR (Pt. 1442) 1; ***Andrew v. INEC*** (2018) 9 NWLR (Pt. 1625) 507; ***Egba v. State*** (2019) 15 NWLR (Pt. 1695) 201; ***Ukwuyok v. Ogbulu*** (2019) 15 NWLR (Pt. 1695) 308.

A galaxy of legal issues germinate from this inelastic position of the law. The filing of an affidavit and an application are twin conditions precedent for a successful erosion of the presumed sanctity and integrity of

a court proceeding. In other words, it is incumbent on the party querying the correctness of a record of court to fulfill them conjunctively. A satisfaction of one, in the eyes of law, is insufficient. The merits of an application, by a party who desires to alter the court record, cannot be over-emphasised. It houses the prayers to amend the record. The court exercises its judicial discretion to amend the record, albeit judicially and judiciously, on footing of the application.

Incontestably, the respondent filed an affidavit, a satisfaction of one limb of the procedure, with scattered references to it in its brief of argument. However, the respondent , in its infinite wisdom, did not file, or bring to the attention of this court, any formal application subsequent to the filing of the affidavit. It flows, that the respondent was, totally, deficient in meeting the second mandatory requirement of challenging the record. The affidavit is merely a forerunner to a formal application which will ignite the jurisdiction of the court to amend the court. The glaring absence of the application constitutes a serious *coup de grace* in the respondent's supplication to this court to correct the record; see ***Garuba v. Omokhodion*** (supra). Alas, the affidavit mirrors the image of an orphan without any legal parentage to perch and command any validity/viability. In the province of the law, it, the filed affidavit, is infested with an indelible incompetence and liable to be ostracised from the appeal. Consequently, I strike out the affidavit for being incompetent.

Resolution of the issues

It is germane to place on record, upfront, that a flood of documentary evidence were furnished before the lower court by the feuding parties. Interestingly, the case-law gives the courts the nod to evaluate

documentary evidence, see ***Fagunwa v. Adibi*** (2004) 17 NWLR (Pt. 903) 544. Admirably, the law, in order to foreclose any injustice, donates concurrent jurisdiction to this court and the lower court in evaluation of documentary evidence, see ***Gonzee (Nig.) Ltd. v. NERDC*** (2005) 13 NWLR (Pt. 943) 634; ***Olagungu v. Adesoye*** (2009) 9 NWLR (Pt. 1146) 225; ***Ayuya v. Yorin*** (2011) 10 NWLR (Pt 1254) 135; ***Eyibio v. Abia*** (2012) 16 NWLR (Pt. 1325) 51; ***Odutola v. Mabogunje*** (2013) 7 NWLR (Pt. 1354); ***CPC v. Ombugadu*** (2013) 18 NWLR (Pt. 1385) 66; ***UTC (Nig) Plc. v. Lawal*** (2014) 5 NWLR (Pt. 1400) 221; ***Ogundalu v. Macjob*** (2015) 8 NWLR (Pt. 1460) 96; ***Onwuzuraike v. Edoziem*** (2016) 6 NWLR (Pt. 1508) 215; ***Ezechukwu v. Onwuka*** (2016) 5 NWLR (Pt. 1506) 529, ***C.K. & W.M.C. Ltd. v. Akingbade*** (2016) 14 NWLR (Pt. 1533) 487; ***Emeka v. Okafor*** (2017) 11 NWLR (Pt. 1577); 410; ***Okoro v. Okoro*** (2018) 16 NWLR (Pt. 1646) 506; ***D.M.V (Nig) Ltd. v. NPA*** (2019) 1 NWLR (Pt. 1652); ***Olomoda v. Mustapha*** (2019) 6 NWLR (Pt. 1667) 36. I will tap from this co-ordinate jurisdiction in the appraisal of the army of documents in the appeal. Having been adequately fortified by the above position of the law, I will proceed to resolve the legion of nagging issues in this appeal.

In the interest of orderliness, I will attend to the issues in their numerical sequence of presentation by the parties. This is more so as the first four issues border on jurisdiction, a *numero uno* in adjudication, which the law compels the court to accord prime attention in any proceedings. To this end, I will take off with the treatment of issue one. The meat of the issue is plain and canalised within a narrow compass. It chastises the lower court's assumption of jurisdiction over the respondent's counter-claim, which mothered the appeal, after it had struck out the main claim filed by

the appellant. It is an invitation to consider the relationship between a principal/main claim and a counter-claim.

To begin with, a counter-claim connotes, a cross-action, "a claim for relief asserted against an opposing party after an original claim has been made, that is a defendant's claim in opposition to or as a set-off against the plaintiff's claim," see ***Maobison Inter-Link Ltd. v. UT.C. (Nig.) Plc.*** (2013) 9 NWLR (Pt. 1359) 197 at 209, per Ariwoola, JSC. It is settled law, beyond any per adventure of doubt, that a counter-claim is an independent and separate action triable with the main claim for reason of convenience. Like the main claim, it must be proved by the counter- claimant in order to earn the favour of the court, see ***Ogbonna v. A-G.., Imo State*** (1992) 1 NWLR (Pt. 220) 647; ***Nsetik & Ors. V. Muna & Ors.*** (2013) vol. 12 MJSC (Pt. 1)116; ***Anwoyi v. Shodeke*** (2006) 13 NWLR (Pt. 996) 34; ***Bilante int'l Ltd v. NDIC*** (2011)15 NWLR (Pt. 1270) 407; ***Esuwoye v. Bosere*** (2017)1 NWLR (Pt.1546) 256; ***Kolade v. Ogundokun*** (2017) 18 NWLR (Pt. 1596) 152; ***Okoro v. Okoro*** (supra); ***Atiba Iyalamu Savings & Loans Ltd. v. Suberu*** (2018) 13 NWLR (Pt. 1639) 387; ***Umar v. Geidam*** (2019) 1 NWLR (Pt. 1652) 29.

In the wide realm of adjectival law, a counter-claim, decipherable from its attributes on *onus probandi* articulated above, exhibits symmetrical characteristics with a main claim. They share the same degree of proof. Nevertheless, it is not an appurtenant/appendage of, nor parasitic on, the main claim. It is not tied to main claim's apron strings. A principal claim does not hold dominion over a counter-claim as much as the latter does not bow to the superiority of the former. They are akin to Siamese twins who are warehoused in the same womb but on birth/delivery enjoy different and

independent life span with certain elements of evidential symbiosis. Thus, there exists a wide dichotomy between a main claim and a counter-claim with the temple of justice as their only confluence point. Given these divergent features, the death of a main claim, by dint of striking out/dismissal, does not render a counter-claim impotent and vice versa. At once, a success of one is not a guarantee for the other.

In the light of this differentiation, where a principle claim fails, the law grants the court the unbridled licence to assume jurisdiction over a living/subsisting counter-claim. The converse/reverse is available to the court. Put simply, the lower court did not, in the least, offend the law when it assumed jurisdiction over the counter-claim when after the appellant's main claim was struck out. In the end, I resolve issue one against the appellant and in favour of the respondent.

That brings me to the settlement of issue two. The kernel of the issue is clear and falls within a very lean scope. It quarrels with the lower court's failure to consider, on the merit, the issues in the appellant's claim, after it had been struck, for the benefit of this court. In the first place, I must observe, pronto, that the appellant did not appeal against the propriety or otherwise of the lower court's proclamation of its claim invalid. In other words, having not appealed against the finding/order, it is binding and acceptable to it, see ***Nwaogu v. Atuma*** (2013) 11 NWLR (Pt. 1364) 117; ***Gundiri v. Nyako*** (2014) 2 NWLR (Pt. 1391) 211; ***Enterprise Bank Ltd v. Aroso*** (2014) 3 (Pt. 1394) 256; ***Anyanu v. Ogunewe*** (2014) 8 NWLR (Pt. 1410) 437; ***Akoma v. Osenwokwu*** (2014) 11 NWLR (Pt. 1419) 462; ***Ukachukwu v. PDP*** (2014) 17 NWLR (Pt. 1435) 134; ***Awodi v. Ajagbe*** (2015) 3 NWLR (Pt. 1447) 578; ***Kayili v. Yilbuk*** (2015) 7 NWLR (Pt. 1457) 26; ***Agbaje v. INEC*** (2016) 4 NWLR (Pt. 1501) 151; ***Emeka v. Okoroafor***

(2017) 11 NWLR (Pt. 1577) 410; ***Poroye v. Makarfi*** (2018) 1 NWLR (P. 1599) 91; ***Abdurahman v. Thomas*** (2019) 12 NWLR (Pt. 1685) 107; ***Offodile v. Offodile*** (2019) 16 NWLR (Pt. 1698) 189.

Flowing from the bald fact, that the appellant has not entreated this court to reverse the declaration of invalidity against on its writ of summons, this issue orbits around the constricted four walls of an academic issue. In ***Plateau State v. A-G., Fed*** (2006) 3 NWLR (Pt. 967) 346 at 419, Tobi, JSC, incisively, explained the term, thus:

> **A suit is academic where it is merely theoretical, makes empty sound, and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situation of human nature and humanity.**

It is settled law, that a court is drained of the necessary jurisdiction to adjudicate over academic disputes. Such academic questions are divorced from live issues which engage the adjudicative attention of the courts. This is so even if their determination will enrich the jurisprudential content of the law, see ***A.-G., Anambra State v. A.-G., Fed.*** (2005) 9 NWLR (Pt. 931) 572; ***Ugba v. Suswan*** (2014) 14 NWLR (Pt. 1427) 264; ***Salik v. Idris*** (2014) 15 NWLR (Pt. 1429) 36; ***FRN v. Borishade*** (2015) 5 NWLR (Pt. 1451) 155; ***Danladi v. T.S.H.A.*** (2015) 2 NWLR (Pt. 1442) 103; ***FRN v. Dairo*** (2015) 6 NWLR (Pt. 1452) 141; ***Daniel v. INEC*** (2015) 9 NWLR (Pt. 1463) 113; ***Odedo v. Oguebego*** (2015) 13 NWLR (Pt. 1476) 229; ***Dickson v. Sylva*** (2017) 10 NWLR (Pt. 1573) 299; ***Olowu v. Building Stock Ltd.*** (2018) 1 NWLR (Pt. 1601) 343.

Having regard to this current inflexible position of the law, the appellant's issue two is, to all intents and purposes, disabled from birth. The *raison d' etre* for its being spent is not far-fetched. Its consideration by this court, even if found in favour of the appellant or the respondent, will be of no judicial utilitarian value to either of them premised on the lack of solicitation, by the appellant, to upturn the lower court's decision on the main claim. A court is not clothed with the jurisdiction to entertain academic suit/issues. In total fidelity to the law, I strike out issue two for want of legal justification to treat it.

Having dispensed with issue two, I go on to handle issue three. The marrow of the issue is simple. It seeks to indict the respondent's legal personality to institute the counter-claim.

