

**IN THE COURT OF APPEAL
ABUJA JUDICIAL DIVISION**

On Friday, the 19th day of March 2021

Suit No: CA/A/CV/564/2020

Before Their Lordship

STEPHEN JONAH ADAH Justice of the Court of Appeal
BOLOUKUROMO MOSES UGO Justice of the Court of Appeal
MOHAMMED MUSTAPHA Justice of the Court of Appeal

Between

ZAIN NIGERIA **APPELLANT(S)**

And

1. TV XTRA PRODUCTIONS LIMITED

2. NATIONAL UNIVERSITY COMMISSION **RESPONDENT(S)**

SUMMARY OF JUDGMENT

FACTS:

This appeal is against the decision of the Federal High Court, Abuja, delivered on the 6th of May 2020, presided by Honourable Justice I. E. Ekwo in suit No FHC/ABJ/CS/680/2008.

The 1st Respondent's (Plaintiff at the High Court) case at trial was that Exhibit PW1 was donated to it by its director, Mr. Christian Ojorovwu Ogodo, through a power of attorney. Exhibit PW5 and the 2nd Respondent (1st Defendant at the High Court) violated its copyright when it granted approval for a similar program to a third party to work on its copyright, when it allowed the Appellant to broadcast a similar program without permission of the 1st Respondent.

By its amended statement of claim the 1st Respondent therefore sought the following reliefs at trial:

a. A DECLARATION that the approval by the 1st Defendant of the program called "ZAIN AFRICAN CHALLENGE" in favour of the 2nd Defendant is an infringement of the copyright of the Plaintiff in respect of the said program.

b. AN ORDER compelling the 1st Defendant whether by themselves or officers, agents, servants, privies or otherwise, howsoever to endorse and approve the program called "UNIVERSITY CHALLENGE" in favour of the Plaintiff.

c. AN ORDER of perpetual injunction restraining the 2nd Defendant whether by themselves or officers, agents, servants, privies, or otherwise howsoever from producing, airing, marketing or exercising any right in respect of the program called "ZAIN AFRICAN CHALLENGE."

d. AN ORDER of perpetual injunction restraining the 1st Defendant whether by itself, or officers, agents, servants, privies, or otherwise howsoever from approving or registering any other program similar to "University Challenge" or which will infringe on the copyright of the Plaintiff over the said program.

e. AN ORDER compelling the Defendants jointly and severally to pay the plaintiff the sum of N500,000,000.00 (Five Hundred Million Naira) as special damages for the infringement of the Plaintiff's copyright.

f. AN ORDER compelling the 2nd Defendant to pay the Plaintiff the sum of N200,000,000.00 (Two Hundred Million Naira) as general damages for airing the program titled Zain African Challenge" in Nigerian television which infringes on the right of the Plaintiff.

g. AN ORDER compelling the Defendants jointly and severally to pay the Plaintiff the sum of N3,000,000.00 (Three Million Naira) being the cost of this action."

At the end of the trial, the High Court in its judgment found in favour of the 1st Respondent.

Dissatisfied, the Appellant appealed to the Court of Appeal.

ISSUES FOR DETERMINATION:

The Court determined the appeal on the following issues.

1. Whether Honourable Justice I. E Ekwo while hearing suit No: FHC/ABJ/CS/680/2008 de-novo, was right in reading and adopting the evidence already given before G.O Kolawole, J (as he then was), without the witnesses being recalled, in view of Order 49 Rule 4 of the Federal High Court (Civil Procedure) Rules, 2019 and in the entire circumstances of this appeal?
2. Whether the learned trial judge, Ekwo, J was right in holding that he would not attach any probative value to Exhibits D2B, D3, D4, and D4A, after same were earlier on admitted in evidence by the Court?
3. Whether the 1st Respondent/Plaintiff sufficiently proved the infringement of its copyright in "Nigerian Universities Challenge" to entitle it to the judgment of the Court?
4. Whether in an action for infringement of copyright, special damages must be particularized and proved?

HELD:

The Court allowed the appeal.

PRACTICE AND PROCEDURE - TRIAL DE NOVO - Whether in a trial de novo judgment can be entered based on evidence given before a judge who was either elevated, transferred, retired, or deceased without recalling the witnesses who had given such evidence.

"Order 49 Rule 4 of the Federal High Court Civil Procedure Rules, 2019 states as follows: "Where a judge is elevated, deceased, retires or is transferred to another division and having part heard a cause or matter which is being heard de novo by another judge, the evidence

already given before the first judge can be read and adopted at the hearing without the witness who had given it being recalled, but if the witness is dead or cannot be found, the onus of establishing that the witness is dead or cannot be found shall lie on the party that wishes to use the evidence." This Order is clearly a child of necessity; its objective is clearly to cure unfortunate incidents, where, after years of trial, a judge hearing a case gets transferred, elevated or dies, as a consequence of which the case suffers, and parties and counsel in such cases have to suffer the indignity of starting such part heard matters all over again, before another judge, thus creating unimaginable problems, that may ultimately lead to injustice. This provisions is not in conflict with any Order of Court or the Evidence Act, particularly Orders 19, 20 and 22 complained of; and it is clear also that Section 46 of the Evidence Act which learned counsel relied on to pillory Order 49 Rule 4 is particularly triggered on death of a witness or where such witness cannot be procured without unreasonable delay or expense; while the jurisdiction of the trial Court is invoked by elevation, retirement or transfer and not death or non-availability of a witness. In the circumstances therefore, the trial Court was perfectly in order, in granting the application dated 4th September 2019, brought pursuant to Order 49 Rule 4 of the Federal High Court Civil Procedure Rules 2019, on the 6th of November 2019. It is important, at the risk of prolixity, to stress that from the records of the trial Court at pages 793 to 798 the 1st respondent as plaintiff filed an application pursuant to Order 49 Rule 4 of the Rules of the Federal High Court, on the 28 of March, 2019, praying for leave of Court to rely on existing record of proceedings in continuation of the trial, and also on the 4th of September, 2019. On the 24th of September 2019, learned counsel for the 1st respondent withdrew the motion of the 28th of March 2019 and applied to argue the application of the 4th September 2019, without objection, as a consequence of which the application was argued and granted. From the clear provisions of Order 49 Rule 4, in civil proceedings, when a judge is elevated, deceased or retires or transferred, an application could be brought before another judge who is hearing the matter de novo to adopt the evidence already before the first judge. I agree with learned counsel for the 1st respondent that the authority of *BASSEY EDIBI V STATE* supra referred to by learned counsel is distinguishable from the case at hand, because the proof required therein is in the category of 'beyond reasonable doubt', because it is a criminal case, while the case at trial in this case is civil, which requires proof on the balance of probabilities. Hearing de novo does not mean a retrial; a hearing de novo in the context of Order 49 Rule 4 only requires for a hearing on the evidence adopted already before the trial. The evidence does not change, what changes is the judge, who has now taken the place of the one elevated, transferred, retired, or deceased; and the sole objective of this procedure is to avoid the undue delay likely to occur when the case is heard all over again by calling fresh evidence. That being the case, the trial Court was right in adopting the evidence already recorded and delivering judgment in accordance with Order 49 Rule 4." **Per MOHAMMED MUSTAPHA, JCA (Pp. 17-20, para. D-D)**

EVIDENCE - WRONGFUL ADMISSION/REJECTION OF EVIDENCE - When a document will be held to have been wrongfully expunged/rejected.

"Exhibits D2B, D3, D4 and D4A are computer generated documents which the appellant tendered before Justice Kolawole. Objections to the admissibility of the exhibits were overruled and the documents admitted. However, Hon. Justice Ekwo thought differently, and held the exhibits to have no nexus with the 2nd defendant, the witness through whom they were admitted and that they were essentially documentary hearsay. It is important at this

junction to point out that DW2 had stated while testifying on oath that he personally downloaded all the exhibits in issue; see page 874 to 879 of the record of appeal. I am not convinced by learned senior counsel for the appellant's argument that the documents cannot be revisited except on appeal because if they were inadmissible, but were nonetheless admitted wrongly, it is within the powers of the trial Court to expunge them. Wrongly admitted evidence cannot be converted to legal evidence, as such the Court has a duty to expunge it from the record, because such evidence is regarded non-existent evidence, to all intents and purposes. It is as good as not tendered or not admitted at all; and any finding based on such inadmissible wrongly admitted evidence would be regarded as perverse. See *AGBAJE V. ADIGUN* (1993) 1 NWLR (PT. 269) 261 AT 272; and the trial Court cannot be said to be functus officio in expunging such exhibits. See *OWOR V CHRISTOPHER & ORS* (2008) LPELR-4813-CA. Having said that, the trial Court rejected the exhibits on account of not having a nexus with DW2, but the record does indeed show a connection between the said exhibits and the DW2, who had them admitted through him, contrary to the conclusion reached by the trial Court. It is equally contradictory for the trial Court to expunge the said exhibits and turn around in the same vein to say that: "upon the evaluation that I have made, I cannot therefore place any probative value on Exhibits D2B, D3, D4, and D4A"; because once expunged, the documents should remain expunged for all times. The trial Court cannot evaluate expunged evidence much less place any probative value on them. At this juncture, this Court is compelled to agree with learned senior counsel for the appellant that the exhibits in question constitute what the appellant had hoped to use at trial as its defense against the claim that the 1st respondent's copyright were infringed upon; denying the appellant the use of the exhibits is clearly a miscarriage of justice in the circumstances. It is for these reasons that I now resolve this issue in favour of the appellant, against the 1st respondent." **Per MOHAMMED MUSTAPHA, JCA (Pp. 22-24, paras. C-D)**

ACTION - DECLARATORY RELIEF(S) - Principles governing the grant of declaratory reliefs.

