KANO STATE URBAN DEV. BOARD VS FANZ CONSTRUCTION CO. LTD. -1990

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In the Supreme Court of Nigeria

Friday, June 15, 1990

Case Number: SC.45/1988

JUSTICES:

ANDREWS OTUTU OBASEKI Justice of The Supreme Court of Nigeria

KAYODE ESO Justice of The Supreme Court of Nigeria

SAIDU KAWU Justice of The Supreme Court of Nigeria

SALIHU MODIBBO ALFA BELGORE Justice of The Supreme Court of Nigeria

ABDUL GANIYU OLATUNJI AGBAJE Justice of The Supreme Court of Nigeria

Between

KANO STATE URBAN DEV. BOARD Appellant(s)

AND

FANZ CONSTRUCTION CO. LTD. Respondent(s)

RATIO

DUTIES OF AN ARBITRATOR

“if the arbitrator even in perfect good faith misconstrued the provisions giving it power to act and thereby failed to deal with the questions remitted to it but decided some question which was not remitted to it, his decision in the arbitration proceedings will be a nullity”. (Per ABDUL GANIYU OLATUNJI AGBAJE, J.S.C.)

ARBITRAL AWARD ENFORCEMENT

“Once an award has been enforced, as opposed to an application for it to be enforced,

under Section 13 of that law, it is too late to apply to have the award set aside under Section 12(2) of that law". (Per ABDUL GANIYU OLATUNJI AGBAJE, J.S.C.)

ABDUL GANIYU OLATUNJI AGBAJE, J.S.C. (Delivering the Leading Judgment): The plaintiff company Fanz Construction Company Ltd., sued the defendant Board, Kano State Urban Development Board, in a Kano High Court claiming against it a total of N6,922,742.00 being damages for a breach of an agreement in writing dated 16th July, 1975 entered into between the plaintiff and the defendant. According to the claim the plaintiff in consideration of the sum of N11,368,652.02 agreed in the agreement to build 840 units of dwelling houses including infrastructures at Kundida Housing Estate Zaria Road, Kano, according to the specifications supplied by the defendant. The contract price of the buildings, according to the plaintiff and to the agreement was to be settled by instalments and by reference to the work completed on the building contract, payment being made upon presentation to the defendant by the plaintiff of certificate or certificates of completion of work issued by the appropriate body.

What gave rise to this action, according to the plaintiff, was the non-payment by the defendant of the sum of money due on certificates of completion of work Nos. 30 and 31 duly issued by the plaintiff to the defendant and also the non-payment of the fluctuation and variation claims made by the plaintiff against the defendant in accordance with the contract agreement between them.

In the plaintiff's claim it is expressly stated as follows:-
"Clause 31 of the said agreement empowers the parties to refer any dispute arising from the said contract to a single arbitrator appointed jointly by the parties failing which either party can apply to the High Court. By a letter dated August 10th, 1979 the plaintiff invited the defendant to agree to the appointment of an arbitrator in accordance with the said clause 31 of the agreement. The defendant turned this request down by its letter to the plaintiff dated 24th August, 1979."
Then it would appear the plaintiff sued the defendant in the Kano High Court on the contract agreement.

On 8/10/79, the case came on in court. On that day, on the application of counsel for the defendant pleadings were ordered by Aikawa, J., as he then was, and the case was adjourned till 7/1/80 for mention.
We are not told what happened on that day perhaps because nothing turned on it in this appeal.
The case came on again before Aikawa, J. on 22/1/80. Counsel for the plaintiff Mr. Nnadi, on that day intimated the court of his intention to apply to the High Court under the relevant provisions of the High Court Law applicable in Kano State to refer the trial of the case to an arbitrator because, according to him, of the failure of the parties to do so as provided for in the contract agreement sued upon. The learned trial Judge then referred the case to the Chief Judge, Kano State Hon. Justice D. Mustapher, who then became seised of this case. For the purposes of the appeal in hand, I need only to refer to the following aspects of the proceedings in this case before him on 4/2/80:-

“Mr. Nnadi for the plaintiff/respondent.
Mr. Tijani Ahmed state counsel for plaintiff/applicant.
MR. TIJANI: I have filed a motion for the striking out of the case.
MR. NNADI: I have a preliminary objection to raise.
COURT: What is your objection.
Mr. Nnadi having stated his objection, Mr. Tijani withdrew the application and it was struck out.
MR. NNADI: I ask that the matter be referred to arbitration straightaway.
MR. TIJANI: I am objecting. I still want time to bring a new application.
I also want time to consult my clients for further instructions. I want 2 weeks.
MR. NNADI: I have no objection.
COURT: The case is adjourned till 18/2/80 for mention. I award 25 Naira costs to the plaintiff.”