As a necessary prelude, a juristic person is an entity armed with the capacity to ventilate his/its complaints *in judicio*. Generally, it is only natural persons, *id est,* human beings, and juristic or artificial persons such as body corporate/corporation, an artificial being which is invisible, intangible and exist only in the contemplation of the law, that are imbued with the capacity to sue and be sued in law court. The jural units, which the law has cloaked with the garment of legal personality, are: human beings, incorporated companies, corporate sole with perpetual succession, trade unions, partnerships and friendly societies. No action can be commenced by or against any party except a natural person(s) save such a party has been accorded by a statute, expressly or impliedly, or by common, either a legal personality under the name by which it sues or is sued or right to sue or be sued by that name. It stems from these, that where either of the parties is not a legal person, capable of exercising legal rights and obligations in law, the action is plagued by incompetence and liable to be

struck out on account of want of legal personality, see ***Agbonmagbe Bank Ltd. v. General Manager G.B. Olivant Ltd.*** (1961) 2 SCNLR 317; ***Kate Ent. Ltd. v. Daewoo Nig. Ltd.*** (1985) 2 NWLR (Pt. 5) 116; ***Fawehinmi v. NBA*** (No. 2) (1989) 2 NWLR (Pt.105) 558; ***Ataguba & Co. v. Gura (Nig) Ltd.*** (2005) 8 NWLR (Pt. 927) 429; ***A. –G., Anambra State v. A. –G., Fed*** (2007) 12 NWLR (Pt. 1047) 4; ***Admin./Exec., Estate, Abacha v. Eke-Spiff*** (2009) 7 NWLR (Pt. 1139) 97; ***SLB Consortium Ltd. v. NNPC*** (2011) 9 NWLR (Pt. 1252) 317; ***M.M.A. Inc. v N.M.A.*** (2012) 18 NWLR (Pt. 1333) 506; ***Uwazuruonye v. Gov., Imo State*** (2013) 8 NWLR (Pt. 1355) 28; ***BB. Apugo & Sons Ltd. v. O.H.M.B.*** (2016) 13 NWLR (Pt. 1529) 206; ***Interdrill (Nig) Ltd v. U.B.A. Plc*** (2017) 13 NWLR (Pt. 1581) 52; ***Dairo v. Regd. Trustees, T. A. O.., Lagos*** (2018) 1 NWLR (Pt. 1599) 62; Bajehson v. Otiko (2018) 14 NWLR (Pt. 1638) 138; ***Socio-Political Research Dev. v. Min., FCT*** (2019) 1 NWLR (Pt. 1653) 313; ***Moses v. NBA*** (2019) 8 NWLR (Pt. 1673) 59; ***Persons, Name Unknown v. Sahris Int'l Ltd.*** (2019) 13 NWLR (Pt. 1689) 203.

It is not in doubt, that an issue of proper/improper parties touches and impinges on the jurisdiction of a court to entertain a matter before it. Indeed, "a person who asserts the right claimed or against whom the right claimed is exercisable must be present to give the court the necessary jurisdiction", see ***Olariede v. Oyebi*** (1984) 1 SCNLR 390 at 406, per Eso, JSC; ***Ekpere v. Aforiji*** (1972) 1 All NLR (Pt. 1) 220; ***Onwunalu v. Osademe*** (1971) 1 All NLR 14; ***Awoniyi v. Reg. Trustees of AMORC*** (2000) 10 NWLR (Pt. 676) 522; ***Mozie v. Mbamalu*** (2006) 15 NWLR (Pt. 1003) 466; ***Plateau State v. A.-G., Fed.*** (2006) 3 NWLR (Pt. 967) 346; ***Faleke v. INEC*** (2016) 18 NWLR (Pt. 1543) 61; ***G. & T. Investment Ltd. v. Witts & Bush Ltd.*** (2011) 8 NWLR (Pt. 1250) 500; ***Ogbebor v. INEC***

(2018) 6 NWLR (Pt. 1614) 1; ***Williams v. Williams*** (2018) 13 NWLR (Pt. 1637) 467; ***Bajehson v. Otiko*** (supra); ***Socio-Political Research Dev. v. Min., FCT*** (supra); ***Nworka v. Ononeze-Madu*** (2019) 7 NWLR (Pt. 1672) 422; ***Moses v. NBA*** (supra); ***Adeniran v. Olusokun II*** (2019) 8 NWLR (Pt. 1673) 98.

Now, the appellant's chief grievance, indeed its trump card on the stubborn issue, is that the respondent failed to prove its juristic personality by production of its certificate of incorporation. Indisputably, where the legal personality of a party is challenged by an adversary, the onus/burden resides in that party to lead evidence, parol or documentary, to establish its legal capacity. The most reliable/dependable way incorporation of a company can be proved is by tendering certificate of its incorporation, see ***NNPC v. Lutin Inv. Ltd.*** (2006) 2 NWLR (Pt. 965) 506; ***Citec Int'l Estate Ltd. v. E. Int'l & Associates*** (2018) 3 NWLR (Pt. 1606) 33; ***Socio-Political Research Dev. v. Min., FCT*** (supra). The *casus belli*, between the feuding parties, is whether the appellant, duly, disputed the juristic entity of the respondent to warrant its proof of it.

It is trite, that every allegation of fact made in a statement of claim or counter-claim, which an opponent, usually a defendant, does not intend to admit, must be specifically, or by necessarily implication, denied. In other words, it is not sufficient for such an adversary to make a general denial of the allegations or improper traverse of facts. The denial/traverse must not be evasive, ambiguous or bare otherwise it will tantamount to admission of it, see ***Taiwo v. Adegboro*** (2011) 11 NWLR (Pt. 1259) 562; ***Atanda v. Iliasu*** (2013) 6 NWLR (Pt. 1351) 529; ***Achilihu v. Anyatonwu*** (2013) 12 NWLR (Pt. 1368) 256; ***Oando (Nig.) Plc. v. Adijere (W/A) Ltd.*** (2013) 15

NWLR (Pt. 1377) 374; ***Ajibulu v. Ajayi*** (2014) 2 NWLR (Pt. 1392) 483; ***Danladi v. Dangari*** (2015) 2 NWLR (Pt. 1442) 124.

I have consulted the mountainous record, the bible of every appeal, especially at the residence/domain of the appellant's 13 – paragraph amended reply and defence to counter-claim which colonises pages 1106 – 1108 thereof. I have perused it with the finery of a tooth comb. Admirably, it is obedient to clarity and comprehension. The law commands the court to read pleading holistically in order to garner a flowing story of it, see ***Okochi v. Animkwoi*** (2003) 18 NWLR (Pt. 851) 1; ***Agi v. PDP*** (2017) 17 NWLR (Pt. 1595)366. I have, in total loyalty to this injunction, given a global examination to the appellant's pleading, *id est*, the amended reply and denfence to counter-claim, in order to ascertain its import. Incidentally, I am unable to locate, even with the prying eagle-eye of a court, wherein the appellant, expressly or impliedly, disputed the juristic personality of the respondent *vis-à-vis* the counter-claim. For the avoidance of doubt, the appellant's assertion of lack of *locus standi*, in paragraph 13 of the reply and denfence to the counter-claim (supra), is too wide and deficit in explicity as contemplated by the adjectival law. That apart, there is a wide dichotomy between legal personality and *locus standi*. The former relates to the legal existence of a party while the latter borders on the party's right to sue, see ***Socio-Political Research Dev. v. Min., FCT*** (supra). Since they are mutually exclusive doctrines, pleading for one will not serve for the other.

Indubitably, the want of frontal challenge of the respondent's jural status by the appellant is fraught with far reaching consequence. It signifies that the contending parties had not, on the point of legal capacity, reached

litis contestatio, see ***Babatunde v. P.A.S. & T.A. Ltd.*** (2007) 14 NWLR (Pt. 1050) 113 at 154 – 155. Simply put, issue was no joined on the knotty but critical point. In the mind of the law, an issue is joined on a particular fact, necessitating its proof, when its assertion is disputed by an opposing party, see ***Galadima v. State*** (2018) 13 NWLR (Pt. 1636) 357. In the absence of non-joinder of issue on the vexed point, the respondent was not saddled with any burden, in law, to prove its juristic personality by production of its certificate of incorporation.

There is, perhaps, possible reason for the appellant's failure to challenge the legal status of the respondent. It would be recalled that at the time the appellant filed its pleading, its claim was still bubbling with viability and vitality. At that time, it could not have queried the legal capacity of the respondent it had sued. To do so would have meant robbing the lower court the jurisdiction to entertain its claim against a non-juristic person. The law frowns on it. In ***Yoye v. Olubode*** (1974) NSCC (vol. 9) 409 at 414, Ibekwe, JSC, incisively, declared:

> **Indeed, it is unthinkable that the very plaintiff who invokes the jurisdiction of the court should afterwards turn round to plead that the same court has no jurisdiction to hear his claim. We would taken such a plaintiff to a man who, while praying fervently for long life, yet carries in his pocket, a time bomb which, on explosion, would end his life.**

The appellant would not have mired itself in the nest of such incongruity which the law, roundly, deprecates.

This brief legal anatomy, on juristic personality, with due reverence, exposes the poverty of the learned appellant's senior counsel's seemingly dazzling argument on the point. The appellant, in its infinite wisdom, starved this court of the crucial assertion, in its pleading, that questioned the legal capacity of the respondent to institute the counter-claim. In view of these, I, will not label the first respondent as a non-juristic unit, stripped of the capacity to sue or defend the counter-claim in the lower court, in order not to insult the law. Contrariwise, I crown it with the toga of a juristic personality with all the attendant rights and liabilities appurtenant to it. In sum, it is a legal *persona ficta*, which is suable or can sue *eo nomine*, and possesses the right to harness all the entitlements of a juristic personality in the counter-claim. As a result, I resolve issue three against the appellant and in favour of the respondent.

I now proceed to thrash out issue four. It shares a common target with the previous issue three: to emasculate the legal capacity of the respondent to institute the counter-claim. The hub of the issue centres on *locus standi* of the respondent.