"The reliefs sought at trial, quoted extensively in this judgment, attest to the fact that the suit at trial is a declaratory action; the first relief sought is: "a declaration that the approval by the 1st defendant of the program called Zain Africa challenge in favour of the 2nd defendant is an infringement of the copyright of the plaintiff in respect of the said program." This relief clearly defines the action from the onset as declaratory in nature. That being so, and in any event, because the plaintiff/1st Respondent sought declaratory reliefs by way of remedy, it is saddled with the burden of proving same and not rely on the weakness of the appellant's case if any. Granted, the law is trite that unchallenged evidence is deemed admitted and evidence admitted need no further proof. For that reason, a plaintiff may take advantage of the weakness of the defendant's case as much as it supports his own case, in proof of same. See *ONOGWU V. STATE* (1995) 6 NWLR PT. 401 PG. 276, *ODUNSI V. BAMGBALA* (1995) 1 NWLR PT. 374 PG. 641. Be that as it may, this position of the law admits certain exceptions. One of which is that Courts do not grant declaratory reliefs as a matter of course in default of defence or admission of the adverse party, without considering the evidence and being satisfied with same. The burden of proof on the plaintiff/1st Respondent to establish its entitlement to the declaratory reliefs being sought is not removed by the admission or failure of the defendant to defend. In other words, the burden is on the party seeking a declaratory relief to establish his claim by satisfactory evidence. See *DUMEZ NIG. LTD. V. NWAKHOBA* (2008) 18 NWLR PT. 1119 PG. 361, *WALLERSTEINER V. MOIR*

(1974) 3 ALL ER 217, CHUKWUMAH V. SHELL PETROLEUM (1993) 4 NWLR PT. 289 PG. 512. This principle of law it should be understood, applies even where there is admission of the Plaintiffs case by the Defendant. See CPC V. INEC (2011) LPELR-8257(SC)." **Per MOHAMMED MUSTAPHA, JCA (Pp. 27-29, paras. E-C)**

INTELLECTUAL PROPERTY - COPYRIGHT - Duty on a Plaintiff who claims infringement of copyright to prove same

"In regard to the question of whether the 1st Respondent's copyright was infringed or not, it is important at this stage to have recourse to the Copyright Act, 2004 which provides at Section 1 that: (1) "subject to this section, the following shall be eligible for copyright- a) Literary work; b) Musical work; c) Artistic work; d) Cinematograph films; e) Sound recordings; f) Broadcasts. (2) A literary, musical or artistic work shall not be eligible for copyright unless - a) Sufficient effort has been expended on making the work to give it an original character; b) The work has been fixed in any definite medium of expression now known or later to be developed, from which it can be perceived, reproduced or otherwise communicated either directly or with the aid of any machine or device. (3) An artistic work shall not be eligible for copyright, if at the time when the work is made, it is intended by the author to be used as a model or pattern to be multiplied by any industrial process. (4) A work shall not be ineligible for copyright by reason only that the making of the work or the doing of any act in relation to the work involves an infringement of copyright in some other work"; and in Section 14 (1) as follows: (1) "copyright is infringed by any person who without the license or authority of the owner of the copyright: (a) Does or causes any other person to do an act, the doing of which is controlled by copy right." This is not about whether the 1st respondent's work is eligible for protection or not, or whether it satisfies the requirements of the Act for protection, as learned counsel for the first respondent contends; it is about whether there was indeed an infringement of the works of the 1st respondent. I am convinced by the submission of learned senior counsel to the appellant that the trial Court fell into the error of assuming, wrongly, by relying on Exhibit 2, that the 1st respondent's copyright was infringed upon. This assumption is not borne out by the pleadings. There is nowhere in the pleadings where the appellant even by implication admitted that the 1st respondent was entitled to copyright protection. I fail to see how the synopsis of Exhibit PW1 alone can be said to be proof of originality or peculiarity as contended. Those words alone do not by any stretch of imagination qualify the work as original, to the extent of suggesting that, no other intellectual work apart from those of the 1st respondent has those words. To hold so is farfetched. The proof of whether the work is original or not is on the 1st respondent, because the law is settled that a plaintiff who claims copyright bears the burden of establishing the right through its originality, which in the context of Section 1 (2) requires proof of expended sufficient effort and skill on the work to give it the distinct character that will stand it out; the authority of FOOTBALL LEAGUE LTD V. LITTLEWOODS POOLS LTD supra cited supports this view. In the circumstances therefore, originality cannot be presumed. The 1st respondent has the burden of not only averring to facts, but also leading evidence in proof, not least because the appellant has contested its claim; as such the finding by the trial Court, that: "going by Exhibit 1, I can see that sufficient effort was expended on making the work to give it an original character" is not supported by the evidence before the trial Court. Now proof of infringement of the copyrights of the 1st respondent cannot be inferred simply on the non-inclusion of the words Zain, Econet, Airtel or Celtel simpliciter in the execution clauses of Exhibit D2B, as contended; and the categorization of Exhibits D2B, D3, D4 and D4A as mere

documentary hearsay by the trial Court on that failing misses the point in view of the evidence of DW2 through whom they were tendered. Strictly speaking, it is not a question of whose copyright or work deserves protection as contended for the 1st Respondent, what counts rather is, whether the 1st Respondent's claim of copyright has been proved to deserve protection. Nothing compels the Appellant or anyone to register their work, because there is no compulsion in registration of copyright. It is not the Appellant's place to show or prove that the 1st Respondent's work is different, but for the 1st Respondent, as plaintiff, seeking declaratory reliefs, to establish that the work infringed its copyright by being the same with its own registered work in every material particular." **Per MOHAMMED MUSTAPHA, JCA (Pp. 29-33, paras. C-B)**

JUDGMENT AND ORDER - AWARD OF COST - Principles of law as regards award of cost

"It is very important to bear in mind that there are two types of costs and care must be taken not to confuse one with the other. The two distinct types of cost are costs awarded according to settled judicial principles and costs awarded in the exercise of discretion on particular facts. Whereas an appeal lies in respect of the former, which is the exercise of judicial discretion, there is no appeal in respect of the latter, even from the erroneous exercise of such discretion. This is so, because this exercise of discretion is based on the private opinion of the Judge. A judicial discretion must be exercised on fixed principles and according to rules of reason and justice. The exercise of discretion in this sense must be justifiable. See *UBA LTD V. STAHLBAU GMBH & CO. KG* (1989) LPELR-3400-SC, *SHARPE V. WAKEFIELD* (1891) A.C. 173, *RITTER V. GODFREY* (1920) 2 K.B.47. It is important also not to lose sight of the fact that in both cases there is the undeniable exercise of discretion, regardless of the thin distinction that appears between the two. That being so, it is safer not to interfere with the exercise of judicial discretion, especially where it is exercised judicially and judiciously except for compelling reasons. See *ANYAH V. A.N.N LTD* (1992) 6 NWLR (PT.247) 319 AT 323, 334. Having found in its considered opinion, rightly or wrongly, that the claims of the plaintiff succeeded, then cost followed events, as the trial Court saw it. That being so, the exercise of discretion, as it were, is beyond reproach." **Per MOHAMMED MUSTAPHA, JCA (Pp. 34, paras. F-A)**

DAMAGES - SPECIAL DAMAGES - Whether a claim for special damages must be specifically pleaded and strictly proved.

Now, having said that, the issue of the award of N500,000,000 is a different thing all together notwithstanding the fact that the position of the law that damages are at large in matters of infringement of copyright. See *PLATEAU PUBLISHING LTD V ADOPHY* (1986) 4 NWLR part 34 page 205. I do not subscribe to the contention that because damages are at large in matters of infringement of copyright, the claim of the 1st Respondent ought to be automatically granted without question, even if damages are at large, whatever is claimed cannot just be awarded automatically without proof, especially where declaratory reliefs are sought. It will be absurd to do so under any guise. Proof is intrinsic to every claim of special damages; it is inconceivable to award special damages on a whim as submitted for the 1st respondent. Special damages must be strictly proved. There is no two ways about that. In proving special damages, credible evidence must be led in support, notwithstanding the rule that pleadings or evidence which is unchallenged or uncontroverted could amount to proof. This is so because special damages are such that the law will not infer from the nature of the act. They do not follow in the ordinary cause of events. They are exceptional in character

and therefore they must be claimed specifically and proved strictly. See ALHAJI OTARU & SONS LTD V. IDRIS (1999) 6 NWLR (PT. 606) 330; IJEBU-ODE LG V. ADEDEJI BALOGUN & CO. LTD (1999) 1 NWLR (PT. 166) 136; ODULAJA V. HADDAD (1973) 11 5C 357. In order to discharge the burden, the 1st Respondent in this case must show by credible evidence that it is indeed entitled to the award. No such thing was done in this case. I am in total agreement with learned senior counsel for the Appellant that the amended statement of claim of the 1st Respondent at pages 286 to 290 of the record of appeal, as well as the witness deposition of PW1 at pages 291 to 295 of the record of appeal shows that the 1st Respondent did not plead or lead evidence on special damages. See HEALTH CARE PRODUCTS (NIG) LTD V. BAZZA (2004) 3 NWLR (PT. 861) 582; NB PLC V. ADETOUN OLADEJI (NIG) LTD (2002) 15 NWLR (PT. 791) 589; OSHINJINRIN V. ELIAS (1970) 1 ALL NLR 153; IMANA V. ROBINSON (1979) 3 - 4 SC 1; OBASUYI V. BUSINESS VENTURES LTD (2000) 5 NWLR (PT. 658) 668; WARNER & WARNER INTERNATIONAL ASSOCIATES (NIG) LTD V. F.H.A. (1993) 6 NWLR (PT. 298) 148; ECOBANK (NIG) PLC V. GATEWAY HOTELS (NIG) LTD (1999) 11 NWLR (PT. 627) 397; NZERIBE V. DAVE ENGINEERING CO. LTD (1994) 8 NWLR (PT. 361) 124. That in itself disentitles the 1st Respondent to the award of N500,000,000 as claimed. There is no basis for the claim or the award in the circumstances. **Per MOHAMMED MUSTAPHA, JCA (Pp. 36-38, paras. B**

PRACTICE AND PROCEDURE - TRIAL DE NOVO - Whether in a trial de novo judgment can be entered based on evidence given before a judge who was either elevated, transferred, retired, or deceased without recalling the witnesses who had given such evidence.

"Appellant sought to know in issue 1 whether Ekwo, J., who gave judgment in the case was right in determining it on the basis only of the evidence of witnesses contained in the record of proceedings conducted by his predecessor, Kolawole, J., (as he then was) who had heard the case up to address stage before his elevation to this Court. Much as I understand the position Ekwo, J., found himself in taking umbrage under Order 49 Rule 4 of the Civil Procedure Rules of this Court, the Federal High Court, I am unable to see the validity of that rule let alone how it can sustain the course he took. Order 49 Rule 4 of the Federal High Court (Civil Procedure) Rules 2019 states as follows: Where a judge is elevated, deceased, retires or is transferred to another Division and having part heard a cause or matter which is being heard de novo by another judge, the evidence already given before the first judge can be read and adopted at the hearing without the witness who had given it being recalled, but if the witness is dead or cannot be found, the onus of establishing that the witness is dead or cannot be found shall lie on the party that wishes to use the evidence. (Italics mine) As against this Rule are the provisions of Sections 46(1) and 39 of the Evidence Act 2011, a substantive statute in the Exclusive Legislative List of the 1999 Constitution (as amended) of this country. Section 46(1) of the Evidence Act 2011 reads thus: (1) Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is admissible for the purpose of proving in a subsequent judicial proceeding, or in a later state of the same judicial proceeding, the truth of the facts which it states, when the witness cannot be called for any of the reasons specified in Section 39, or is kept out of the way by the adverse party. Section 39 referenced therein states the only occasions when such evidence will be admissible in a subsequent trial. It does not cover elevation, death, retirement, transfer of, or indeed any other thing seen or unforeseen happening to the judge hearing the case. Section 39 of the Evidence Act simply says: Statements, whether written