It will appear that the defendants application which was struck out was that the plaintiff’s suit be struck out for non-compliance with S. 31 of the agreement sued upon to which I have referred above.
The case came on again before Mustapher, C.J., as he then was, on 31/3/80, 6/10/80 and 11/2/81.
The proceedings of each of these three days are relevant to the appeal in hand so I reproduce them here:-
(1) 31/3/1980
“Mr. Nnadi for the plaintiff.
R. D. Mohammed solicitor-general for the defendant.
R. D. MOHAMMED: We want to go to arbitration. We want time to negotiate and agree on an arbitrator.
Mr. NNADI: We have no objection. We want the matter adjourned to 3 months.
R. D. Mohammed agreed.
COURT: Case is adjourned to 28/7/80 for mention.”
(2) 6/10/1980.
“Mr. Nnadi for plaintiff.
R.D. Mohammed solicitor-general (Sanusi Yusuf deputy solicitor-general with him for the defendant).
B MR. NNADI: We both agreed to approach Mr. Majiyagbe, S.A.N. to be the arbitrator. I have filed a motion but I am withdrawing it.
I am asking for adjournment to end of February.
R. D. MOHAMMED: I have no objection.
COURT: Case is adjourned to 23/2/1981 for mention.”
(3) 11/211981.
“Mr. Nnadi for the plaintiff.
Mr. Modibbo for the defendant.
MR. NNADI: We have started the arbitration.
MR. MODIBBO: That is so we want the matter be stayed.
COURT: The matter is hereby stayed pending the decision of the arbitrator. Case is adjourned sine die.”

So, it happened that the proceedings in the plaintiff's action were stayed by the court on 11/2/81 pending the decision of the arbitrator and the case itself was adjourned sine die".

It will appear that the dispute between the parties to this appeal was then referred to an arbitrator, one Alhaji Kalama Ali. The circumstances leading up to this reference I have already stated above. It will also appear that the arbitrator sat on the dispute, took evidence, oral and documentary, and eventually gave his decision and made an award in favour of the plaintiff against the defendant. The award is contained in Exhibit B.U.4 in these proceedings.
By an application filed on 23/4/82, the plaintiff applied under Section 13 of the Arbitration Law, Caps. 7 of the Laws of Northern Nigeria applicable in Kano State, for leave to enforce the award of the arbitrator, Alhaji Kaloma Ali, as a judgment or order of court. In the application, it was said that the arbitrator was duly appointed under the agreement of 16/7/75 between the parties to this case. Prompted by this application by the plaintiff to enforce the arbitrator's award, the defendant by a motion brought under S.12(2) of the Arbitration Law applied to the High Court for the following orders:-
"(a) The findings of the arbitrator in the dispute between two parties be set aside and (b) such other order or orders as the Honourable court may deem fit to make."

The defendant's application to set aside the award was taken first by the learned trial Judge to whom both applications were assigned. Fernandez, J. ruling on that application on 25/11/82 he held thus:-
"The court will not review the arbitrator's discretion, provided he acts within his authority and according to the principles of justice and behaves fairly to each party.
Thus Cockburn Chief Judge as he then was said:-
"I would observe that we must not be over ready to set aside awards where the parties have agreed to abide by the decision of a tribunal of their own selection, unless we see that there has been something radically wrong and vicious in the proceedings."
In this application, the applicant did not attack the conduct of proceedings but the failure of the arbitrator to consider the experts evidence, the contract agreement and other evidence necessary for making the award.
The affidavit filed in support of the motion did not say that the arbitrator failed to hear or improperly received evidence. This view was expressed by ATKIN, L.J. (as he then was) in the case of Gillespie Bro. & Co. v. Thompson Bros. 1922 13 LIL Report 519 at page 529. Following Gillespie's case supra and Tersons Ltd. v. Stevemage Development Corporation 1965 1.Q.B. 37 it was held that:-
"It is never possible to set aside an award merely because there was no evidence supporting a particular finding unless it appears from the award itself that there was no evidence to support the finding."
On the face of the award marked BU1 attached to the summons, the arbitrator at page 29 lines 16-29 referred to the documentary evidence which he relied upon before the award was made. Whether his decision was right or wrong is not for this court to adjudicate upon since the High Court is not a Court of Appeal over arbitration proceedings. Another important aspect of this application to be considered is the

procedure to set aside an award.
The particular procedure for setting aside an award is by motion before a single Judge. Misconduct of the arbitrator cannot be pleaded as a defence to an action to enforce the award. An award cannot be set aside in an action commenced by a writ, a fortiori it cannot be set aside on a counter claim. See Birtley and District Co-operative Society Ltd. v. Windy (1959) 1 WLR 142. There is therefore no ground for this application to succeed and it is hereby dismissed."