The issue evinces a jurisdictional question in that it quarrels with the respondent's *locus standi* to institute the action. It is trite, that the absence or presence of *locus standi* in a party will divest or infuse jurisdiction into a court to discountenance or entertain a matter before it, see ***Emezi v. Osuagwu*** **(2005) 12 NWLR (Pt. 939) 349/(2005) 30 WRN 1;** ***A.-G., Anambra State v. A.-G. Fed*** **(2007)11 NWLR (Pt. 1047) 4;** ***Admin/Exec., Estate Abacha v. Eke-Spiff*** **(2009) 17 NWLR (Pt. 1171) 614;** ***Ajayi v. Adebiyi*** **(2012) 11 NWLR (Pt. 1310 1370;** ***Uwazuruonye v. Gov., Imo State*** **(2013) 8 NWLR (Pt. 1355) 28;** ***Adebayo v. PDP*** **(2013) 17 NWLR (Pt. 1382) 1;** ***Okwu v. Umeh*** **(2016) 4 NWLR (pt. 1501) 120;**

Nyesom v. Peterside* (2016) 7 NWLR (Pt. 1512) 452; *Rebold Ind. Ltd. v. Magreola* (2015) 8 NWLR (Pt. 1461) 210; *Centre for Oil Pollution Watch v. NNPC (2019) 5 NWLR (Pt. 1666)518; ***Nworka v. Ononeze-Madu*** (supra); ***A.-G., C.R.S. v. FRN*** (2019) 10 NWLR (Pt. 1681) 401. The law compels the court to accord premier consideration to issue of jurisdiction flowing from any proceedings, see ***SPDC Ltd. v. Amadi* (2011) 14 NWLR (Pt. 1266) 157.**

From an etymological perspective, the cliché, *locus standi,* traces its roots to Latin Language which means: "place of standing". In its expounded legal form, *locus standi* denotes the legal right or capacity of a person to institute an action in a court of law when his right is trampled upon by somebody or authority, see ***INEC v. Ogbadibo L. G.*** (2016) 3 NWLR (Pt. 1498) 167; ***Centre for Oil Pollution Watch v. NNPC*** (supra) ***Nworka v. Ononeze-Madu*** (supra); ***A.-G., C.R.S. v. FRN*** (supra). Nigeria citizens derive their *locus standi* from the Constitution, statutes, customary law or voluntary arrangements in organisation involving their civil rights and obligations, see ***Odeneye v. Efunuga* (1990) 7 NWLR (Pt. 164) 618.** *Locus standi* was evolved to protect the court from being converted into a jamboree by professional litigants who have no interest in matter, see ***Taiwo v. Adegboro* (2011) 11 NWLR (Pt. 1259) 562; *Al – Hassan v. Ishaku* (2016) 10 NWLR (Pt. 1520) 230.** For a party to establish *locus standi*, he must show that the matter is justiciable – capable of being disposed of judiciously in a court of law – and the existence of dispute between parties, see ***Taiwo v. Adegboro* (supra); *Ajayi v. Adebiyi* (supra).** Again, that he has sufficient interest in the subject-matter of the action and that his civil rights and obligations are in the danger of being infringed, see ***Jitte v. Okpulor* (2016) 2 NWLR (Pt. 1497) 542;**

Nyesom v. Peterside **(supra); Al – Hassan v. Ishaku (supra);** ***Centre for Oil Pollution Watch v. NNPC*** (supra) ***Nworka v. Ononeze-Madu*** (supra); ***A.-G., C.R.S. v. FRN*** (supra).

It is the statement of claim, or affidavit in originating summons, that is examined by a court in determining the *locus standi* of a party, see ***Nyesom v. Peterside*** **(supra);** ***Taiwo v. Adegboro*** **(supra);** ***Odeneye v. Efunuga*** **(supra);** ***Uwazuruonye v. Gov., Imo state*** **(2013) 8 NWLR (Pt. 1355) 28;** ***Bakare v. Ajose-Adeogun*** (2014) 6 NWLR (Pt. 1403) 320; ***INEC v. Ogbadibo L. G.*** (supra); ***Okwu v. Umeh*** (supra); ***Centre for Oil Pollution Watch v. NNPC*** (supra) ***Nworka v. Ononeze-Madu*** (supra); ***A.-G., C.R.S. v. FRN*** (supra). However, chances of success of an action is irrelevant in considering *locus standi,* see ***Taiwo v. Adegboro*** (supra); ***Ajayi v. Adebiyi*** (supra); ***Okwu v. Umeh*** (supra). The order a court makes, in the absence of *locus standi*, is one of striking out the suit, not dismissal, see ***Magbagbeola v. Akintola*** (2018) 11 NWLR (Pt. 1629) 177.

The *gravamien* of the appellant's grouse is that the respondent lacked the *locus standi* to sue in that it is operating business as a collecting society without the imprimatur of the Nigerian Copyright Commission (NCC). The appellant staked its complaint on the provisions of sections 17 and 39 of the Copyright Act Cap C 28, Laws of the Federation of Nigeria, LFN, 2004. Due to their kingly positions on the issue, it is imperative to pluck them out, *ipsissima verba*, whence they are ingrained in the statute book, as follows:

> **17 Notwithstanding the provisions of this Act or any other law, no action for infringement of**

copyright or any right under this Act shall be commenced or maintained by any person –

a) Carrying on the business of negotiating and granting of licence;

b) Collecting and distribution royalties in respect of copyright works or representing more than fifty owners of copyright in any category or works protected by this Act;

Unless it is approved under section 39 of this Act to operate as a collecting society or is otherwise issued a certificate of exemption by the commission".

39 (1) A collecting society may be formed in respect of any one or more rights of copyright owners for the benefit of such owners and the society may apply to the Commission for approval to operate as a collecting society for the purpose of this Act.

(2) The commission may approve of a society if it is satisfied that;

a) It is incorporated as a Company Limited by Guarantee;

b) Its objectives are to carry out the general duty of negotiating and granting copyright licence and collecting royalties on behalf of

copyright owners and distributing same to them;

c) It represents the substantial numbers of owners of copyright in any category of works protected by this Act, in this paragraph of this subsection, 'Owners of Copyright' includes owners of performer's rights;

d) It complies with the terms and conditions prescribed by regulations made by the commission under this section.

On the contrary, the respondent erected its defence on the provisions of section 16(1) and 52(3) of the Copyright Act. Being the cynosure of its defence, I will extract them out, *verbatim ac litteratim*, from where they are domiciled in the law book, thus:

16(1) Subject to this Act, infringement of copyright shall be actionable at the suit of the owner, assignee or an exclusive licencee as the case may be in the Federal High Court exercising jurisdiction in the place where the infringement occurred, and in any action for such infringement, all such relief by way of damages, injunction, accounts or otherwise shall be available o the plaintiff as it is available in any corresponding proceedings in respect of infringement of other proprietary rights.

52(3) The Transitional and Savings Provisions in the Fifth Schedule to this Act shall have effect notwithstanding subsection (1) of this section or any other provisions of this Act

Paragraph 3 of the Fifth Schedule reads:

3(1) Subject to sub-paragraph (2) of this paragraph, contracts for the licensing of any act in respect of copyright which were effective immediately before the commencement of this Act, shall continue in force as if it they are related to corresponding copyright under this Act.

To start with, these provisions, upon which the warring parties anchored their stance, are submissive to clarity in their connotations. On this score, the law compels the court to accord them their ordinary grammatical meanings without any embellishments, see ***Bakare v. NRC*** (2007) 17 NWLR (Pt. 1064) 606; ***PDP v. Okorocha*** (2012) 15 NWLR (Pt. 1323) 205; ***Kawawu v. PDP*** (2017) 3 NWLR(Pt. 1553) 420; ***Setracto (Nig) Ltd. v. Kpayi*** (2017) 5 NWLR (Pt. 1558) 280; ***Adeokin Records v. MCSCN*** (2018) NWLR (Pt. 1643); ***Ecobank v Honeywell Flour*** (2019) NWLR (Pt. 1655) 55. I will pay due respect to this cannon of interpretation in order not to annoy the law and incur its wrath.

In due obeisance to the law, I have given a clinical examination to these statutory provisions. A communal/conjunctive reading of the prescriptions of section 16, 17 and 39 supra discloses five classes of

divorced from being a collecting society or any other category of parties chronicled in sections 17 and 39 of the Copyright Act displayed above.

There is no gainsaying the fact that section 16 of the Copyright Act donates to the respondent the right of access to court, and ventilate any violation of its copyright works. The respondent's litigable rights trace their paternity to two agreements wrapped in exhibits G and G1. They occupy pages 1373 – 1379 and 1380 – 1393, volume III, of the prolix record respectively. Exhibit G was signed on 5th June, 1990 between the Mechanical Copyright Protection Society Limited (MCPS) and the respondent. Exhibit G1 was executed on in 1986 between the Performing Right Society Limited (PRS) and the respondent.

By the tenor and phraseology of exhibits G and G1, the MCPS and PRS were the assignors and the respondent the assignee in the copyright works. The provision of section 11(1) and (3) of the Copyright Act allows the transmission by assignment of copyright right works in writing. By the assignment, which implies transfer, exhibits G and G1, the respondent acquired a chose in action in the copyrights assigned. A chose in action, a proprietary right in *personam*, denotes "all personal rights of property, which can only be claimed or enforced by action, and not by taking physical possession", see ***Torkington v. Magee*** (1902) 2 KB 47; ***A.T.S. & Sons v. B.E.C. (Nig.) Ltd.*** (2018) 17 NWLR (Pt. 1647) 1; ***Julius Berger (Nig.) Plc v. T.R.C.B. Ltd.*** (2019) 5 NWLR (Pt. 1665) 219. Copyright is a classic exemplification of chose in action. It can be gleaned from these highlights, that the assignors transferred, *videre* exhibits G and G1, their acquired rights in the itemised repertoire to the respondent, as an exclusive licencee, to sue against their infringement by anybody in the territory of Nigeria. An exclusive liencee wields lots of litigable power in the sense that: "An

persons who/which can institute an action, either personally or in a representative capacity, in respect of breach of copyright rights in Nigeria. They are: owner, assignee and exclusive licencee (section 16); a person carrying on the business of negotiating, granting licences, collection and distribution of royalties for not more than fifty (50) owners of copyright (section 17) and a collecting society (section 39), see ***MCSN Ltd./Gte v. C.D.T. Ltd.*** **(2019) 4 NWLR (Pt. 1661) 1**; ***Adeokin Records v. MCSN (Ltd./Gte)*** (2018) 15 NWLR (Pt. 1643) 550. A collecting society is "an association of copyright owners which has its principal objectives the negotiating and granting of licences, collecting and distributing of royalties in respect of copyright works" – section 39(8) of the Copyright Act.

As already noted, the court has endorsed, *in toto*, the statement of claim as the major barometer to gauge the presence or absence of *locus standi* in any proceeding. It is axiomatic that the action that transfigured into the appeal was the respondent's counter-claim. Since its counter-claim parented the appeal, the statement of claim, *mutatis mutandis*, was the respondent's amended statement of defence and counter-claim which monopolises pages 1022 – 1039, volume III, of the elephantine record. I have given an intimate reading to it. It is obedient to easy comprehension. The respondent, pleaded therein, in an unmistakable terms, that it is the owner, assignee and exclusive licencee of copyright in a body of musical works and attendant neighbouring rights, in the territory of Nigeria, which the appellant infringed, via retransmitting, rebroadcasting and broadcasting to the public, without its licence. Thus, the respondent's status falls within the slim perimeter of the category of litigants hosted by section 16 of the Copyright Act. It stems from this, that its litigable rights/status is, totally,

exclusive iicencee means a licence in writing signed by or on behalf of the copyright owner, authorizing the licenece to the exclusion of all other persons including the person granting the licence to exercise a right which would otherwise be exercise exclusively by the copyright owner. The licencee under an exclusive licence has the same rights against a successor in title who is bound by the licence as he has against the person granting the licence. An exclusive licencee may bring proceedings for infringement in the same way as an assignee". See ***MCSN (Ltd./Gte) v. C.D.T. Ltd.*** (supra) per, Peter-Odili, JSC. Again, "an owner is one who holds an exclusive right or rights to copyrighted material" see ***MCSN (Ltd./Gte) v. C.D.T. Ltd.*** (supra) per, Peter-Odili, JSC. These assignments, made in consonance with the prescription of the Copyright Act, with due deference, puncture the learned appellant's senior counsel's scintillating contention on the doctrine of illegal contract. It is lame and cannot fly.