or oral of facts in issue or relevant facts made by a person - (a) Who is dead; (b) Who cannot be found; (c) Who has become incapable of giving evidence; or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are admissible under Section 40 to 50. In the first place, in the hierarchy of Laws Rules of Court made by heads of Court are inferior to substantive statutes, like the Evidence Act in issue here, enacted by the National Assembly and signed into Law by the President of this country. That means, where there is conflict between the Legislative power of the National Assembly and the rule making power of the head of Court as it is here, the former must prevail, for the legislative power of the National Assembly cannot be subjected to the rule making power of the Head of Court. See Ezenwosu v. Ngonadi (1992) 1 NSCC 416 @ 426; Jimoh v Akande (2009) 5 NWLR (PT 1135) 549 @ 571(SC). See further Touton S.A. v. Grimaldi Compagnia Di Naviga Zioni S.P.A. (2011) 4 NWLR (PT. 1236) 1 @ 23, Touton v. G.C.D.N.Z. SPA. (2011) 4 NWLR (PT 1236) 1 @ 23 where it was said (Okoro, J.C.A., as he then was) that "it is quite trite that rules of Court cannot override the provisions of a statute on a subject matter or an issue." Closely related to and arising from that is also the constitutional issue of whether the Chief Judge of the Federal High Court can in exercise of his rule making powers legislate on admission and use of evidence in Court as he purported to do in Order 49 Rule 4 in allowing admission and use of evidence on elevation of the judge trying the case, given especially that Evidence is a matter in the Exclusive Legislative of the 1999 Constitution of this country. The answer to that will again be in the negative: See Adelaja v. Fanoiki (1990) 2 NWLR (PT 131) 137 @ 170 (S.C.) and Anagbado v. Faruk (2019) 1 NWLR (PT 1653) 279 @ 311 -312 (SC). It is of no moment that Order 49 Rule 4 of the Federal High Court (Civil Procedure) Rules 2019 is beneficial and was intended to cure a mischief; that provision itself must be lawful and constitutional otherwise it will not support what it sought to do. That much is also confirmed by the 8th May, 2020 judgment of the Supreme Court in Ude Jones Udeogu v. Federal Republic of Nigeria & 2 Ors in Appeal No. SC.622c/2019, involving former Governor (now Senator) Orji Uzor Kalu, where the apex Court struck down an equally beneficial provision of Section 396(7) of the Administration of Criminal Justice Act 2015 purporting to confer powers on judges elevated to this Court to return to the High Court to complete their part heard cases. Thirdly is whether a trial conducted in the manner it was done in this case without strict compliance with the provisions of Sections 46(1) and 39 of the Evidence Act 2011 can be called a fair trial, and a fortiori a fair hearing within the meaning of Section 36(1) of the 1999 Constitution of this country, to be countenanced by this Court. On that point, the apex Court in Francis Shanu v. Afribank (Nig.) Plc (2002) LPELR-41916 (SC); (2002) 17 NWLR (PT 795) 185 @ 225 had a lot to say while upholding the decision of this Court setting aside the judgment of Edokpayi J., of the Edo State High Court who like Ekwo J., here, on application of counsel to plaintiff in that case, relied on evidence of witnesses contained in record of proceedings of a previous trial of the case before Obi J., in determining the case before him. The apex Court with Uwaifo, J.S.C., in lead judgment, had the following very interesting treatise to give on the issue at pages 225-228 (NWLR): "Where an inquiry is commenced before one adjudicator and completed by another, the second adjudicator cannot as a rule decide upon the evidence given before the first. It is the principle that the judicial discretion which an adjudicator has to exercise in cases brought before him must be based upon the evidence taken before him, and it is not competent for him generally, to act upon evidence taken before another adjudicator unless there is a statutory provision permitting that procedure. In Re: Guerin (1888) 16 Cox CC 596 at p. 601, Wills, J., said: 'It is contrary to all my ideas and experience of justice for depositions taken before one

magistrate to be considered by another magistrate sufficient evidence to commit a prisoner upon without having seen the demeanour of the witnesses when they were giving their evidence, and so being in a position to Judge for himself of the truth of their statements.' "A trial Judge is a peculiar adjudicator. Of all Judges, the heaviest burden and responsibility of deciding a case rests with him. He normally hears a case by receiving evidence both oral and documentary from witnesses who appear before him in Court, are asked questions and cross-examined. In the process, he engages himself to see, listen to and watch them testify. Not only that, his feelings and impressions are tested from time to time upon one issue or another when, apart from listening, he watches; he takes mental note of the performance of witnesses, their demeanour in the witness box, in particular how they react to questioning and the manner they give answers. Quite often, it is this that helps the trial Judge as to who and what to believe. The witnesses are telling him what he was aware of before, the circumstances in which it happened and in respect of which both sides claim that their evidence represents the truth, and the trial Judge will have to take a decision. So if the trial judge is up to the demands of his duty, he will continue to size up the witnesses in their oral testimonies. Is a particular witness lying or prevaricating or just slow in nature, or has he a peculiar idiosyncrasy? That is for the trial Judge to determine. When there are relevant documents, they serve as the touchstone against which the oral testimony can be tested, and so much of the demeanour of a witness may not quite matter. See *Olujinle v. Adeagbo* (1988) 2 WLR (Pt. 75) 238 at p. 254. As said by Nokes in his book, *An Introduction to Evidence*, 4th edition, at pages 448-449, inter alia: 'The behaviour of witnesses in the box may materially affect their credit. The blush of nervousness or shame the gape of stupidity, the gesture of annoyance, the hesitation to answer, and a dozen other manifestations of a witness's state of mind or emotion, may affect the weight which is given to his evidence. This is primarily a matter for the Tribunal which sees the witness... Further, when the credibility of a witness is the basis of a specific finding, his demeanour, so far as it can be known, may be considered and should be balanced against the rest of the evidence.' "However, as a rule, the belief and satisfaction expressed by the trial Judge in the end would represent his reaction to, and reflection of, the facts placed before him and the manner it was done, as well as the probabilities and possibilities based on or arising from those facts and the circumstances as a whole. It is in this special position of a trial Judge that he is able to make findings on the evidence placed before him by assessing the quality of the evidence along with the facts pleaded and issues joined, giving necessary credence to or expressing doubts about witnesses by taking advantage of seeing and hearing them testify, weighing the evidence of one witness as against that of another, where appropriate, and in the end making up his mind as revealed from the imaginary scale which side is preferred. The trial Judge's performance in this regard is usually crucial to the proper determination of contentious facts. See *Ebba v. Ogodo* (1984) 1 SCNLR 372, 3 SC 84 at 98; *Atanda v Ajani* (1989) 3 NWLR (Pt. 111) 511 at 524; *Olufosoye v. Olorunfemi* (1989) 1 NWLR (Pt. 95) 26 at 37; *Adeleke v. Iyanda* (2001) 13 NWLR (Pt. 729) 1 at 20; (2001) Vol. 9 MJSC 171 at 185. "The need for a trial Judge to take evidence himself which he is to rely on to decide a matter is unarguably very vital. This was so unmistakably expressed in *R. v. Bertrand* 16 L.T. Rep. N.S. 752; (1967) L. Rep. 1 P.C. 520, that I desire to recount it here. In that case, the jury in a trial for felony having disagreed, another jury was empaneled, and a fresh trial had. On the second trial, some of the witnesses having been resworn, the evidence given by them at the first trial was read over to them from the Judge's notes, and liberty was given both to the prosecution and the prisoner to examine and cross-examine. The course so adopted was vigorously and powerfully denounced by Coleridge, J. In delivering the judgment of the Court

on appeal to the Privy Council, the learned Judge said at p. 535: "The most careful note must often fail to convey the evidence fully in some of the most important elements - those for which the open oral examination of the witness in presence of prisoner, Judge, and jury is so justly prized. It cannot give the look or manner of the witness, his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration; it cannot give the manner of the prisoner, when that has been important, upon the statement of anything of particular moment; nor could the Judge properly take on him to supply any of these defects, who, indeed, will not necessarily be the same on both trials; it is in short, or it may be the dead body of the evidence without its spirit, which is supplied when given openly and orally by the ear and eye of those who receive it." "In *Munday v. Munday* (1954) 2 ALL E.R. 667, a curious situation arose. The hearing of an application by a husband to vary an order for the maintenance of his wife which had previously been made against him was spread, owing to adjournments, over three separate days. Three Justices were present on the first day, the same three with two additional Justices on the second day, and on the third day the first three Justices were absent, and the matter was heard by the second two Justices and another Justice who had been present previously. The application was dismissed by the Justices sitting on the third day. On appeal to a Divisional Court of the Probate, Divorce and Admiralty Division it was held by Lord Merriman, P. and David J., that there must be a rehearing before an entirely new panel of Justices and a different clerk of Court, for there had been a failure to comply with the mandatory provisions of Section 98(6) of the Magistrates' Courts Act, 1952. It was also held that this was pre-eminently a case in which the principle that Justice must not merely be done but must be seen to be done, had been infringed. At page 670, Davies, J, observed inter alia: '...these three Justices who sat on Mar 3, 1954, were acting in part on evidence which none of them had heard. But, to my way of thinking, the real point is broader. Every layman would believe that all three hearings were part of the same case. Indeed, the Justices themselves in reason (iv) speak of 'the three occasions on which the complaint under review was heard' so that each is treated as a part of the hearing. It seems to me impossible that any layman could believe that justice had been done in the circumstances of the present case when three persons heard it on the first day, those three plus two others heard it on the second day, and the second plus a third and without the original three heard and determined it finally. Any member of the public would rightly think that that was no way for any legal proceedings to be conducted, and would at once come to the conclusion that no fair or proper decision could be arrived at in proceedings conducted in such a manner.'" (Italics all mine) Ejiwunmi, J.S.C., on his part concluded his contribution (at p. 242 NWLR) in the same case by pointing out that the use of Sections 46(1) and 39 of the Evidence Act 2011 (then Section 34(1) of the Evidence Act) is a 'statutory exception' to the ordinary principle in our jurisprudence that before the resolution of a conflict or any issue in the Court, the oral evidence of the parties to the conflict or issue must be heard by the judge determining the suit, with His Lordship adding further in dismissing the appeal that "I have no doubt in mind from what I have said above that Edokpayi, J., did not try the case on its merits." When confronted again with a similar trial by the same Edokpayi, J., in *A.O. Eghobamien v. Federal Mortgage Bank of Nigeria* (2002) 17 NWLR (PT 797) 488, the apex Court was quick to reconfirm its stand in *Shanu v. Afribank (Nig.) Plc.* The apex Court (Uthman Mohammed, J.S.C. in lead judgment this time) first said (@ p. 500) that evidence obtained without compliance with Section 46(1) and 39 of the Evidence Act is legally 'inadmissible' regardless of any consent of parties to admit it, and then added at @ p. 501 that: "A trial is a judicial examination of evidence according to the law of the land, given before the Court after hearing parties and their witnesses. A trial must

be conducted by the Judge himself and at the end of the hearing he will write a judgment which is the authentic decision based on the evidence he received and recorded, it is a mistrial for one judge to receive evidence and another to write judgment on it. Learned Justice Nsofor J.C.A., commenting on the judgment of Edokpayi J., had the following to say: 'Could the learned Judge, who did not see the witnesses testify and hear the witnesses testify, really, as a trial Court, rely on the silent, cold and printed record (Exhibit 9) to believe or disbelieve any witness.' "I agree entirely with Nsofor's observation. It is amazing to read the analysis of the evidence made by Edokpayi J., when he had no opportunity to look into the eyes of witnesses in order to observe their demeanour when they were giving evidence." As shown above, the aim of Sections 46(1) and 39 of the Evidence Act 2011 - (formerly Section 34(1) of the Evidence Act 2004) that formed the bedrock of the apex Court's decisions in both *Eghobamien v. Federal Mortgage Bank of Nigeria* (supra) and *Shanu v. AfriBank Plc* (supra) is the need to ensure fair trial of cases by trial Courts. It is to guard against what happened in this case and those cases. That is why it has been said repeatedly that compliance with Sections 46(1) and 39 of the Evidence Act 2011 is strict and must be proved strictly by the person wishing to rely on such evidence before the Court in a subsequent trial can admit and rely on evidence given by witnesses in a previous trial: See *Eze v. Ene & Anor* (2017) LPELR-41916 (SC), *Shanu v. Afribank Plc* (2002) 17 NWLR (PT. 795) 185 @ 237, 242; (2002) LPELR-41916 (SC) p. 42-43. That was not done in this case before Ekwo J., relied on the evidence of witnesses he did not see testify before him. His judgment therefore ought not to be allowed to stand even on the basis of issue 1 alone, which I here resolve in favour of appellant. Order 49 Rule 4 of the Federal High Court (Civil Procedure) Rules 2019, undoubtedly laudable as it is in its aim, is of no avail."