It admits of no argument, that the respondent's chose in action come to being in 1986 and 1990. The import is that as at these dates, the respondent had acquired, in the assigned copyright musical works, vested right – "a right held by somebody in something to his advantage and interest. A vested right accrues to the owner or holder who has it for keeps as the allodial owner" ***Adesanoye v. Adewole*** (2006) 14 NWLR (Pt. 1000) 242 at 277 per Tobi, JSC. An accrued vested interest is completely and definitely settled on its beneficiary and cannot be defeated by a private person save in accordance with the law and for public purpose, see ***Wilson v. Oshen*** (200) 2 SCNQR (Pt. 2) 1215; ***Agbetoba v. Lagos State Executive Council*** (1991) 4 NWLR (Pt. 188) 664; ***Adesanoye v. Adewole*** (supra); ***Ndayako v. Dantoro*** (2004) 13 NWLR (Pt. 889) 18; ***Gana v. SDP*** (2019) 11 NWLR (Pt. 1684) 510. Then, the nagging question,

begging/itching for an answer, is: has any law destroyed the respondent's vested right?

A legal solution to the poser is tucked in the selfsame Copyright Act. The copyright (Amendment) Decree No. 42 of 1999, which introduced section 15A (now section 17), which the appellant brandishes about, commenced operation on 10th May, 1999. Section 39 of the copyright Act came to life through Decree No. 98 of 1992. I have given an in-depth study to the provisions of the Copyright Act with binocular judicial lens. I am unable to find where it made a retrospective provision. In addition, since the birth day of the legislation was 10th May, 1999, it is derobed of any retrospective effect *vis-à-vis* the respondent's vested rights.

The reasons are not far-fetched. A statute, save on express provision, operates prospectively, *in futuro*. In the Lain days of the law, it was encapsulated as *Lex prospicit non respicit* – the law looks forward and not back. In the illuminating words of Nnamani, JSC in ***Ojokolobo v. Alamu*** (1987) 3 NWLR (Pt. 61) 377 at 391. "A statute is retrospective which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transaction or consideration already past". Thus, a retrospective enactment, which bears the other appellations, *ex post facto* or retroactive laws, is one whose date of commencement is anterior to its date of enactment as well as accommodates/extends its effect to previous matters that had occurred before its enactment, see, ***Adesanoye v. Adewole*** (supra); ***Alewa v. SSIEC*** (2007) 15 NWLR (Pt. 1057) 285; ***Olaniyi v. Aroyehum*** (1991) 5 NWLR (Pt. 194) 652; ***Aremo II v. Adekanye*** (2004) 13 NWLR (Pt. 891) 522; ***Ojukwu v. Obasanjo*** (2004) 12 NWLR (Pt. 886) 169; ***Ayida v. Town Planning Authority*** (2013) 10 NWLR

(Pt. 1362) 226; ***Kotoye v. Saraki*** (1994) 7 – 8 SCNJ 524; ***SPDC Ltd. v. Anaro*** (2015) 12 NWLR (Pt. 1472) 122; ***Obiuwubi v. CBN*** (2011) 7 NWLR (Pt. 1279) 738; ***Goldmark (Nig.) Ltd. v. Ibafon Co. Ltd.*** (2012) 18 NWLR (Pt. 1308) 291; ***Ogaga v. Umokoro*** (2011) 18 NWLR (Pt. 1279) 924; ***B.B. Apugo & Sons Ltd. v. O.H.M.B.*** (2016) 13 NWLR (Pt. 1529) 206; ***Gana v. SDP*** (supra); ***N.C.C. v. Motophone Ltd.*** (2019) 14 NWLR (Pt. 1691) 1; ***MCSN Ltd/Gte v. C.D.T. Ltd.*** (supra); ***Toyin v. PDP*** (2019) 9 NWLR (Pt. 1676) 50.

That apart, the provision of section 52 of the Copyright Act, in its paragraph 3 (1) of the Fifth Schedule, to all intents and purposes, consolidates the vested rights of the respondent which enured to it in 1986 and 1990. It preserves the validity and efficacy of copyright licencing contracts which preceded/predated the commencement of the Copyright Act and treats them as effervesecnt ones during the existence of the Act. In, ample, demonstration of its superiority in law, section 52 of the Copyright Act employs the phrase "notwithstanding subsection (1) of this section or any other provisions of this Act". Notwithstanding is, usually, intended to express a clear intention to exclude any impinging/impeding effect of any other provision in a legislation so that the provision it introduces will fulfill itself. Therefore, the import of the word, "notwithstanding", a phrase of exclusion, is that the section supersedes, controls, and overrides all other provisions of the copyright Act, see ***Olatunbosun v. Niger Council*** (1988) 1. NSCC 1025; ***A.-G., Fed. Abubakar*** (2007) 8 NWLR (Pt. 1035) 117; ***Ugwuanyi v. Nicon Ins. Plc*** (2013) 11 NWLR (Pt. 1366) 546; ***Adebayo v. PDP*** (2013) 17 NWLR (Pt. 1382) 1; ***A.-G., Lagos State v. A.-G., Fed.*** (2014) 9 NWLR (Pt. 1412) 217; ***Cocacola (Nig.) Ltd. v. Akinsanya*** (2017) 17 NWLR (Pt. 1593) 74;

Ehindero v. FRN (2018) 5 NWLR (Pt. 1612) 301; ***A.-G., Bauchi State v. A.-G., Fed.*** (2018) 17 NWLR (Pt. 1648) 299. It follows, that every other provision in the Copyright Act must bow/genuflect to the preeminence of the sacrosanct provision of section 52 of it. Put bluntly, the provision of sections 17 and 39 of the copyright Act, which the appellant had paraded as dominant, will vaporize in the face of section 52 of the Act. It is at the apex of the pyramid of the Copyright Act and they are impotent to dethrone it as it remains the lord within the confines of vested right of the respondent.

The progeny of the foregoing is not a moot point. The respondent was not required to seek and obtain approval or exemption from the NCC, as enjoined by sections 17 and 39 of the Copyright Act, since it did not come with the ambit of a collecting society. Indubitably, the analysis, with due regard, drowns the appellant's sterling submission that the lower court was not equipped with the jurisdiction to entertain the counter-claim *ab initio*. This is because, there was/is no feature in the case, nor was it initiated in defilement of due process of law or fulfillment of any condition – precedent, as to derobe it of jurisdiction.

In the light of this judicial survey, done in due consultation with the law, the respondent was not destitute of the right to sue the appellant on violation of the copyright works assigned to it. In a word, the respondent was clad with the requisite *locus standi* to institute the counter-claim against the appellant. In effect, all the strictures, which the learned appellant's counsel rained against the *locus standi* of the respondent, pale into insignificance. I resolve the issue four against the appellant and in favour of the respondent.

I will go on to tackle issue five. The *nucleus* of the issue presents two facets. The first facet is hedged/ weaved around the respondent's failure, as a collecting society, to obtain the blessing of the NCC before instituting the counter-claim in contravention of sections 17 and 39 of the copyright Act. I had, while considering issue four, dealt with this fact *in extenso*. It is pointless, in order to conserve the scarce judicial time and space, to recycle the analyses here. I had reached a finding that the failure to procure the NCC approval or exemption was not an affront to the Copyright Act because the respondent was/is not a collecting society. This court is not furnished with an extenuating circumstance to propel/stimulate me to disturb/upset that finding arrived at on the footing of *ex cathedra* authorities, both statutory and case-law. I, therefore, import and propagate that finding as applicable to this facet.

The second facet takes a serious swipe at the respondent's execution of exhibits G and G1 in a different name and so not a beneficial party therein. The evidence of the respondent's DW1, its star and only witness, in the crucible of cross-examination, at page 1179, volume III, of the huge record, is that the respondent, as a limited liability company, acquired 139 works of as at 1984. This concrete piece of evidence opens the gate of inference: "A conclusion reached by considering other facts and deducing a logical sequence from them," see ***Muhammed v. State*** (2017) 13 NWLR (Pt. 1583) 386) at 420, per Augie, JSC. The law gives the courts the latitude to make inferences, see ***Okoye v. Kpajie*** (1992) 2 SCNJ 290 reported as ***Okonkwo v. Kpajie*** (1992) 2 NWLR (Pt. 226) 633; ***Akpan v. Bob*** (2010) 17 NWLR (Pt. 1223) 421; ***Adebayo v. PDP*** (2013) 17 NWLR (Pt. 1382); ***NNPC v. Roven Shipping Ltd.*** (20190 9 NWLR (Pt. 1676). I will reap from this unfettered liberty allotted to the court by the law.

The irresistible inference, flowing from this impregnable evidence elicited from the cross-fire of cross-examination, is that the respondent was incorporated/registered as at 1984. I take judicial notice of the fact that the company law in operation as at that time was the companies Decree (Act) 1968. I take shelter under the sanctuary of the provision of section 122(2)(a) of the Evidence Act, 2011. It requires no proof, see ***Joseph v. State*** (2011) 16 NWLR (Pt. 1273) 226; ***Akere v. Gov., Oyo State*** (2012) 12 NWLR (Pt. 1314) 241; ***Lafia L.G. v. Gov., Nasarawa State*** (2012) 17 NWLR (Pt. 1328) 94; ***Aiyeola v. Pedro*** (2014) 13 NWLR (Pt. 1424) 409; ***INEC v. Asuquo*** (2018) 9 NWLR (Pt. 1624) 305. The prescription of section 3(a)(1) of the defunct/erstwhile Companies Act, 1968 permitted a company limited by guarantee, like the respondent, to add the word "Limited" as a suffix to its name. Thus, that nomenclature does not, in the least, alter the configuration of the respondent with the words "Limited by Guarantee" as enjoined by the Companies and Allied Matters Act (CAMA). Undeniably, the CAMA, in section 568 thereof, expressly repealed the Companies Act, 1968.

It cannot be gainsaid that the respondent's registration was a quintessence of an act done/right acquired under a repealed legislation while it was a living enactment. By virtue of the stipulation of section 6(1) of the Interpretation Act, Cap. I 23, Laws of the Federation of Nigeria, 2004, such an accomplished act or right, gained from an abrogated law, are preserved and harvestable by the owner, see ***Lakanmi v. Adene*** (2003) 10 NWLR (Pt. 828) 353; ***A.-G., Abia State v. A.-G., Fed.*** (2002) 6 NWLR (Pt. 763) 364; ***A.-G., Lagos State v. A.-G., Fed.*** (2003) 12 NWLR (Pt. 833) 1 ***Abubakar v. B.O. & A.P.*** (2007)18 NWLR (Pt. 1066) 319; ***OSIEC v. A C*** (2010) 19 NWLR (Pt. 1226) 273; ***Goldmark (Nig.) Ltd. v. Ibafon Co. Ltd.***

(supra); ***L.S.B.P.C. v. Purification Tech. (Nig.) Ltd.*** (2013) 7 NWLR (Pt. 1352) 82. The net effect is that the respondent is still one and same assignee in exhibits G and G1.

In an avowed bid to decimate the party status of the respondent, the appellant deployed the want of doctrine of privity of contract against it. The ancient doctrine of privity of contract has been defined as "that connection or relationship which exists between two or more contracting parties", see ***Rebold Ind. Ltd. v. Magreola (2015)*** 8 NWLR (Pt. 1461) 201 at 231, per Fabiyi, JSC. The doctrine, which is part of our *corpus juris*, postulates, generally, that a contract cannot confer/bestow rights, or impose obligations arising under it, on any person except parties to it. Put simply, a stranger to a contract cannot gain or be bound by it even if made for his benefit, see ***T. E. Oshevire Ltd v. Tripoli Motors*** (1997) 5 NWLR (Pt. 503) 1/(1997) 4 SCNJ 246; ***Owodunmi v. Registered Trustees, CCC Worldwide*** (2001) 10 NWLR (Pt. 675) 315; ***Makwe v. Nwukor*** (2001) FWLR (Pt. 63)/(2001) 14 NWLR (Pt. 733) 356; ***Union Beverages Ltd v. Pepsi Cola Int. Ltd*** (1994) 3 NWLR (Pt. 330) 1; ***UBA v. Jargaba*** (2007) NWLR (Pt. 1045); ***Nwuba v. Ogbuehi*** (2007) NWLR (Pt. 1072); ***Osoh v. Unity Bank Plc*** (2013) 9 NWLR (Pt. 1358) 1; ***Idufueko v. Pfizer Products Ltd.*** (2014) 12 NWLR (Pt. 1420) 96; ***Rebold Ind. Ltd. v. Magreola (supra); Reichie v. N.B.C.I*** (2016) 8 NWLR (Pt. 1514) 274.

I had, elsewhere in the judgment, amply, demonstrated that the respondent was the same assignee who executed the reciprocal representation agreements encased in exhibits G and G1. It was, also, showcased that as an assignee of the musical works of MCPS and PRS, in exhibits G and G1 respectively, the respondent acquired a chose in action in those copyright musical works. The respondent was a competent party to

exhibits G and G1 which, in turn, bestowed on it the right to enforce their contents. In sum, the respondent was not an alien to the proprietary contracts in exhibits G and G1 and had the right to sue against their invader. It will smack of judicial sacrilege to tinker with the lower court's failure to declare the respondent a stranger to the contracts, in exhibits G and G1, when it was not hostile to the law. Consequently, I resolve the issue five against the appellant and in favour of the respondent.

It is now the turn of issue six. The heart of the agitation on the issue is obvious. It decries the lower court's failure to follow the decision in exhibit B, pasted at pages 1228 – 1264, volume III, of the windy record. It was the case of Appeal No. CA/L/787/2008: ***Compact Disc Technology Ltd. & 2 Ors v. MCSN Ltd.*** (unreported) delivered by this court on 17th March, 2010. The appeal, at the instance of the respondent therein which lost, had meandered/travelled, at the measured speed of court process, to the apex court. On 14th December, 2018, the Supreme Court, unanimously, allowed the respondent's appeal. It has been reported as ***MCSN Ltd./Gte v. C.D.T. Ltd.*** (2019) 4 NWLR (Pt. 1661) 1. In other words, the decision in exhibit B, which the appellant insisted that the lower court should have followed, under the canopy of the doctrine of *stare decisis*, had been upturned. On this premise, this issue is infested with the stigma of an academic issue. In this wise, it shares the same destiny with issue two already decided earlier on. On the footing of spatial constraint, it will be superfluous to duplicate my efforts already invested/injected in that issue. I, therefore, adopt my reasoning and conclusion on academic issue in that issue two. For this reason, and in due allegiance to the dictate of the law, I strike out the issue six for want of jurisdiction to adjudicate over it.

That takes me to the treatment of issue seven. It castigates he lower court's award of damages against the appellant. The award was made under three heads: special, general and aggravated damages.

Damages have been defined as: "that pecuniary compensation which law awards to a person for the injury he has sustained by reason of the act or default of another whether that act or default is a breach of contract or tort", see ***Iyere v. B.F.F M Ltd*** (2008) 18 NWLR (Pt. 1119) 300 at 345, per Muhammad, JSC; ***Ukudie v. SPDCN*** (1975) 8-11 SC 155 at 162; ***Neka B.B.B. Mfg. Co. Ltd. v. A.CB. Ltd*** (2004). 2 NWLR (PH. 858) 521.

Special or particular damages are those damages which are the actual, but not necessary, result of the injury complained of, but follow it as a natural and proximate consequence in a particular case, that is, by reason of special circumstances or conditions, see ***Ahmed v. CBN*** (2013) 2 NWLR (Pt. 1339); ***U.B.N. Plc v. Ajubule*** (2011) 18 NWLR (Pt. 1278) 152; ***Ajigbotosho v. R.C.C. Ltd.*** (2019) 3 NWLR (Pt. 1659) 287; ***UBN Plc v. Nwankwo*** (2019) 3 NWLR (Pt. 1660) 474; ***Ibrahim v. Obaje*** (2019) 3 NWLR (Pt. 1660) 389; ***Onyiorah v. Onyiorah*** (2019) 15 NWLR (Pt. 1695) 227. Special damages must be specially pleaded with particulars and strictly proved. By a strict proof, the law means that a party claiming special damages should establish his entitlement to them by credible evidence of such a nature/character that would suggest he is indeed entitled to them, see ***Oshinjinrin v. Elias*** (1969) NSCC vol. 6, 95; ***Cameroon Airlines v. Otutuizu*** (2011) 4 NWLR (Pt. 1238) 512; ***Neka B.B.B. Mfg. Co. v. Ltd. A.C.B. Ltd.*** (2004) 2 NWLR (Pt. 858) 521; ***S.P.D.C. (Nig.) Ltd. v. Tiebo VII*** (2005) 9 NWLR (Pt. 931) 439; ***Gonzee (Nig.) Ltd. v. N.E.R.D.C.*** (2005) 13 NWLR (Pt. 943) 634; ***N.N.P.C. v. Klifco (Nig.) Ltd.*** (2011) 10 NWLR (Pt. 1255) 209; ***Ahmed v. CBN*** (supra); ***Ajagbe v. Idowu*** (2011) 17 NWLR (Pt.

1276) 422; ***Akinkugbe v. E.H. (Nig.) Ltd.*** (2008) 11 NWLR (Pt. 1098) 375. Admission by an opponent party to special damages does not relieve a claimant from strict proof, see ***S.P.D.C. (Nig.) Ltd. v. Tiebo VII*** (supra); ***Akinkugbe v. E.H. (Nig.) Ltd.*** (supra); ***N.N.P.C. v. Klifco (Nig.) Ltd.*** (supra).

In proof of this specie of damages, the respondent itemised the particulars of monetary damages as a result of the appellant's encroachment on the musical works in its repertoire assigned to it. It followed it evidentially via DW1. These are embedded in pages 1027 – 1038 and 1322 – 1332, volume III, of the hefty record. The lower court's 76 – page judgment is located at pages 1772 – 1797, volume III, of the bulky record. It devoted/dedicated pages 1779 – 1795 thereof to assessment of damages. It carried a painstaking analyses of the evidence proffered by the respondent which were not challenged by the appellant testimonies. Exhibit H5, a letter to the appellant, seen at pages 1404 – 1409, volume III, of the heavy record, is instructive. Therein, the appellant enumerated general tariffs. The evidence, clearly, disclosed the particular losses claimed by the appellant. The lower court followed the principles governing damages as propounded in judicial authorities.

The appellant made heavy weather of the fact that the broadcast in court on 17th January, 2017, loaded in exhibit J, was not pleaded and given in evidence. In paragraph 20 of the amended statement of defence and counter-claim, precisely at page 1027 of the record, the respondent pleaded public performance or exhibition of the musical works as part of the infringement. In his evidence-in-chief, DW1, at page 1171 of the record, alluded to the records part of which was played during trial. The appellant did not register any protest to the admission of the document in exhibit J (2

CDs) for reasons of lack of pleading it. In other words, there were sufficient pleaded facts as documents need not be specifically pleaded, see ***Sani v. KSHA*** (2019) 4 NWLR (Pt. 1661) 172. The evidence, grounded on those facts, had factual progenitor. In effect, the defence of want of pleading and evidence, invented by the appellant, comes to naught. It flies in the face of the law.

General damages are those damages that the law presumes as flowing from the wrong complained of by the victim. They need not be specifically pleaded and strictly proved, see ***U.B.N. Plc v. Ajabule*** (supra); ***Neka B.B.B. Mfg. Co. Ltd. v. A.C.B. Ltd.*** (supra); ***Ajigbotosho v. R.C.C. Ltd.*** (supra); ***UBN Plc v. Nwankwo*** (supra); ***Ibrahim v. Obaje*** (supra); ***Onyiorah v. Onyiorah*** (supra). It is at the discretion of the court to award general damages, see ***Cameroon Airlines v. Otutuize*** (supra); ***Ahmed v. CBN*** (supra); ***Unity Bank Plc v. Ahmed*** (2020) 1 NWLR (Pt. 1705) 364. Did the lower court exercise its discretion properly in awarding the general damages? This involves a little excursion into the large domain of discretionary power of court.

Discretion signifies: the right or power of a *Judex* to act according to the dictates of his personal judgment and conscience uninfluenced by the judgment or conscience of other persons, see ***Suleiman v. C.O.P., Plateau State*** (2008) 8 NWLR (Pt. 1089) 298, ***Ajuwa v. S.P.D.C.N. Ltd.*** (2011) 18 NWLR (Pt. 1279) 797; ***NJC v. Dakwang*** (2019) 7 NWLR (Pt. 1672) 532; ***Nzekwe v. Anaekwenegbu*** (2019) 8 NWLR (Pt. 1674) 235; ***Adeniyi v. Tina George Ind. Ltd.*** (2019) 16 NWLR (Pt. 1699) 560. An exercise of discretion does not grant the court the unbridled licence to act arbitrarily or capriciously. Contrariwise, it gives it the latitude to act judicially and judiciously, see ***Shittu v. PAN Ltd.*** (2018) 15 NWLR (Pt. 1642) 195;

APGA v. Oye (2019) 2 NWLR (Pt. 1657) 472; ***Adeniyi v. Tina George Ind. Ltd.*** (supra). To act judicially denotes ". . . discretion bounded by the rules and principles of law, and not arbitrary, capricious, or unrestrained. It is not the indulgence of a judicial whim, but the exercise of judicial judgment, based on facts and guided by law, or the equitable decision of what is just and proper under the circumstances". see ***Babatunde v. P.A.S. & T.A. Ltd.*** (2007) 13 NWLR (Pt. 1050) 113, at 149 and 150, Per Muhammad, JSC. On the other hand, "Acting judiciously...is said to import the consideration of the interest of both sides and weighing them in order to arrive at a just or fair decision", see ***Babatunde v. P.A.S & T.A Ltd.*** (supra), at 164, Per Ogbuagu, JSC.