(DISSENTING) **Per BOLOUKUROMO MOSES UGO, JCA (Pp. 39-54, paras. E-D)**

MOHAMMED MUSTAPHA, J.C.A. (Delivering the Leading Judgment): This appeal is against the decision of the Federal High Court, Abuja, delivered on the 6th of May, 2020, presided by Honourable Justice I. E. Ekwo in suit No FHC/ABJ/CS/680/2008.

The Appellant was the 2nd defendant, the 1st Respondent, the plaintiff, while the 2nd Respondent was the 1st defendant.

The 1st Respondent's case at trial is that Exhibit PW1 was donated to it by its director Mr. Christian Ojorovwu Ogodo, through a power of attorney, Exhibit PW5; and the 2nd respondent violated its copy right when it granted approval for a similar program to a third party to work on its copyright, when it allowed the appellant to broadcast a similar program without permission of the 1st respondent.

By its amended statement of claim the plaintiff, now 1st respondent sought the following reliefs at trial:

- a. A DECLARATION that the approval by the 1st Defendant of the program called "ZAIN AFRICAN CHALLENGE" in favour of the 2nd Defendant is an infringement of the copyright of the Plaintiff in respect of the said program.
- b. AN ORDER compelling the 1st Defendant whether by themselves or officers, agents, servants, privies or otherwise, howsoever to endorse and approve the program called "UNIVERSITY CHALLENGE" in favour of the Plaintiff.

c. AN ORDER of perpetual injunction restraining the 2nd Defendant whether by themselves or officers, agents, servants, privies, or otherwise howsoever from producing, airing, marketing or exercising any right in respect of the program called ZAIN AFRICAN CHALLENGE."

d. AN ORDER of perpetual injunction restraining the 1st Defendant whether by itself, or officers, agents, servants, privies, or otherwise howsoever from approving or registering any other program similar to "University Challenge" or which will infringe on the copyright of the Plaintiff over the said program.

e. An order compelling the Defendants jointly and severally to pay the plaintiff the sum of N500,000,000.00 (Five Hundred Million Naira) as special damages for the infringement of the Plaintiff's copyright.

f. AN ORDER compelling the 2nd Defendant to pay the Plaintiff the sum of N200,000,000.00 (Two Hundred Million Naira) as general damages for airing the program titled Zain African Challenge" in Nigerian television which infringes on the right of the Plaintiff.

g. AN ORDER compelling the Defendants jointly and severally to pay the Plaintiff the sum of N3,000,000.00 (Three Million Naira) being the cost of this action.

The trial Court in its judgment found in favour of the 1st Respondent. This appeal is against the judgment of the trial Court, by the notice of appeal filed on the 16th of June, 2020 on the following grounds shorn of their respective particulars:

GROUPS OF APPEAL

GROUND 1:

The learned trial Judge erred in law and thereby occasioned a serious miscarriage of justice when he wrote and delivered a Judgment in this case when he did not have jurisdiction to do so, having not heard any of the witnesses that gave evidence in the suit.

GROUND 2:

The learned trial Judge erred in law when he, without having had the opportunity of hearing and observing PW1 who testified for the Plaintiff and DW2 sole witness for the 2nd Defendant, went ahead to deliver Judgment based on proceedings which were conducted and presided over by another Judge without complying with the mandatory provisions of Order 20 Rule 18 of the Federal High Court (Civil Procedure) Rule 2019 and Section 39 of the Evidence Act 2011 Cap. E14 LFN 2004 (Revised Edition) .

GROUND 3:

The learned trial Judge erred in law when in his judgment, he wrongly identified or formulated the issue between the Plaintiff and the 2nd Defendant thus:

"On the case between the Plaintiff and the 2nd Defendant, the issue is whether the Plaintiff has sufficiently proved the infringement of its copyright of Nigeria Universities Challenge' in this suit to entitle it to the claims before the Court? The plaintiff had referred this Court to Section 1 (1) and (2) (a) and (b) of the Copyright Act. "

and thus, assumed from the outset that the Plaintiff had proved its entitlement to copyright over the subject matter of the dispute and this occasioned a serious miscarriage of justice.

GROUND 4:

The learned trial Judge erred in law when in his Judgment he held thus:

"I can see from Exh. 1 that the Plaintiff on 8th October 2007 requested for collaboration with the 1st Defendant on the production of Television program 'Nigeria University Challenge'. On paragraph 3, page 2 of Exh. 1, the Plaintiff stated that the collaboration with the 1st Defendant was to organize the first ever Academic Quiz Program on television for all NUC accredited Universities/Degree Awarding Institution'. I have also seen from Exh. 2 tendered by the Plaintiff P.W1 registered copyright ownership of literary work titled 'University Challenge' on 10th June, 2008 with NCC and by Exh. 5 P.W1 donated the copyright by Irrevocable Power of Attorney dated 11th June, 2008 to the Plaintiff. It is in evidence that the 1st Defendant by Exh. 3 dated 10th July, 2008 informed the Plaintiff 'that approval had already been granted another company for a similar program. Going by Exh. 4 dated 19th September, 2008 the 1st Defendant informed the Plaintiff' concerning the issue of intellectual property that the 1st Defendant's (sic) stands by its decision 'to endorse Zain Nigeria for "Zain African Challenge" program: I can see that the other case of the Plaintiff here is that the 1st Defendant backdated the approval given to the 2nd Defendant so as to make it appear as if the 2nd Defendant was the first in time to apply to the 1st Defendant. The Plaintiff avers that the 2nd Defendant infringed on its copyright by plagiarizing literal work titled 'University Challenge' and naming its own as "Zain African Challenge". And airing same on terrestrial broadcast stations, that is and NTA The Plaintiff has established by Exh. 2 that the copyright to literary work titled "University Challenge" was registered with NCC on 10th June, 2008. This evidence has neither been controverted nor rebutted. The Plaintiff has established by Exhs, 1, 3 and 4 that it made proposal to the 1st Defendant for collaboration on television program but the 1st Defendant in turn gave the broadcasting right to the 2nd Defendant for its program titled 'Zain African Challenge' which was copied from the plaintiff's work by the 2nd Defendant and the program had been aired on AIT and NTA. This has not been rebutted. I have studied the content of Exh. 2 which is the certificate of copyright ownership given to the Plaintiff by the NCC upon the registration of the said copyright. It can be safely said that going by the Exh. 2 that the Plaintiff's copyright ownership belongs to the category of works stated in Section 1 (1)(a) of the Copyright Act as literary work entitled for copyright protection. Going by Exh. 1, I can see that sufficient effort has been expended on making the work to give it an original character in Nigeria. It must be stated that it is registration by NCC that qualifies a person to the exercise of copyright ownership in Nigeria as stated in Section 2(1)(i) of the category of work which the copyright is granted."

GROUND 5:

The learned trial Judge erred in law when he held thus:

"It is a person who has registered copyright in Nigeria that can exercise all the rights that accrue to that registration exclusively. It is in that regard that it must be stated that any other person seeking to use any work to which there is copyright ownership can only do so by express permission of the owner of the copyright. I also find by Exhs. 1 and 4 that there is similarity between "Nigerian Universities Challenge" proposed by the Plaintiff to the 1st

Defendant for the 2nd Defendant as both are program quiz competition between tertiary students. In fact, the 1st Defendant admitted this much in paragraph 2 Exh 3

I find that the evidence of P.W1 and Exhs P.W1, 2, 3 and 4 have not been challenged by the 2nd

Defendant, therefore, the Plaintiff has established its case".

and this occasioned a serious miscarriage of justice.

GROUND 6:

The learned trial Judge erred in law when, after Exhibits D2B, D3, D4 and D4A were admitted during trial, after a considered ruling by Kolawole J., turned round in his Judgment to hold that the said exhibits be expunged and held thus:

"However, there are two things to be said concerning Exhs. D2B, D3 and D4 and D4A tendered by the 2nd Defendant. The first is that the 2nd Defendant there is no averment in the entire Exh. D2A which put the deponent as the receiver or sender of Exhs. D2B, D3 and D4 and D4A to buttress the fact that Exhs. D2B, D3 and D4 and D3A was (sic) stored in the computer in the ordinary course of business of the deponent or the 2nd Defendant. There is no nexus between the deponent and the 2nd Defendant with Exhs. D2B, D3 and D4 and D4A, What the deponent did was to visit the internet site containing these documents, downloaded them and tendered same through the deponent of Exh. D2A. This amounts to documentary hearsay. Documentary hearsay arises when a person who is not the author or signatory or privy to a document seeks to prove its content by oral or other secondary evidence...

No impression should be given to anybody that he can log into the internet site of anybody, download the documents therein and tender same whimsically as computer generated documentary evidence. In my opinion, Exhs. D2B, D3 and D4 was (sic) wrongly admitted and can be expunged from the records of this Court".

and this occasioned a serious miscarriage of justice.

GROUND 7:

The learned trial Judge erred in law when he held concerning the exhibits tendered by the 2nd Defendant thus:

"The other issue with Exhs. D2B, D3 and D4 and D4A is that they have not by any stretch challenged the case of the plaintiff. In other words, the exhibits have not challenged the Plaintiffs case of ownership of the copyright (EXh.2) of the "Universities Challenge" which the 2nd Defendant copied and titled ZAIN AFRICAN CHALLENGE'. For the avoidance of doubt, Exhs. D2B, D3 and D4 and D4A do not establish copyright ownership of 'Zain Africa Challenge' in Nigeria or dispel the fact that the concept of Zain African Challenge' is not similar to that of the Plaintiff's

'Universities Challenge' which ownership of copyright belongs to the Plaintiff. Furthermore, by tendering Exhs. D2B, D3 and D4 and D4A. I am tempted to think that the 2nd Defendant

do not understand the case of the Plaintiff. Upon the evaluation that I have made I cannot therefore place any probative value on Exhs. D2B, D3 and D4 and D4A"

and thus occasioned a miscarriage of justice.

GROUND 8:

The learned trial Judge misdirected himself in law when he held that:

"The law is that the exercise of copyright in a work in Nigeria is the exclusive right of the owner to control the reproduction of the work going by Section 6(1)(a)(i) and (viii) of the Copyright Act . The defence of the 2nd Defendant has not taken care of the fact that the work of the Plaintiff was reproduced by them in material form and that the 2nd Defendant made adaptation of the literary work of the Plaintiff which the 2nd Defendant aired as its own program on AIT and NTA in Nigeria. This is a clear case of infringement of the copyright of the Plaintiff as contained in Exh.2."

GROUND 9:

The learned trial Judge erred in law when he granted the claims of the Plaintiff and awarded a sum of N500,000,000.00 (Five Hundred Million Naira) as special damages when there were no pleadings/Particulars and evidence before the Court to warrant or support the grant.

GROUND 10:

The learned trial Judge erred in law when he awarded the sum N3,000,000.00 (Three Million Naira) as cost against the Defendant when there exists no basis for the award of such, and none was actually given by the Judge.

GROUND 11:

The decision of the trial Court is against the weight of evidence.

From these grounds of appeal, the following issues were formulated for determination by Rotimi Oguneso Esq., SAN in the brief filed on behalf of the appellant on the 2nd day of September, 2020:

ISSUES FOR DETERMINATION

1. Having regard to the circumstances of this case and the stage at which the learned trial Judge took over the proceedings was the learned trial Judge right to have proceeded to deliver judgment in the matter without first ordering a hearing of the matter de novo Ground 1 & 2.
2. Whether the learned trial Judge Ekwo J., was correct when in its judgment, he expunged Exhibits D2B, D3, D4 and D4A which exhibits had been previously admitted by Kolawole J., after the latter had delivered a considered ruling admitting same. (Ground 6)
3. Whether having regard to the facts of this case, the learned trial Judge Ekwo J. correctly identified where the burden of proof lies and whether by its approach, this has not occasioned a miscarried of justice (Ground 3)

4. Whether the learned trial Judge was right when in his consideration and evaluation of the case of the parties, held that the Plaintiff has proved its case and that the Defendants have infringed on the Plaintiff's copyright and consequently entered judgment in favour of the Plaintiff. (Ground 4, 5, 7 and 8)

5. Whether having regard to the pleadings and evidence before the Court, the learned trial Judge was right when he granted in favour of the Plaintiff special damages to the tune of N500,000,000 (Five Hundred Million Naira) and N3,000,000 (Three Million Naira) as costs. (Grounds 9 and 10).

Okechukwu C Uju-Azorji Esq., of counsel for the 1st Respondent formulated the following issues of his own for determination by this Court:

1. Whether Honourable Justice I. E Ekwo while hearing suit No: FHC/ABJ/CS/680/2008 DE NOVO, was right in reading and adopting the evidence already given before G.O Kolawole, J (as he then was), without the witnesses being recalled, in view of Order 49 Rule 4 of the Federal High Court (Civil Procedure) Rules, 2019 and in the entire circumstances of this appeal?

This issue is distilled from Grounds 1 and 2 of the Notice of Appeal filed 16/06/2020.

2. Whether the learned trial judge, Ekwo, J was right in holding that he would not attach any probative value to Exhibits D2B, D3, D4, and D4A, after same were earlier on admitted in evidence by the Court?

This issue is distilled from Ground 6 of the Notice of Appeal filed 16/06/2020.

3. Whether the 1st Respondent/Plaintiff sufficiently proved the infringement of its copyright in 'Nigerian Universities Challenge' to entitle it to the judgment of the Court?

This issue is distilled from Grounds 3, 4, 5, 7 and 8 of the Notice of Appeal filed 16/06/2020.

4. Whether in an action for infringement of copyright, special damages must be particularized and proved?

This issue is distilled from Grounds 9 and 10 of the Notice of Appeal filed 16/06/2020.

The 2nd respondent did not formulate issues, but relied on those formulated for the appellant. The appeal will be decided on the issues formulated on behalf of the 1st respondent, not least because the said issues aptly suffice for the determination of this appeal:

ISSUE ONE:

Whether Honourable Justice I.E Ekwo while hearing suit No: FHC/ABJ/CS/680/2008 DE NOVO, was right in reading and adopting the evidence already given before G. O Kolawole, J (as he then was), without the witnesses being recalled, in view of Order 49 Rule 4 of the Federal High Court, (Civil procedure) Rules, 2019 and in the entire circumstances of this appeal?

It is submitted for the appellant that the trial judge who did not participate in the trial of the matter, is not qualified to deliver judgment on same. See *BASSEY EDIBI V THE STATE* (2009) LPELR-8702-CA and *SOKOTO STATE GOVT V KAMDEX* (2007) LPELR-3093-SC.

That the judgment of the trial Court delivered by EKWO J., is not in consonance with the provisions of Section 294 of the 1999 Constitution, as his Lordship had no jurisdiction to deliver judgment in a matter that he did not hear the witnesses. That even though parties did not object to the procedure whereby 1st respondent's application of the 4th of September, 2019 before Ekwo J., granted leave to the parties to rely on the existing record of proceedings in the continuation of the suit before the Court; the parties cannot by consent confer jurisdiction to the Court where the Court lacks jurisdiction. See *FAM-LAB NIG LTD & ANOR V JAHMARCO NIG LTD & ANR* (2018) LPELR-44730-CA; *MOBIL PROD NIG LTD & ANR V MONOKPO* (2003) 18 NWLR part 852 page 356 and *OKOLO V UBN LTD* (2004) 3 NWLR part 859 page 87.

That from the facts, there is nothing on record to show that Ekwo J., ordered trial de novo, and there is nothing also to show that the witnesses were dead or could not be found to enable the Court reach a decision, that their presence can be dispensed with, and the evidence previously given by witnesses can be adopted without the necessity of calling the witnesses in compliance with the provisions of Order 49 Rule 4 of the Federal High Court, Civil Procedure Rules 2019.

That also Section 39 of the Evidence Act, 2011 requires that before the evidence of a person not before the Court can be used, it has to be shown that he is dead, cannot be found, the person is incapable of giving evidence or the person's attendance in Court cannot be procured without delay or incurring expense which is unreasonable.

That there was nothing to show compliance with Section 39 of the Evidence Act; the learned trial judge was therefore wrong in making use of the previous evidence in the circumstances of the case.

It is submitted for the 1st respondent in response that by the provisions of Order 49 of the Federal High Court Civil Procedure Rules 2019 to succeed in this line of argument, the aggrieved party must demonstrate how such procedure occasioned a miscarriage of justice, since the Rules allow for another judge hearing the matter de novo to read and adopt such earlier proceedings.

That the trial Court did indeed order a trial of the matter de novo from pages 1173 to 1175 of the record of appeal. The 1st respondent as plaintiff filed an application on the 28th of March, 2019 pursuant to Order 49 Rule 4 of the Rules of Court praying for leave for parties to rely on existing records of proceedings in continuation of the suit, as shown by pages 793 to 798 of the record; without objection from counsel.

That what invokes the jurisdiction of the Court is the elevation, death, retirement or transfer of the judge, not the death or non-availability of the witness; and also that the level of proof required in *BASSEY EDIBI V STATE* (2009) LPELR-8702-CA is beyond reasonable doubt because it is a criminal case, that is why this Court held that a judge who did not conduct the entire trial cannot write or deliver judgment; while the case at hand is a civil case, where proof is on balance of probabilities.

RESOLUTION OF ISSUE ONE:

Order 49 Rule 4 of the Federal High Court Civil Procedure Rules, 2019 states as follows:

"Where a judge is elevated, deceased, retires or is transferred to another division and having part heard a cause or matter which is being heard de novo by another judge, the evidence already given before the first judge can be read and adopted at the hearing without the witness who had given it being recalled, but if the witness is dead or cannot be found, the onus of establishing that the witness is dead or cannot be found shall lie on the party that wishes to use the evidence."

This Order is clearly a child of necessity; its objective is clearly to cure unfortunate incidents, where, after years of trial, a judge hearing a case gets transferred, elevated or dies, as a consequence of which the case suffers, and parties and counsel in such cases have to suffer the indignity of starting such part heard matters all over again, before another judge, thus creating unimaginable problems, that may ultimately lead to injustice.

This provisions is not in conflict with any Order of Court or the Evidence Act, particularly Orders 19 , 20 and 22 complained of; and it is clear also that Section 46 of the Evidence Act which learned counsel relied on to pillory Order 49 Rule 4 is particularly triggered on death of a witness or where such witness cannot be procured without unreasonable delay or expense; while the jurisdiction of the trial Court is invoked by elevation, retirement or transfer and not death or non-availability of a witness.

In the circumstances therefore, the trial Court was perfectly in order, in granting the application dated 4th September 2019, brought pursuant to Order 49 Rule 4 of the Federal High Court Civil Procedure Rules 2019, on the 6th of November, 2019.

It is important, at the risk of prolixity, to stress that from the records of the trial Court at pages 793 to 798 the 1st respondent as plaintiff filed an application pursuant to Order 49 Rule 4 of the Rules of the Federal High Court , on the 28 of March, 2019, praying for leave of Court to rely on exiting record of proceedings in continuation of the trial, and also on the 4th of September, 2019.

On the 24th of September, 2019, learned counsel for the 1st respondent withdrew the motion of the 28th of March, 2019 and applied to argue the application of the 4th September, 2019, without objection, as a consequence of which the application was argued and granted.

From the clear provisions of Order 49 Rule 4 , in civil proceedings, when a judge is elevated, deceased or retires or transferred, an application could be brought before another judge who is hearing the matter de novo to adopt the evidence already before the first judge.

I agree with learned counsel for the 1st respondent that the authority of *BASSEY EDIBI V STATE* supra referred to by learned counsel is distinguishable from the case at hand, because the proof required therein is in the category of 'beyond reasonable doubt', because it is a criminal case, while the case at trial in this case is civil, which requires proof on the balance of probabilities.

Hearing de novo does not mean a retrial; a hearing de novo in the context of Order 49 Rule 4 only requires for a hearing on the evidence adopted already before the trial. The evidence does not change, what changes is the judge, who has now taken the place of the one

elevated, transferred, retired or deceased; and the sole objective of this procedure is to avoid the undue delay likely to occur when the case is heard all over again by calling fresh evidence.

That being the case, the trial Court was right in adopting the evidence already recorded and delivering judgment in accordance with Order 49 Rule 4; it is for these reasons that I now resolve this issue in favour of the 1st respondent, against the appellant.

ISSUE TWO:

Whether the learned trial judge, Ekwo, J., was right in holding that he would not attach any probative value to Exhibits D2B, D3, D4, And D4A, after same were earlier on admitted in evidence by the Court?

It is submitted for the appellant that the trial Court was wrong to have held that Exhibits D2, D3, D4 and D4A are documentary hearsay wrongly admitted on the Ground that there is no nexus between the witness and the documents, on the basis that every computer generated document should have a separate certificate of compliance.

That the trial Court was wrong to have expunged the said exhibits after they were admitted, because the admission of the documents is a decision that cannot be revisited except on appeal. See *NWOSU V UDEAJA* (1990) 1 NWLR part 125 page 188.

That also a Court of coordinate jurisdiction cannot overrule the other especially as the exhibits constituted the cornerstone of the defence, showing that the work in question did not belong to the 1st respondent, to constitute copyright.