My noble Lords, in the wide residence of discretion, previous decisions are not of much relevance. The reason is not far-fetched. The facts and circumstances of two cases are not always on all fours. A court of law is not, willy-nilly, bound by a precedent in an earlier decision as that will be akin to putting an end to exercise of discretion. It can only use such decisions as guidelines, see ***Abacha v. State*** (2002) 5 NWLR (Pt. 761) 638; ***Bamaiyi v. State*** (2001) 8 NWLR (Pt. 715) 270; ***Suleiman v. C.O.P., Plateau State*** (supra); ***Babatunde v. P.A.S. & T.A. Ltd.*** (supra); ***Oyegun v. Nzeribe*** (2010) All FWLR (Pt. 542) 1612; ***Regt. Trustees, P.C.N. v. Etim*** (2017) 13 NWLR (Pt. 1581); 1 ***NJC v. Dakwang*** (supra); ***Adeniyi v. Tina George Ind. Ltd.*** (supra). An appellate is, usually, loath to interfere with an exercise of discretion save where it is: wrongly exercised; tainted with irregularity, irrelevant or extraneous matters or defilement of the law, or in the interest of justice, see ***Ajuwa v. S.P.D.C.N. Ltd*** (supra); ***T.S.A. Ind. Ltd. v. Kema Inv. Ltd*** (2006) 2 NWLR (Pt. 964) 300; ***Dick v. Our and Oil Co. Ltd.*** (2018) 14 NWLR (Pt. 1638) 13; ***FRN v. Yahaya*** (2019) 7

. NWLR (Pt. 1670) 85; ***Nzekwe*** v. ***Anaekwenegbu*** (supra); ***Takoh v. MTN (Nig) Comm. Ltd.*** (2019) 10 NWLR (Pt. 1679) 23; ***Ogunpehin v. Nuclus Venture*** (2019) 16 NWLR (pt. 1699) 533.

I have given a microscopic examination to the judgment of the lower court, sought to be creamed, particularly as it concerns/relates to general damages. The lower court was guided by the law in assessing damages in copyright actions as enunciated in ***Plateau Publishing Company Ltd. v. Chief Chuks Adoply*** (1986) 4 NWLR (Pt. 34)205 at 225: "In action for infringement of copyright damages are at large and it is not necessary to prove actual or specific damages", per Uwas, JSC (as he then was). Put differently, in the eyes of the law, infringement of copyright interests, like trespass, is actionable *per se*, see ***Anyanwu v. Uzowuaka*** (2009) 13 NWLR (Pt. 1159) 445. In this wise, the lower court was, duly, guided by the dictate of the law in contradistinction to arbitrary and capricious considerations.

In its pleading, the respondent averred that the infringement promoted the appellant's business and demoted its financial fortune. The appellant was collecting premium and charges from Nigerian subscribers while the respondent was paying its assignors. Evidence was remained galore on these facts. Thus, the award took care of the competing monetary interests of the feuding parties. It served as striking a balance in the fiscal relationship between them. Put the other way round, it was a judicious award. In the aggregate, the lower court acted judicially and judiciously and did not fracture the law on exercise of discretion. In sum, the lower court's exercise of discretion was not injudicious nor was it guilty of any of the negative elements that will compel an appellate court to interfere with it.

Thirdly, aggravated damages are grantable against a party where the party has committed the wrongful act complained of and, in addition, displays conduct that is high-handed, outrageous, insolent, vindictive, oppressive or malicious and contemptuous of opponent's rights or of every decent conduct of civilised men in the society, see ***Odiba v.Azege*** (1998) 9 NWLR (Pt 566) 370; ***M.M.A. Inc. v. N.M.A.*** (2012) 18 NWLR (Pt. 1333) 506; ***Mekwunye v. Emirales Airlines*** (2019) 9 NWLR (Pt. 1677) 191. A grant of this genre of damages is, also, hedged around the discretion of the court like general damages. To this end, the principles regulating exercise of discretion, already highlighted earlier, *mutatis mutandis*, apply to it.

The intellectual property law allocates power to the court to award additional punitive damages where the infringement occasions, *inter alia*, vulgarisation of the work, economic loss, unjust enrichment of the offending party, see ***UBN Ltd. v. Odusotbe Bookstores Ltd.*** (1996) 9 NWLR (Pt. 421) 588. The provision of section 16(4) of the Copyright Act sanctions such additional damages in the presence of blatant infringement copyright which aggrandises the copier. Exhibits H, H1, H3, H4, and H5 were letters written by the respondent to the appellants intimating it of the infringement with a plea for amicable negotiation. Indeed, in exhibit H5, the appellant's indebtedness arising from the breach was disclosed. The appellant rebuffed the "olive branch" invitation. The lower court, in its judgment, took all these into account. To my mind, the conduct of the respondent came within the purview of the elements of aggravated damages adumbrated above. Its conduct was spiteful, disdainful and remorseless. In consequence, the lower court properly exercised its discretion in granting the aggravated damages.

Indubitably, a musician is a composer, who, like a spider that spins cobweb from its belly, creates something out of nothing. The product of his ingenuity is music which is the soul, lubricant and elixir of life. He acquires intellectual interest, over his musical work, which racks *pari passu* with other proprietary rights. The copyright in music is transferable through assignment, inheritance and testamentary dispositions. Thus, music is a money spinner for an artiste, his dependants and successors. In essence, the gains of musical work permeate all segments of the global society. It is, therefore, unconscionable, in the presence of damning testimony, to deny a musician the fruits of his intellectual efforts. Such kills ingenuity in the music artistic firmament to the detriment of all!

The appellant's learned senior counsel had submitted that it had shown reasons/justification for this court to interfere in the award of damages. An appellate court does not usually interfere with award of damages unless: (a) the trial court acted under a mistake of law; or (b) where the trial court acted in disregard of some principles of law; or (c) where the trial court acted under misapprehension of facts; or (d) where it has taken into account irrelevant matters or failed to take into account relevant matters; or (e) where injustice would result if the appellate court does not interfere; or (f) where the amount awarded is ridiculously low or high that it must have been a wholly erroneous estimate of the damages, see ***SPDCN*** **v.** ***Tiebo VII*** (supra); ***Cameroon Airlines*** **v.** ***Otutuizu*** (supra); ***British Airways*** **v.** ***Atoyebi*** (2014) 13 NWLR (Pt. 1424) 253; ***Agu*** **v.** ***General Oil Ltd.*** (2015) 17 NWLR (Pt. 1488) 327.

I just catalogued the circumstances under which an appellate court would interfere in award of damages. I had just found that the lower court paid due fidelity to the law when it awarded the damages

in the case. As shown earlier, the lower court did not offend the law nor disregard its principles in the awards. It was not mistaken as to the facts. It never invited matters alien to the case in its assessment of the damages. The corollary is that no injustice will arise if an appellate court fails to intervene in the awards. On the *quantum* of the damages, the appellant, for reasons best known to it, made no case for mitigation of damages before the lower court or even in this court. It, therefore, starved the court, to its detriment, of the necessary facts and evidence that would have compelled this court to slash the damages. In a nutshell, the lower court was/is not guilty of any of the circumstances chronicled above as to warrant and propel this court to tamper with the award in damages. It will, therefore, tantamount to transgression of the law to intervene against the award. I resolve the issue seven against the appellant and in favour of the respondent.

Having done away with issue seven, I turn to deal with issue eight. The fulcrum of the issue is simple. It derides the lower court's admission of exhibits J, F, – F14 and L – L7. The appellant's *coup de main* is rooted in their violation of the provision of section 84(1)(2) and (4) of the Evidence Act, 2011. For this reason, I will, at the expense of verbosity, but borne out of necessity, extract the provision, from where it is lodged in the Evidence Act, 2011. It provides:

> **(1) In any proceedings a statement contained in a document produced by a computer shall be admissible as evidence of any fact stated in it of**

which direct oral evidence would be admissible, if it is shown that the conditions in subsection (2) of the section are satisfied in relation to the statement and computer in question.

(2) The conditions referred to in subsection (1) of this section are:-

(a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purpose of any activities regularly carried on over that period, whether for profit or not, by anybody, whether corporate or not, or by any individual;

(b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;

(c) that throughout the material part of that period the computer was operating properly or, if not, that in

any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its content; and

(d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.

4 In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say –

(a) identifying the document containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in

subsection (2) above related, and purporting to signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities, as the case may be, shall be evidence of the matter stated in the certificate; and for the purpose of this subsection it shall be sufficient for matter to be stated to the best of the knowledge and belief of the person stating it.

In keeping with the tenet and spirit of the law, I have given a merciless scrùting to the documents, exhibits J, F, F1 – F4 and L – L7, which are in the heat of expulsion by the appellant. They fall, squarely, within the wide definition of document as ordained in section 258 of the Evidence Act, 2011 because their contents are "expressed or described upon any substance by means of letters, figures or marks". Exhibit J, which encompasses 2 CDs, is included as a document in the provision, see ***Dickson v. Sylva*** (2017) 8 NWLR (Pt. 1567) 167; They were procured from computer which according to the definition prescription of section 258 of the Evidence Act, 2011, denotes "any device for storing and processing information, and any reference to information being derived from other information is a reference to its being derived from it by calculation, comparison or any other process", see ***Omisere v. Aregbesola*** (2015) 15 NWLR (Pt. 1482) 205. It stems from these,

that the exhibits, in question, are classic exemplification of internet/computer-generated documents.

As it pertains to exhibits F – F14, the evidence of DW1, exhibit E1, encased in pages 1334 and 1335, volume III, of the big record, has met the requirement of section 84(2) of the Evidence Act, 2011. Each of those exhibits contains a certificate, signed by DW1, in the manner decreed by the provision of section 284(4) supra. Put the other way round, the exhibits F – F14, pages 1337 – 1372, volume III, of the record, fulfilled the compulsive conditions in section 84(2) and (4) of the Evidence Act, 2011.

Amazingly, the respondent, through DW1, its only principal witness, failed to comply with the inflexible and mandatory provision of section 84(2) and 4 of the Evidence Act, 2011, x-rayed above, as it relates to exhibits J and L – L7. In ***Dickson v. Sylva*** (2017) 8 NWLR (Pt. 1567) 167 at 203, the oracular jurist, Nweze, JSC, incisively, stated:

> **In actual fact, section 84 (supra) consecrates two methods of proof, either by oral evidence under section 84(1) and (2) or by a certificate under section 84(4). In either case, the conditions stipulated in section 84(2) must be satisfied.**

See, also, ***Kubor v. Dickson*** (supra); ***Omisere v. Aregbesola*** (supra); ***Dauda v. FRN*** (2018) 10 NWLR (Pt. 1626) 169; ***Onuoha v. Ubah*** (2019) 15 NWLR (Pt. 1694) 1. The *rationale* for the satisfaction of the requirements of the sacred provision is to "ensure the

authenticity of the document and the integrity of the procedure used to bring it into being", ***Dickson v. Sylva*** (supra), at 233, per Kekere-Ekun, JSC.

The respondent's flagrant defilement of this inviolable provision is replete with caustic effects. It renders those documents, exhibits J and L – L7, wholly, inadmissible. Put simply, their admission by the lower court ran foul of the adjectival law. It is of no moment that their admission was not greeted with any opposition. Incontestably, if a party fails to register an objection to the admissibility of a document in the bowel of a trial court, he is *estopped* from opposing its admission on appeal. This hallowed principle of procedural law is elastic. It admits of an exception. Where a document is inherently inadmissible, as in the instant case, the rule becomes lame. The law grants a trial court the unbridled liberty to expunge admitted inadmissible evidence at the judgment stage. An appellate court enjoys the same right so far as the document is inherently inadmissible. The wisdom behind these is plain. A court of law is drained of the jurisdiction to act on an inadmissible evidence in reaching a decision, see ***Alade v. Olukade*** (1976) 2 SC 183; ***IBWA v. Imano Ltd.*** (2001) 3 SCNJ 160; ***Durosaro v. Ayorinde*** (2005) 8 NWLR (Pt. 927) 407; ***Namsoh v. State*** (1993) 5 NWLR (Pt. 292) 129; ***Abubakar v. Joseph*** (2008) 13 NWLR (Pt. 1104) 307; ***Abubakar v. Chuks*** (2007) 18 NWLR (Pt. 1066) 389; ***Phillips v. E.D.C. & Ind. Co. Ltd.*** (2013) 1 NWLR (Pt. 1336) 618; ***Nwaogu v. Atuma*** (2013) 11 NWLR (Pt. 1364) 117.

As a consequence, all the defences mounted by the learned respondent's senior counsel, to infuse validity into them, with due

respect, lose steam in the face of the law. The documents are trapped in intractable web of inadmissibility with a clear fate to be ostracised from the appeal. Accordingly, the exhibits J and L – L7, wrongly received in evidence by the lower court, with due reverence, are expunged from the appeal. Conversely, the exhibits F – F14, lawfully admitted by the lower court, are welcome to the appeal. In effect, the issue eight is partly resolved in favour of the appellant and against the respondent and vice versa.

It remains to settle issue nine. The crux of the issue is plain. It probes into the correctness of the lower court's evaluation of the evidence in the matter. Put bluntly, the appellants accused the lower court of improper evaluation of evidence because the judgment was against the weight of evidence. A castigation of a decision on the premise that a judgment is against the weight of evidence, invariably couched as an omnibus ground, connotes that the decision of the trial court cannot be supported by the weight of evidence advanced by the successful party which the court either wrongly accepted or that the inference it drew or conclusion it reached, based on the accepted evidence, is unjustifiable in law. Also, it implies that there is no evidence, which if accepted, will buttress the finding of the trial court. Furthermore, it denotes that when the evidence adduced by the complaining appellant is weighed against that given by the respondent, the judgment rendered to the respondent is against the totality of the evidence placed before the trial court. In ascertaining the weight of evidence, the trial court is enjoined, by law, to consider whether the evidence is admissible, relevant, credible, conclusive or more probable than that given by the other party, see ***Mogaji v. Odofin*** (1978) 3 SC91; ***Anyaoke v. Adi*** (1986) 2 NSCC, Vol. 17, 799 at 806/(1986) 3 NWLR (Pt. 31) 731; ***Nwokidu v.***

Okanu (supra) (2010) 3 NWLR (Pt. 1181) 362; ***Akinlagun v. Oshoboja*** (2006) 12 NWLR (Pt. 993) 60; ***Gov., Lagos State v. Adyiga*** (2012) 5 NWLR (Pt. 1293) 291; ***Oyewole v. Akande*** (2009)15 NWLR (Pt. 1163) 11; ***Agala v. Okusin*** (2010) 10 NWLR (Pt. 1202) 412.

Furthermore, the law has saddled a trial court, like the lower court herein, with the primary duty to evaluate relevant and material evidence, both oral and documentary, after hearing and watching the demeanour of witnesses called by the parties in any proceedings having regard to their pleadings. To discharge that bounden duty, a trial court must show how and why it arrived at its findings of fact and final determination of the issues before it. It has to be cautious and understand the distinction between summary or restatement of evidence and evaluation of evidence which means assessment of evidence and giving them probative value. It appraises evidence by constructing an imaginary scale of justice and putting the evidence of the parties on the two different pans of the scale. Then, it weighs them to determine which is heavier, not in terms of quantity, but quality of the testimonies, see ***Mogaji v. Odofin*** (1978) 3 SC 91; ***Olagunju v. Adesoye*** (2009) 9 NWLR (Pt. 1146) 225; ***Oyewole v. Akande*** (2009) 5 NWLR (Pt. 1163) 11; ***Ayuya v. Yonrin*** (2011) 10 NWLR (Pt. 1254) 135; ***Adusei v. Adebayo*** (2012) 3 NWLR (Pt. 1288) 534; ***Odutola v. Mabogunje*** (2013) 7 NWLR (Pt. 1356) 522; ***Ndulue v. Ojiakor*** (2013) 8 NWLR (Pt. 1356) 311; ***Okoro v. Okoro*** (2018) 16 NWLR (Pt. 1646) 506; ***D.M.V (Nig) Ltd. v. NPA*** (2019) 1 NWLR (Pt. 1652) 1635; ***Onyekwuluje v. Animashaun*** (2019) 4 NWLR (Pt. 1662) 242. I have placed the decision of the lower court with the positions of law, dissected above, with a view to identifying their infractions or compliance.

It is foremost to resolve one point that is tangential to the issue. One of the appellant's grouches is that the DW1's depositions were irregular and incompetent because they were not deemed as properly filed by the lower court. Those depositions metamorphosed into DW1's evidence-in-chief on their adoption, see ***G.E Int'l Operations (Nig.) Ltd. v. Q-Oil & Gas Services Ltd.*** (2016) 10 NWLR (Pt. 1520) 304. They were admitted as exhibits E-E2, on 17th January, 2017, and monopolise pages 1269-1336, volume III, of the enormous record.

In the first place, on 25th May, 2017, before the lower court, the appellant's counsel, O.P Uwalaka, Esq., cross-examined DW1 on those depositions, exhibits E-E2. On 10th July, 2017, posterior to their date of adoption and admission in evidence, O.P. Uwalaka, Esq., of counsel, filed the plaintiff's final written address which spans pages 1182-1199, volume III, of the gargantuan record. The filing, to all intents and purposes, amounted to taking a fresh step in the proceeding, see ***Enterprise Bank Ltd v. Aroso*** (2014) 3 NWLR (Pt. 1394) 256. It is trite, that a party should register an objection to the violation of the rules of court timeously: at the commencement of the action or when the irregularity is noticed. If a party delays in his objection against non-observance of the rules of court, and proceeds to take a step in the matter, the law deems him as having acquiesced in the irregularity and his objection taken as belated. Such an indolent party will, in the sight of the law, be caught in the intractable vortex of waiver, see ***CBN v. Amao*** (2010) 16 NWLR (Pt. 1219) 271; ***Enterprise Bank Ltd v. Aroso (supra); Blessing v. FRN*** (2015) 13 NWLR (Pt. 1475); ***Anyanwoko v. Okoye*** (2010) 5 NWLR (Pt. 1188) 497; ***Belgore v. Ahmed*** (2013) 8 NWLR (Pt. 1355) 60; ***Bagoja v. Govt., FRN*** (2008) 1 NWLR (Pt. 1067) 85).

The appellant, in the mind of the law, unduly, embraced indolence in its opposition to the irregularity of those documents. Even equity, which balances fairness to litigants, aids the vigilant and not the indolent. The appellant, for reasons best known to it, relished in a slumber over his right of objection. It is too late in the day to stoke the irregularity that was buried in the bowel of waiver. The unwarranted tardiness constitutes a serious blight on the appellant's objection. The exhibits E-E2 are not smeared with any incompetence. In all, I have no backing of the law to declare them incompetent.

One other peripheral grudge, nursed by the appellant, relates to the broadcast logs. The appellant reasoned that the lower court misplaced the onus of production of those logs by placing it on it. The provision of chapter 1 paragraphs 1.9 and 1.6 of the Nigerian Broadcasting Code, 2006 and 2012 respectively, made by the National Broadcasting Commission (NBC) pursuant to the powers vested on it by the provision of section 2 (1) (h) of the National Broadcasting Commission Act, mandates a broadcaster to mandatorily keep the broadcast logs. Going by the appellant's own *ipse dixit*, it is a broadcaster.

By virtue of the provision of section 167 (d) of the Evidence Act, 2011 (former section 149 (d) of the defunct Evidence Act, 2004), the law allocates to the court the power/right to presume that where a party, in a possession of evidence, who ought to produce such evidence fails to do so, the evidence is presumed to be unfavourable to him, see ***A.-G., Adamawa State v. Wara*** (2006) 4 NWLR (Pt. 970) 399; ***Ojo v. Gharoro*** (2006) 10 NWLR (Pt. 987) 173; ***Aremu v. Adetoro*** (2007) 16 NWLR (Pt. 1060) 244; ***S.S.GMBH v. T.D. Ind. Ltd*** (2010) 11 NWLR (Pt. 1206) 589; ***Danladi v. Dangiri*** (2015) 2 NWLR (Pt. 1442) 124; ***Onyekwuluje v. Animasaun***

(supra) ; ***UBN Plc v. Ravih Abdul & Co. Ltd.*** (2019) 3 NWLR (Pt.1659) 203.

It is discernible from the provision of the Nigeria Broadcasting Code supra, that the law impels the appellant, a broadcaster in its own right, to keep the broadcast logs. In other words, it is the bounden duty of the appellant to be in custody of them. This is a statutory injunction/mandate. The concept of notice to produce, contrived by the appellant, as a defence to their non-production, is impotent to neutralise the statutory duty imposed on it as the custodian of those logs. Again, the defence of their immovability, which the appellant set up under section 89(d) of Evidence Act, 2011, was not available to the lower court. It was, therefore, futile and displaced. The absent broadcast logs, justifiably, cried for the attention of the lower court to douse the damning evidence of the respondent. The appellant abdicated its statutory responsibility even at the lower court's command via *subpoena duces tecum*. When a fact is within the knowledge of a party, the burden to prove it is cast on him, see section 140 of the Evidence Act, 2011; ***Unity Bank Plc v. Ahmed*** (2020) 1 NWLR (Pt. 1705) 364. The respondent would not produce what was not in its possession. The appropriate maxim is: *lex non cogit ad impossibila* – the law does not command the impossible see ***Lasun v. Awoyemi*** (2009) 16 NWLR (Pt. 1168) 513. The lower court was *firma terra*, in law, to have invoked the provision of section 167 (d) of the Evidence Act, 2011 against the appellant's case. The finding is immaculate and unassailable.

I have, severally, subjected the lower court's judgment, copied at pages 1722-1797, volume IV, of the expansive record, to careful, meticulous and clinical study. The lower court, to my mind, carried out a meticulous and thorough analyses of the evidence, *viva voce* and documentary, proffered

by the warring parties after assigning them to their respective pans in the imaginary scale of justice. It attached deserving probative weight to the respective evidence offered by the parties. It found that the respondent's pan in the imaginary scale of justice hosted more admissible, credible and conclusive evidence. A piece of evidence is credible when it is worthy of belief, see ***Agbi v. Ogbeh*** (2006) 11 NWLR (Pt. 990) 1; ***Dim v. Enemuo*** (2009) 10 NWLR (Pt. 1149) 353; ***Eta v. Dazie*** (2013) 9 NWLR (Pt. 1359) 248; ***A. J. Inv. Ltd. v. Afribank (Nig.) Plc.*** (2013) 9 NWLR (Pt. 1359) 380; ***Emeka v. Chuba-Ikeazu*** (2017) 15 NWLR (Pt. 1589) 345. In the same vein, a piece of evidence is conclusive if it leads to a definite result, see ***Nruamah v. Ebuzoeme*** (2013) 13 NWLR (Pt. 1372) 474. The lower court found, rightly in my view, that the evidence of the respondent, based on their qualitative nature, preponderated over those of the appellant's. The net effect is that the respondent proved its case. Proof, in law, is a process by which the existence of facts is established to the satisfaction of the court, see section 121 of the Evidence Act, 2011; ***Olufosoye v. Fakorede*** (1993) 1 NWLR (Pt. 272) 747; ***Awuse v. Odili*** (2005) 16 NWLR (Pt. 952) 416; ***Salau v. State*** (2019) 16 NWLR (Pt. 1699) 399; ***Onyiorah v. Onyiorah*** (2019) 15 NWLR (Pt. 1695) 227.