It is submitted for the 1st respondent in response that the issues for determination in *NWOSU V UDEAJA* supra were not about expunging wrongly admitted documents and so should not be an authority in the manner argued by earned counsel; and that wrongfully admitted evidence can be expunged from the records; *SURAKATU V ADEKUNLE* (2019) LPELR-46412-CA.

That the trial Court did indeed look at the evidence and decided not to attach probative values to them after evaluating them as there is no categorical expunging of the documents by the trial Court.

The trial Court was at liberty to determine what weight to attach to the documents at the appropriate stage, not at the interlocutory stage. See *ADENUGA V ODUMERU* (2003) 8 NWLR part 821 page 187.

RESOLUTION OF ISSUE TWO

Exhibits D2B, D3, D4 and D4A are computer generated documents which the appellant tendered before Justice Kolawole, objections to the admissibility of the exhibits were overruled, and the documents admitted. However, Hon. Justice Ekwo thought differently, and held the exhibits to have no nexus with the 2nd defendant, the witness through whom they were admitted, and that they were essentially documentary hearsay.

It is important at this juncture to point out that DW2 had stated while testifying on oath that he personally downloaded all the exhibits in issue; see page 874 to 879 of the record of appeal.

I am not convinced by learned senior counsel for the appellant's argument that the documents cannot be revisited except on appeal because if they were inadmissible, but were nonetheless admitted wrongly, it is within the powers of the trial Court to expunge them. Wrongly admitted evidence cannot be converted to legal evidence, as such the Court has a duty to expunge it from the record, because such evidence is regarded non-existent evidence, to all intents and purposes. It is as good as not tendered or not admitted at all; and any finding based on such inadmissible wrongly admitted evidence would be regarded as perverse. See *AGBAJE V. ADIGUN* (1993) 1 NWLR (PT. 269) 261 AT 272; and the trial Court cannot be said to be *functus officio* in expunging such exhibits. See *OWOR V CHRISTOPHER & ORS* (2008) LPELR-4813-CA.

Having said that, the trial Court rejected the exhibits on account of not having a nexus with DW2 but the record does indeed show a connection between the said exhibits and the DW2, who had them admitted through him, contrary to the conclusion reached by the trial Court.

It is equally contradictory for the trial Court to expunge the said exhibits and turn around in the same vein to say that: "upon the evaluation that I have made, I cannot therefore place any probative value on Exhibits D2B, D3, D4, and D4A"; because once expunged, the documents should remain expunged for all times. The trial Court cannot evaluate expunged evidence much less place any probative value on them.

At this juncture, this Court is compelled to agree with learned senior counsel for the appellant that the exhibits in question constitute what the appellant had hoped to use at trial as its defence against the claim that the 1st respondent's copyright were infringed upon; denying the appellant the use of the exhibits is clearly a miscarriage of justice in the circumstances.

It is for these reasons that I now resolve this issue in favour of the appellant, against the 1st respondent.

ISSUES THREE:

Whether the 1st Respondent/Plaintiff sufficiently proved the infringement of its copyright in Nigerian Universities Challenge to entitle it to the judgment of the Court?

It is submitted for the appellant that the trial Court did not avert its mind to the state of pleadings between the parties. That the appellant did not concede that the 2nd respondent is entitled to any copyright; the trial Court simply assumed that the 1st respondent had proved its entitlement to copyright.

That according to the copyright Act, a party claiming copyright has a burden to prove originality, i.e. such party must have expended sufficient effort on the work to give the work an original character, by giving evidence to show the labour and skill that have gone into the work. See *FOOTBALL LEAGUE LTD V LITTLEWOODS POOLS LTD* (1959) 2 ALL ER 546; *LADBROOKE (FOOTBALL) V WILLIAM HILL* (1964) 1 ALL ER 465 and *EXPRESS NEWSPAPERS PLC V LITTLEPOOL DAILY POST* and *ECHO* (1985) 3 ALL ER 680.

That the trial Court elevated Exhibit 2 to the status of evidence of copyright ownership as there is no provision for registration under copyright, unlike trademarks, designs and patents. That also the issuance of notification of copyright by the national copyright commission does not ipso facto confer copyright on the 1st respondent.

That the trial Court failed to avert its mind to the facts, otherwise it would have found that the work which the 1st respondent claimed copyright in respect of does not belong to it, because it is work that is already well known, as evidence of DW2 and Exhibits D2B, D3, D4 and D4A have shown.

That contrary to the findings of the trial Court, the copyright Reciprocal extension Order 1972 made pursuant to the 1970 ACT included Britain and the United Kingdom amongst those countries whose works will enjoy reciprocal protection.

It is what weighed on the mind of the trial judge is the fact that Exhibit D2B, which infringes on the submitted for the 1st respondent in response while referring to ADENUGA V ILESANMI (1991) 5 NWLR part 189 that literary work irrespective of literary quality includes novels, stories, and poetical works, plays, stage directions, film scenarios, broadcasting, choreographic works, computer programs, textbooks, treatises, histories, biographies etc. etc.; and the 1st respondent's 'Nigeria universities challenge' qualifies as literary, artistic work and broadcast eligible for protection.

That the 1st respondent's work is peculiar to the author and no other intellectual work has its exact words except they were copied from exhibit PW1; and also that the appellant did not deny airing educational television program involving university students who face each other in a competition, with questions, and time allotted, with marks for correct answers.

That copyright of the 1st respondent does not contain Zain, Econet, Celtel or Airtel in its execution clauses.

Also that the distinction sought to be drawn between registration and notification is of no moment because registration of rights is for the purpose of notice to infringers that a right exists and in the case of copyright the law requires notification with certificates given. That there was no evidence at trial that university challenge belonged to any other person other than the 1st respondent.

That even if there is some British university challenge and Zain Africa challenge, non-had been shown by the appellant to have been registered with Nigerian copyright commission to enjoy the protection of this Court. See SMITHKLINE BEECHAM PLC V FARMEX LTD (2010) 1 NWLR part 1175 page 285.

RESOLUTION OF ISSUES THREE

The reliefs sought at trial, quoted extensively in this judgment, attest to the fact that the suit at trial is a declaratory action; the first relief sought is:

"a declaration that the approval by the 1st defendant of the program called Zain Africa challenge in favour of the 2nd defendant is an infringement of the copyright of the plaintiff in respect of the said program."

This relief clearly defines the action from the onset as declaratory in nature. That being so, and in any event, because the plaintiff/1st Respondent sought declaratory reliefs by way of remedy, it is saddled with the burden of proving same, and not rely on the weakness of the appellant's case if any. Granted, the law is trite that unchallenged evidence is deemed admitted, and evidence admitted need no further proof. For that reason, a plaintiff may take advantage of the weakness of the defendant's case as much as it supports his own case, in proof of same. See *ONOGWU V. STATE* (1995) 6 NWLR PT. 401 PG. 276, *ODUNSI V. BAMGBALA* (1995) 1 NWLR PT. 374 PG. 641.

Be that as it may, this position of the law admits certain exceptions. One of which is that Courts do not grant declaratory reliefs as a matter of course in default of defense or admission of the adverse party, without considering the evidence and being satisfied with same. The burden of proof on the plaintiff/1st Respondent to establish its entitlement to the declaratory reliefs being sought is not removed by the admission or failure of the defendant to defend. In other words, the burden is on the party seeking a declaratory relief to establish his claim by satisfactory evidence. See *DUMEZ NIG. LTD. V. NWAKHOBA* (2008) 18 NWLR PT. 1119 PG. 361, *WALLERSTEINER V. MOIR* (1974) 3 ALL ER 217, *CHUKWUMAH V. SHELL PETROLEUM* (1993) 4 NWLR PT. 289 PG. 512.

This principle of law it should be understood, applies even where there is admission of the Plaintiffs case by the Defendant. See *CPC v. INEC* (2011) LPELR-8257(SC).

In regard to the question of whether the 1st Respondent's copyright was infringed or not, it is important at this stage to have recourse to the Copyright Act, 2004 which provides at Section 1 that: (1) "subject to this section, the following shall be eligible for copyright-

a) Literary work;

b) Musical work;

c) Artistic work;

d) Cinematograph films;

e) Sound recordings;

f) Broadcasts.

(2) A literary, musical or artistic work shall not be eligible for copyright unless -

a) Sufficient effort has been expended on making the work to give it an original character;

b) The work has been fixed in any definite medium of expression now known or later to be developed, from which it can be perceived, reproduced or otherwise communicated either directly or with the aid of any machine or device.

(3) An artistic work shall not be eligible for copyright, if at the time when the work is made, it is intended by the author to be used as a model or pattern to be multiplied by any industrial process.

(4) A work shall not be ineligible for copyright by reason only that the making of the work or the doing of any act in relation to the work involves an infringement of copyright in some other work"; and in Section 14 (1) as follows:

(1) "copyright is infringed by any person who without the license or authority of the owner of the copyright:

(a) Does or causes any other person do an act, the doing of which is controlled by copy right."

This is not about whether the 1st respondent's work is eligible for protection or not, or whether it satisfies the requirements of the Act for protection, as learned counsel for the first respondent contends; it is about whether there was indeed an infringement of the works of the 1st respondent.

I am convinced by the submission of learned senior counsel to the appellant that the trial Court fell into the error of assuming, wrongly, by relying on Exhibit 2, that the 1st respondent's copy right was infringed upon. This assumption is not borne out by the pleadings.

There is nowhere in the pleadings where the appellant even by implication admitted that the 1st respondent was entitled to copyright protection.

I fail to see how the synopsis of Exhibit PW1 alone can be said to be proof of originality or peculiarity as contended. Those words alone do not by any stretch of imagination qualify the work as original, to the extent of suggesting that, no other intellectual work apart from those of the 1st respondent has those words. To hold so is farfetched.

The proof of whether the work is original or not is on the 1st respondent, because the law is settled that a plaintiff who claims copyright bears the burden of establishing the right through its originality, which in the context of Section 1 (2) requires proof of expended sufficient effort and skill on the work to give it the distinct character that will stand it out; the authority of FOOTBALL LEAGUE LTD V LITTLEWOODS POOLS LTD supra cited supports this view.

In the circumstances therefore, originality cannot be presumed. The 1st respondent has the burden of not only averring to facts, but also leading evidence in proof, not least because the appellant has contested its claim; as such the finding by the trial Court, that: "going by Exhibit 1, I can see that sufficient effort has was expended on making the work to give it an original character" is not supported by the evidence before the trial Court.

Now proof of infringement of the copyrights of the 1st respondent cannot be inferred simply on the non-inclusion of the words Zain, Econet, Airtel or Celtel simpliciter in the execution clauses of Exhibit D2B, as contended; and the categorization of Exhibits D2B, D3, D4 and D4A as mere documentary hearsay by the trial Court on that failing misses the point in view of the evidence of DW2 through whom they were tendered.

Strictly speaking, it is not a question of whose copyright or work deserves protection as contended for the 1st Respondent, what counts rather is, whether the 1st Respondent's claim of copy right has been proved to deserve protection. Nothing compels the Appellant or anyone to register their work, because there is no compulsion in registration of copyrights. It is not the Appellant's place to show or prove that the 1st Respondent's work is different, but

for the 1st Respondent, as plaintiff, seeking declaratory reliefs, to establish that the work infringed its copyright by being the same with its own registered work in every material particular.

It is for these reasons that I now resolve this issue in favour of the Appellant, against the 1st Respondent.

ISSUE FOUR:

Whether in an action for infringement of copyright, special damages must be particularized and proved?

It is submitted for the appellant that where a party claims special damages in copyright, he has a duty to plead the particulars of special damages and lead evidence in proof.

See *DUMEZ NIG LTD OGBOLI* (1972) 3 UILR 306.

That the 1st respondent did not plead or lead evidence on special damages, it merely claimed N500,000,000 as special damages, and the trial Court was therefore wrong to have awarded the claim.

That also the award of N3,000,000, as cost was an exercise of discretion gone awry. See *NBCI & ANOR V ALFIJIR MINING NIG LTD* (1999); as there was no basis for the award of as cost.

In response, it is submitted for the 1st Respondent that in a claim for infringement of intellectual property rights damages are at large, that once infringement is proved, the claim ought to be granted automatically. See *PLATEAU PUBLISHING LTD V ADOPHY* (1986) 4 NWLR part 34 page 205.

That intellectual property rights are a special breed, the loss of which monetary claims cannot assuage, because it is permanent harm to the copyright owner.

That the trial Court was right in awarding the claim because the law is that where there is a right there is a remedy. See *ARULOGUN V COP LAGOS & ORS* (2016) LPELR-40190-CA.

That also the award of cost of N3,000,000 is not outrageous in the circumstances, because cost follows events; and this Court ought not to interfere with the exercise of discretion of the trial Court.

RESOLUTION OF ISSUE FOUR

It is very important to bear in mind that there are two types of costs, and care must be taken not to confuse one with the other. The two distinct types of cost are costs awarded according to settled judicial principles, and costs awarded in the exercise of discretion, on particular facts.

Whereas an appeal lies in respect of the former, which is the exercise of judicial discretion, there is no appeal in respect of the latter, even from the erroneous exercise of such discretion. This is so, because this exercise of discretion is based on the private opinion of the Judge. A judicial discretion must be exercised on fixed principles, and according to rules of reason and justice. The exercise of discretion in this sense must be justifiable. See *UBA*

LTD V STAHLBAU GMBH & CO. KG (1989) LPELR-3400-SC AND SHARPE V. WAKEFIELD (1891) A.C. 173 RITTER V. GODFREY (1920) 2 K.B.47.

It is important also not to lose sight of the fact that in both cases there is the undeniable exercise of discretion, regardless of the thin distinction that appears between the two. That being so, it is safer not to interfere with the exercise of judicial discretion, especially where it is exercised judicially and judiciously, except for compelling reasons. See ANYAH VS A.N.N LTD (1992) 6 NWLR (PT.247) 319 AT 323, 334. Having found, in its considered opinion, rightly or wrongly, that the claims of the plaintiff succeeded, then cost followed events, as the trial Court saw it. That being so, the exercise of discretion, as it were, is beyond reproach.

Now, having said that, the issue of the award of N500,000,000 is a different thing all together notwithstanding the fact that the position of the law that damages are at large in matters of infringement of copyright. See PLATEAU PUBLISHING LTD V ADOPHY (1986) 4 NWLR part 34 page 205. I do not subscribe to the contention that because damages are at large in matters of infringement of copyright, the claim of the 1st Respondent ought to be automatically granted without question, even if damages are at large, whatever is claimed cannot just be awarded automatically without proof, especially where declaratory reliefs are sought. It will be absurd to do so under any guise. Proof is intrinsic to every claim of special damages; it is inconceivable to award special damages on a whim as submitted for the 1st respondent.

Special damages must be strictly proved. There is no two ways about that. In proving special damages, credible evidence must be led in support, notwithstanding the rule that pleadings or evidence which is unchallenged or uncontroverted could amount to proof. This is so because special damages are such that the law will not infer from the nature of the act. They do not follow in the ordinary cause of events. They are exceptional in character and therefore they must be claimed specifically and proved strictly. See ALHAJI OTARU & SONS LTD V. IDRIS (1999) 6 NWLR (PT. 606) 330; IJEBU-ODE LG V. ADEDEJI BALOGUN & CO. LTD (1991) 1 NWLR (PT. 166) 136; ODULAJA V. HADDAD (1973) 11 5C 357.

In order to discharge the burden the 1st Respondent in this case must show by credible evidence that it is indeed entitled to the award. No such thing was done in this case. I am in total agreement with learned senior counsel for the Appellant that the amended statement of claim of the 1st Respondent at pages 286 to 290 of the record of appeal, as well as the witness deposition of PW1 at pages 291 to 295 of the record of appeal shows that the 1st Respondent did not plead or lead evidence on special damages. See HEALTH CARE PRODUCTS (NIG) LTD V. BAZZA (2004) 3 NWLR (PT. 861) 582; NB PLC V. ADETOUN OLADEJI (NIG) LTD (2002) 15 NWLR (PT. 791) 589; OSHINJINRIN V. ELIAS (1970) 1 ALL NLR 153; IMANA V. ROBINSON (1979) 3 - 4 SC 1; OBASUYI V. BUSINESS VENTURES LTD (2000) 5 NWLR (PT. 658) 668; WARNER & WARNER INTERNATIONAL ASSOCIATES (NIG) LTD V. F.H.A. (1993) 6 NWLR (PT. 298) 148; ECOBANK (NIG) PLC V. GATEWAY HOTELS (NIG) LTD (1999) 11 NWLR (PT. 627) 397; NZERIBE V. DAVE ENGINEERING CO. LTD (1994) 8 NWLR (PT. 361) 124. That in itself disentitles the 1st Respondent to the award of N500,000,000 as claimed. There is no basis for the claim or the award in the circumstances.

It is for these reasons that I now resolve this issue in favour of the Appellant, against the Respondent.

Having resolved issue one in favour of the 1st Respondent, against the Appellant; issues two, three and four in favour of the Appellant, against the 1st Respondent, the appeal is meritorious and accordingly succeeds. Judgment of the trial Federal High Court in suit No FHC/ABJ/CS/680/2008 of the 6th day of May 2020 is hereby set aside.

Parties to bear their respective costs.

STEPHEN JONAH ADAH, J.C.A.: I have had the benefit of reading in draft the Judgment just delivered by my learned brother, Mohammed Mustapha, JCA.

I am in full agreement with the reasoning and the conclusion which I adopt as mine. The appeal is allowed. the Judgment of the lower Court in Suit No: FHC/ABJ/CS/680/2008 of 6th May 2020, is hereby set aside.

BOLOUKUROMO MOSES UGO, J.C.A.: I read in draft the lead judgment of my learned brother Mohammed Mustapha, J.C.A. I agree with his conclusion setting aside the judgment of the lower Court. I also agree with his Lordship's reasoning on issues 2, 3 and 4 of the appeal on the basis of which his Lordship allowed the appeal and set aside the decision of the Federal High Court. But, with the greatest respect, I am not persuaded that issue 1 of the appeal ought also to be also resolved in favour of respondent and not appellant. Appellant sought to know in issue 1 whether Ekwo, J., who gave judgment in the case was right in determining it on the basis only of the evidence of witnesses contained in the record of proceedings conducted by his predecessor, Kolawole, J., (as he then was) who had heard the case up to address stage before his elevation to this Court. Much as I understand the position Ekwo, J., found himself in taking umbrage under Order 49 Rule 4 of the Civil Procedure Rules of this Court, the Federal High Court , I am unable to see the validity of that rule let alone how it can sustain the course he took.

Order 49 Rule 4 of the Federal High Court (Civil Procedure) Rules 2019 states as follows:

Where a judge is elevated, deceased, retires or is transferred to another Division and having part heard a cause or matter which is being heard de novo by another judge, the evidence already given before the first judge can be read and adopted at the hearing without the witness who had given it being recalled, but if the witness is dead or cannot be found, the onus of establishing that the witness is dead or cannot be found shall lie on the party that wishes to use the evidence. (Italics mine)

As against this Rule are the provisions of Sections 46(1) and 39 of the Evidence Act 2011, a substantive statute in the Exclusive Legislative List of the 1999 Constitution (as amended) of this country. Section 46(1) of the Evidence Act 2011 reads thus:

authorized by law to take it, is admissible for the purpose of proving in a subsequent judicial proceeding, or in a later state of the same judicial proceeding, the truth of the facts which it states, when the witness cannot be called for any of the reasons specified in Section 39, or is kept out of the way by the adverse party.

Section 39 referenced therein states the only occasions when such evidence will be admissible in a subsequent trial. It does not cover elevation, death, retirement, transfer of, or

indeed any other thing seen or unforeseen happening to the judge hearing the case. Section 39 of the Evidence Act simply says:

Statements, whether written or oral of facts in issue or relevant facts made by a person -

(a) Who is dead;

(b) Who cannot be found;

(c) Who has become incapable of giving evidence; or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are admissible under Section 40 to 50.

In the first place, in the hierarchy of Laws Rules of Court made by heads of Court are inferior to substantive statutes, like the Evidence Act in issue here, enacted by the National Assembly and signed into Law by the President of this country. That means, where there is conflict between the Legislative power of the National Assembly and the rule making power of the head of Court as it is here, the former must prevail, for the legislative power of the National Assembly cannot be subjected to the rule making power of the Head of Court. See *Ezenwosu v. Ngonadi* (1992) 1 NSCC 416 @ 426; *Jimoh v Akande* (2009) 5 NWLR (PT 1135) 549 @ 571(SC). See further *Touton S.A. v. Grimaldi Compagnia Di Naviga Zioni S.P.A.* (2011) 4 NWLR (PT. 1236) 1 @ 23, *Touton v. G.C.D.N.Z. SPA.* (2011) 4 NWLR (PT 1236) 1 @ 23 where it was said (Okoro, J.C.A., as he then was) that "it is quite trite that rules of Court cannot override the provisions of a statute on a subject matter or an issue."

Closely related to and arising from that is also the constitutional issue of whether the Chief Judge of the Federal High Court can in exercise of his rule making powers legislate on admission and use of evidence in Court as he purported to do in Order 49 Rule 4 in allowing admission and use of evidence on elevation of the judge trying the case, given especially that Evidence is a matter in the Exclusive Legislative of the 1999 Constitution of this country. The answer to that will again be in the negative: See *Adelaja v. Fanoiki* (1990) 2 NWLR (PT 131) 137 @ 170 (S.C.) and *Anagbado v. Faruk* (2019) 1 NWLR (PT 1653) 279 @ 311 -312 (SC). It is of no moment that Order 49 Rule 4 of the Federal High Court (Civil Procedure) Rules 2019 is beneficial and was intended to cure a mischief; that provision itself must be lawful and constitutional otherwise it will not support what it sought to do. That much is also confirmed by the 8th May, 2020 judgment of the Supreme Court in *Ude Jones Udeogu v. Federal Republic of Nigeria & 2 Ors* in Appeal No. SC.622c/2019, involving former Governor (now Senator) Orji Uzor Kalu, where the apex Court struck down an equally beneficial provision of Section 396(7) of the Administration of Criminal Justice Act 2015 purporting to confer powers on judges elevated to this Court to return to the High Court to complete their part heard cases.