The appellant branded the finding as perverse. Since perversion is the pivot of the point, it is germane to comb out its purports for easy appreciation. A verdict of court is perverse when: it runs counter to the pleadings and evidence before it, a court takes into account matters it ought not to take into consideration, a court shuts its eyes to the evidence, a court takes irrelevant matters into account or it has occasioned a miscarriage of justice, see ***Udengwu v. Uzuegbu*** (2003) 13 NWLR (Pt. 836) 136; ***Nnorodim v. Ezeani*** (1995) 2 NWLR (Pt. 378) 448; ***Lagga v.***

Sarhuna NWLR (Pt. 1114) 427; ***Onyekwelu v. Elf Pet (Nig.) Ltd.*** (2009) 5 BWKR (Pt. 1133) 181; ***Momoh v. Umoru*** (2011) 15 NWLR (Pt. 1270) 217; ***Ihunwo v. Ihunwo*** (2013) 8 NWLR (Pt. 1357) 550; ***Olaniyan v. Fatoki*** (2013) 17 NWLR (Pt. 1384) 477; ***Udom v. Umanah*** (No.1) (2016) 12 NWLR (Pt. 1526) 179 ***Adeokin Records v. M.C.S.N. (Ltd)/GTE)*** (supra); ***Mamonu v. Dikat*** (2019) 7 NWLR (Pt 1672) 495; ***MTN (Nig.) Comm. Ltd. v. Corporate Comm. Inv. Ltd.*** (2019) 9 NWLR (Pt. 1678) 427; ***Offodile v. Offodile*** (2019) 16 NWLR (Pt. 1698) 189; ***Bi-Courtney Ltd. v. A-G, Fed.*** (2019) 10 NWLR (Pt. 1679) 112.

Now, I have, in total fidelity to the desire of the law, situated the judgment, sought to be annihilated, with the elements of perverse decision x-rayed above. The *raison d'etre* behind the juxtaposition is simple. It is to discover if the judgment is marooned in the ocean of perversity. The judgment of the lower court, which is submissive to comprehension, is not antithetical to the pleadings and evidence presented before it by the feuding parties. At the same time, the lower court did not import alien/foreign matters into the judgment. It utilised the evidence the parties presented before it as adumbrated above. The finding does not, in the least, smell of any charge of perversity levelled against it by the appellant.

By the same token, the judgment did not occasion a miscarriage of justice. Miscarriage of justice, in law, denotes such a departure from the rules which pervade all judicial process as to make what happened not, in the proper sense of the word, judicial procedure, see ***Amadi v. NNPC*** (2000) 10 NWLR (Pt. 674) 76. It signifies a decision or outcome of legal proceedings which is prejudicial or inconsistent with the substantial rights of a party. It implies a failure of justice and a reasonable probability of more

favourable result of the case for a party alleging it, see ***Larmie v. DPM & Services*** (2006) All FWLR (Pt. 296) 775; ***Gbadamosi v. Dairo*** (2007) 3 NWLR (Pt. 1021) 282; ***Aigbobahi v. Aifuwa*** (2006) 6 NWLR (Pt. 976) 270; ***Akpan v. Bob*** (supra); ***Afolabi V. W,S.W. Ltd*** (2012) 7 NWLR (Pt. 1329) 286; ***Abubakar V. Nasamu*** (No. 2) (2012) 17 NWLR (Pt. 1332) 523; ***Oke V. Mimiko*** (No.2) (2014) 1 NWLR (Pt. 1338) 332; ***Fredrick v. Ibekwe*** (2019) 17 NWLR (Pt. 1702) 467. The appellant was stingy in illustrating how it was afflicted with miscarriage of justice. It never garnered any substantial rights from its claim that the law aborted and made it dead on arrival. From the concrete evidence, the reasonable probability to earn a favourable result in its favour was, with respect, an echo of mirage.'

It stems from this juridical survey, that the finding of the lower court is not, in the least, trapped in the intractable nest of perversion nor does it smell of any miscarriage of justice. Put bluntly, the charges of perversity and miscarriage of justice levelled against the finding cannot be sustained. It is not guilty of them. On this score, I dishonour the salivating invitation of the appellant to sacrifice the judgment of the lower court on the undeserved shrine of perversity and miscarriage of justice.

For the sake of clarity and completeness, I am not oblivious of the finding under issue eight wherein some exhibits, J and I – L7, suffered an expunction from the appeal. I must observe, pronto, that the appellant has only scored a barren victory on that finding. The reasons are: Firstly, even though those documents have been rejected by this court, the oral evidence in proof of the facts which they were intended to prove are admissible in law. In other words, those pieces of oral evidence still stand. The apex court has approbated this evidential principle of law, see ***Ezemba***

v. Ibeneme (2004) 14 NWLR (Pt. 894) 617 at 651 – 652. Secondly, those documents were jettisoned from the appeal on grounds of wrongful admission. In the sight of the law, a wrongful admission of evidence shall not be a ground to reverse a decision if an appellant court finds that the decision would have been the same without the jettisoned evidence, see section 251 of the Evidence Act, 2011, former section 227 of the Evidence Act, 2004; ***Ogunsina v. Matanmi*** (2001) 9 NWLR (Pt. 718) 286; ***Omomeji v. Kolawole*** (2008) 2 NWLR (Pt. 1106) 180; ***Archibong v. State*** (2008) 14 NWLR (Pt. 1000) 349; ***Adeyemi v. State*** (2014) 13 NWLR (Pt. 1433) 132; ***Tyonex (Nig.) Ltd. v. Pfizer Ltd.*** (2020) 1 NWLR (Pt. 1704) 125. Indubitably, there are an avalanche of evidence on record that buttress and solidify the lower court's decision.

I, therefore, acquit the well-honed judgment of the lower court of the unfounded allegation of improper and perfunctory evaluation of the evidence. I will not hesitate to resolve the issue nine against the appellant and in favour of the respondent.

Resolution of the Respondent's Notice

The respondent's Notice of Contention (Respondent's Notice) is anchored on the provision of order 9 rule 1 of the Court of Appeal Rules, 2016. It read:

> **1. A respondent who not having appealed from the decision of the court below, desires to contend on the appeal that the decision of that court should be varied, either in any event or in the event of the**

> **appeal being allowed in whole or in part, must give notice to that effect, specifying the grounds of that contention and the precise form of the order which he proposes to ask the Court to make, or to make in that event, as the case may be.**

This one-sentence-provision, which is crystal clear, has fallen for interpretation in a battery of authorities. It is available to a respondent who intends to have the judgment varied without soliciting for a reversal of it, see ***Bob-Manuel v. Briggs*** (1990) 1 SCNJ 1; ***Briggs v. Bob-Manuel*** (2003) 1 SCNJ 218; ***A.T.E. Co. Ltd. v. Mil. Gov., Ogun State*** (2009) 15 NWLR (Pt. 1163) 26; ***Gwede v. INEC*** (2014) 18 NWLR (Pt. 1438) 56; ***Zakirai v. Muhammad*** (2017) 17 NWLR (Pt.1594) 181; ***Nsirim v. Amadi*** (supra); ***Lawal v. APC*** (2019) 3 NWLR (Pt. 1658) 86.

I have given a close look at the Respondent's Notice. It seeks for a variation/alteration of the judgment to reflect the correct mathematical calculation of the special damages awarded against the appellant. It is, totally, divorced from seeking for a reversal of the entire judgment. In fact, it is for a downward variation of the sum granted in special damages to the benefit of the appellant. It is a paradox that the appellant has opposed it when it is its beneficiary. In effect, the Respondent's Notice has satisfied the requirement of the law. I resolve the solitary issue against the appellant and in favour of the respondent. Accordingly, I grant the prayer in Respondent's Notice. Consequently, the special damages in the sum of ₦5, 490,652,125.00 (Five Billion, Four Hundred and Ninety Million, Six Hundred and Fifty Tow Thousand, One Hundred and Twenty Five Naira

only) is varied to ₦5, 450,152,125.00 (Five Billion, Four Hundred and Fifty Million, One Hundred and Fifty Two Thousand, One Hundred and Twenty Five Naira only). No order as to costs.

On the whole, having resolved the live issues one, three, four, five, seven, eight (partly) and nine against the appellant, the fate of the appeal is obvious. It is bereft of any grain of merit and deserves the penalty of dismissal. Consequently, I dismiss the appeal. I affirm the decision of the lower court delivered on 19th January, 2018. The parties shall bear the respective costs they expended in the prosecution and defence of the doomed appeal.

OBANDE FESTUS OGBUINYA
JUSTICE, COURT OF APPEAL.

COUNSEL:

M.I. Igbokwe, SAN (with him, Sir A. Nwachukwu, A. Ajamobi, Esq., V. Okotie, Esq., and E. Bassey, Esq.) for the appellant.

N.I. Quakers, SAN (with him O. Ekisola, Esq., B. Daramola, Esq., S. Fashanu, Esq. and G. Adelaja, Esq.,) for the respondent.

CA/L/188/2018

GABRIEL OMONIYI KOLAWOLE, JCA

I had the privilege to read in its draft form, the leading judgment just delivered by my learned brother, **OBANDE FESTUS OGBUINYA, JCA** in which he found the appeal unmeritorious and dismissed it.

I agree with the conclusions reached on the issues which were raised in the appeal and I do not have anything useful to add.

I too dismiss the appeal, and I abide with the consequential order made as to costs.

Appeal is dismissed.

GABRIEL O. KOLAWOLE

JUSTICE, COURT OF APPEAL

CERTIFIED TRUE COPY
AYOADE M. A.
PRINCIPAL EXECUTIVE OFFICER
COURT OF APPEAL
Sign.....
Date.....

CA/L/188/2018
(BALKISU BELLO ALIYU, JCA)

I had the privilege of reading in draft, the leading judgment just delivered by my learned brother **OBANDE FESTUS OGBUINYA, JCA.**

I agree entirely with the reasoning and conclusion reached therein and I adopt same as mine. I too find no merit in this appeal and I dismiss it.

I also agree that the Respondent's Notice has merit and it succeeds as such the special damages awarded by the trial Court is varied to **₦5, 450, 152, 125: 00**. I abide by the order of no cost made in the leading judgment. Appeal dismissed.

BALKISU BELLO ALIYU
JUSTICE, COURT OF APPEAL

CERTIFIED TRUE COPY
AYOADE M. A.
PRINCIPAL EXECUTIVE OFFICER II
COURT OF APPEAL
Sign.....
Date..... 3/8/2020