Thirdly is whether a trial conducted in the manner it was done in this case without strict compliance with the provisions of Sections 46(1) and 39 of the Evidence Act 2011 can be called a fair trial, and a fortiori a fair hearing within the meaning of Section 36(1) of the 1999 Constitution of this country, to be countenanced by this Court. On that point, the apex Court in *Francis Shanu v. Afribank (Nig.) Plc* (2002) LPELR-41916 (SC); (2002) 17 NWLR (PT 795) 185 @ 225 had a lot to say while upholding the decision of this Court setting aside the judgment of Edokpayi J., of the Edo State High Court who like Ekwo J., here, on application of counsel to plaintiff in that case, relied on evidence of witnesses contained in record of

proceedings of a previous trial of the case before Obi J., in determining the case before him. The apex Court with Uwaifo, J.S.C., in lead judgment, had the following very interesting treatise to give on the issue at pages 225-228 (NWLR):

"Where an inquiry is commenced before one adjudicator and completed by another, the second adjudicator cannot as a rule decide upon the evidence given before the first. It is the principle that the judicial discretion which an adjudicator has to exercise in cases brought before him must be based upon the evidence taken before him, and it is not competent for him generally, to act upon evidence taken before another adjudicator unless there is a statutory provision permitting that procedure. In *Re: Guerin* (1888) 16 Cox CC 596 at p. 601, Wills, J., said:

'It is contrary to all my ideas and experience of justice for depositions taken before one magistrate to be considered by another magistrate sufficient evidence to commit a prisoner upon without having seen the demeanour of the witnesses when they were giving their evidence, and so being in a position to Judge for himself of the truth of their statements.'

"A trial Judge is a peculiar adjudicator. Of all Judges, the heaviest burden and responsibility of deciding a case rests with him. He normally hears a case by receiving evidence both oral and documentary from witnesses who appear before him in Court, are asked questions and cross-examined. In the process, he engages himself to see, listen to and watch them testify. Not only that, his feelings and impressions are tested from time to time upon one issue or another when, apart from listening, he watches; he takes mental note of the performance of witnesses, their demeanour in the witness box, in particular how they react to questioning and the manner they give answers. Quite often, it is this that helps the trial Judge as to who and what to believe. The witnesses are telling him what he was aware of before, the circumstances in which it happened and in respect of which both sides claim that their evidence represents the truth, and the trial Judge will have to take a decision. So if the trial judge is up to the demands of his duty, he will continue to size up the witnesses in their oral testimonies. Is a particular witness lying or prevaricating or just slow in nature, or has he a peculiar idiosyncrasy? That is for the trial Judge to determine. When there are relevant documents, they serve as the touchstone against which the oral testimony can be tested, and so much of the demeanour of a witness may not quite matter. See *Olujinle v. Adeagbo* (1988) 2 WLR (Pt. 75) 238 at p. 254. As said by Nokes in his book, *An Introduction to Evidence*, 4th edition, at pages 448-449, inter alia:

'The behaviour of witnesses in the box may materially affect their credit. The blush of nervousness or shame the gape of stupidity, the gesture of annoyance, the hesitation to answer, and a dozen other manifestations of a witness's state of mind or emotion, may affect the weight which is given to his evidence. This is primarily a matter for the Tribunal which sees the witness. Further, when the credibility of a witness is the basis of a specific finding, his demeanour, so far as it can be known, may be considered and should be balanced against the rest of the evidence.'

"However, as a rule, the belief and satisfaction expressed by the trial Judge in the end would represent his reaction to, and reflection of, the facts placed before him and the manner it was done, as well as the probabilities and possibilities based on or arising from those facts and the circumstances as a whole. It is in this special position of a trial Judge that he is able to make findings on the evidence placed before him by assessing the quality of the evidence

along with the facts pleaded and issues joined, giving necessary credence to or expressing doubts about witnesses by taking advantage of seeing and hearing them testify, weighing the evidence of one witness as against that of another, where appropriate, and in the end making up his mind as revealed from the imaginary scale which side is preferred. The trial Judge's performance in this regard is usually crucial to the proper determination of contentious facts. See *Ebba v. Ogodo* (1984) 1 SCNLR 372, 3 SC 84 at 98; *Atanda v Ajani* (1989) 3 NWLR (Pt. 111) 511 at 524; *Olufosoye v. Olorunfemi* (1989) 1 NWLR (Pt. 95) 26 at 37; *Adeleke v. Iyanda* (2001) 13 NWLR (Pt. 729) 1 at 20; (2001) Vol. 9 MJSC 171 at 185.

"The need for a trial Judge to take evidence himself which he is to rely on to decide a matter is unarguably very vital. This was so unmistakably expressed in *R. v. Bertrand* 16 L.T. Rep. N.S. 752; (1967) L. Rep. 1 P.C. 520, that I desire to recount it here. In that case, the jury in a trial for felony having disagreed, another jury was empaneled, and a fresh trial had. On the second trial, some of the witnesses having been re sworn, the evidence given by them at the first trial was read over to them from the Judge's notes, and liberty was given both to the prosecution and the prisoner to examine and cross-examine. The course so adopted was vigorously and powerfully denounced by Coleridge, J.

In delivering the judgment of the Court on appeal to the Privy Council, the learned Judge said at p. 535:

"The most careful note must often fail to convey the evidence fully in some of the most important elements - those for which the open oral examination of the witness in presence of prisoner, Judge, and jury is so justly prized. It cannot give the look or manner of the witness, his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration; it cannot give the manner of the prisoner, when that has been important, upon the statement of anything of particular moment; nor could the Judge properly take on him to supply any of these defects, who, indeed, will not necessarily be the same on both trials; it is in short, or it may be the dead body of the evidence without its spirit, which is supplied when given openly and orally by the ear and eye of those who receive it."

"In *Munday v. Munday* (1954) 2 ALL E.R. 667, a curious situation arose. The hearing of an application by a husband to vary an order for the maintenance of his wife which had previously been made against him was spread, owing to adjournments, over three separate days. Three Justices were present on the first day, the same three with two additional Justices on the second day, and on the third day the first three Justices were absent, and the matter was heard by the second two Justices and another Justice who had been present previously. The application was dismissed by the Justices sitting on the third day. On appeal to a Divisional Court of the Probate, Divorce and Admiralty Division it was held by Lord Merriman, P. and David J., that there must be a rehearing before an entirely new panel of Justices and a different clerk of Court, for there had been a failure to comply with the mandatory provisions of Section 98(6) of the Magistrates' Courts Act, 1952. It was also held that this was pre-eminently a case in which the principle that Justice must not merely be done but must be seen to be done, had been infringed. At page 670, Davies, J, observed *inter alia*:

these three Justices who sat on Mar 3, 1954, were acting in part on evidence which none of them had heard. But, to my way of thinking, the real point is broader. Every layman would believe that all three hearings were part of the same case. Indeed, the Justices themselves

in reason (iv) speak of 'the three occasions on which the complaint under review was heard' so that each is treated as a part of the hearing. It seems to me impossible that any layman could believe that justice had been done in the circumstances of the present case when three persons heard it on the first day, those three plus two others heard it on the second day, and the second plus a third and without the original three heard and determined it finally. Any member of the public would rightly think that that was no way for any legal proceedings to be conducted, and would at once come to the conclusion that no fair or proper decision could be arrived at in proceedings conducted in such a manner." (Italics all mine)

Ejiwunmi, J.S.C., on his part concluded his contribution (at p. 242 NWLR) in the same case by pointing out that the use of Sections 46(1) and 39 of the Evidence Act 2011 (then Section 34(1) of the Evidence Act) is a 'statutory exception' to the ordinary principle in our jurisprudence that before the resolution of a conflict or any issue in the Court, the oral evidence of the parties to the conflict or issue must be heard by the judge determining the suit, with His Lordship adding further in dismissing the appeal that "I have no doubt in mind from what I have said above that Edokpayi, J., did not try the case on its merits."

When confronted again with a similar trial by the same Edokpayi, J., in *A.O. Eghobamien v. Federal Mortgage Bank of Nigeria* (2002) 17 NWLR (PT 797) 488, the apex Court was quick to reconfirm its stand in *Shanu v. Afribank (Nig.) Plc*. The apex Court (Uthman Mohammed, J.S.C. in lead judgment this time) first said (@ p. 500) that evidence obtained without compliance with Section 46(1) and 39 of the Evidence Act is legally 'inadmissible' regardless of any consent of parties to admit it, and then added at @ p. 501 that:

"A trial is a judicial examination of evidence according to the law of the land, given before the Court after hearing parties and their witnesses. A trial must be conducted by the Judge himself and at the end of the hearing he will write a judgment which is the authentic decision based on the evidence he received and recorded, it is a mistrial for one judge to receive evidence and another to write judgment on it. Learned Justice Nsofor J.C.A., commenting on the judgment of Edokpayi J., had the following to say:

'Could the learned Judge, who did not see the witnesses testify and hear the witnesses testify, really, as a trial Court, rely on the silent, cold and printed record (Exhibit 9) to believe or disbelieve any witness.'

"I agree entirely with Nsofor's observation. It is amazing to read the analysis of the evidence made by Edokpayi J., when he had no opportunity to look into the eyes of witnesses in order to observe their demeanour when they were giving evidence."

As shown above, the aim of Sections 46(1) and 39 of the Evidence Act 2011 - (formerly Section 34(1) of the Evidence Act 2004) that formed the bedrock of the apex Court's decisions in both *Eghobamien v. Federal Mortgage Bank of Nigeria* (supra) and *Shanu v. AfriBank Plc* (supra) is the need to ensure fair trial of cases by trial Courts. It is to guard against what happened in this case and those cases. That is why it has been said repeatedly that compliance with Sections 46(1) and 39 of the Evidence Act 2011 is strict and must be proved strictly by the person wishing to rely on such evidence before the Court in a subsequent trial can admit and rely on evidence given by witnesses in a previous trial: See *Eze v. Ene & Anor* (2017) LPELR-41916 (SC), *Shanu v. Afribank Plc* (2002) 17 NWLR

(PT. 795) 185 @ 237, 242; (2002) LPELR-3036 (SC) p. 42-43. That was not done in this case before Ekwo J., relied on the evidence of witnesses he did not see testify before him. His judgment therefore ought not to be allowed to stand even on the basis of issue 1 alone, which I here resolve in favour of appellant. Order 49 Rule 4 of the Federal High Court (Civil Procedure) Rules 2019, undoubtedly laudable as it is in its aim, is of no avail.

On this basis and for the fuller reasons of my brother Mustapha, J.C.A., on issues 2, 3 and 4, I also see merit in the appeal and hereby allow it and set aside the judgment of the Federal High Court (Ekwo, J.) in its entirety.

I abide by the order of my learned brother that parties bear their costs.

Appearances:

Rotimi Oguneso, SAN, with him, Mercy Okolo, Esq. and I. A Oyeyipo, Esq. For Appellant(s)

O. C. Uju-Azorji, Esq. - for 1st Respondent

Chief Solomon Akuma, SAN, with him, Emmanuel Akuma and Samuel Akanji - for 2nd Respondent for Respondent(s)