The learned trial Judge then took the plaintiff's application to enforce the arbitrator's award and granted it in his ruling on it on 29/1/83, holding in doing so as follows:-
"The applicant in my view has complied with all the vital ingredients above. As I earlier mentioned, this application is brought under Section 13 of the Arbitration Law Cap. 7 N.N.L. applicable to Kano State and by virtue of Section 3 of the same Law, such an award is irrevocable except by leave, and has the same effect as if it had been made an order of court. I therefore have no alternative than to grant the leave.
I hereby make an order pursuant to Section 13 of the Arbitration Law, Cap.7 Laws of Northern Nigeria 1963 Vol. 1 applicable to Kano State that the plaintiff Fanz Construction Co. Ltd. is granted leave to enforce the award of Alhaji Kalama Ali Esq; the arbitrator duly appointed in the matter of an arbitration between Fanz Construction Co. Ltd. and Kano State Urban Development Board as shown in Exhibit "B.U.4" made pursuant to an agreement dated 16th July, 1975 in the same manner as a judgment or order of the court."

The defendant was not satisfied with both decisions and appealed against both of them to the Court of Appeal, Kaduna, Division.
The defendant's notice of appeal in the Court of Appeal said, inter alia, as follows:-
"TAKE NOTICE that the appellant being dissatisfied with the orders of the High Court of Justice of Kano contained in the order of Justice Akinola Fernandez dated the 25th November, 1982 and 27th January, 1983, doth hereby appeal to the Federal Court of Appeal upon the grounds set out in paragraph 3 and will at the hearing of the appeal seek the relief set out in paragraph 4.
PART OF DECISION OF THE LOWER COURT COMPLAINED OF
1. The refusal to set aside the award of the arbitrator.
2. Leave granted to the respondent to enforce the award of the arbitrator in the matter of dispute between the parties.
GROUNDS OF APPEAL
...
...
RELIEF SOUGHT FROM THE FEDERAL COURT OF APPEAL:
1. The order granted on the 27th January, 1983 to the respondent by the Hon. High Court be set aside
The refusal
2. A declaration that the refusal of the Honourable High Court to set aside the award is wrong."
Original and additional – with leave of the Court of Appeal grounds of appeal were

filed.
At the Court of Appeal the defendant sought and obtained leave to raise new points not raised at the trial court. The application was made and granted on 16th April, 1986. The proceedings of that day were in part as follows:-
"There are five grounds to this appeal. The two grounds raised as part of the grounds not raised in the High Court refers to p.3 of his brief. I apply under order 7 rule 2 of the Court of Appeal Rules, 1981 to apply orally for leave to argue the award as a nullity refers to ground 1, 4... I urge court to allow us argue the new issues of law raised in this appeal.
CHIEF KEHINDE: No objection.
COURT: Application granted. Counsel allowed to raise the points of law not previously raised and canvassed before the High Court."
Grounds 1 and 4 of the new points raised in the Court of Appeal were:-
GROUND ONE
The learned Chief Judge erred in law in allowing the matter to proceed to arbitration after the defendant (now appellant) had taken steps in the proceedings before the High Court. The arbitration was accordingly a nullity and consequently of no effect whatsoever.
PARTICULARS
(i) The power to stay proceedings commenced in the High Court to allow arbitration is a statutory one conferred on the High Court by Section 5 of the Arbitration Law, 1963 Laws of Kano State.
(ii) Section 5 does not authorise a stay once the defendant has taken steps as was done in this case
(iii) The only proper thing for the High Court to have done was to allow the proceedings to continue."
GROUND FOUR
The learned High Court Judge ought not to have granted leave to enforce the award when it was obvious that the award is bad in law.
PARTICULARS
(i) The arbitrator interpreted Exhibit 9 to be an admission of liability by the appellant on which basis he awarded points 1 and 2 of the respondents claim:
N2,390,620.00 and N3,939,439.73 when the said Exhibit 9 is no such admission
(ii) Exhibit 9 is an inchoate document and could not be the basis of an award or judgment.
The arbitrator interpreted Exhibit 7 and in particular Exhibit 8 to be an admission by the appellant on the basis of which he awarded point 3, 4 and 5 of the respondent's claim that is N500,000.00, N500,000.00 and N192,681.84
when the said Exhibit 8 is no such admission
(iv) The arbitrator construed Section 10 of the Commission of Inquiry Law, Cap.25, 1963 Laws of Kano State as rendering inadmissible the expert evidence of DW.1 including his report, Exhibit 18 when the said section does not make such evidence inadmissible.
(v) The arbitrator construed Section 10 of the Commission of Inquiry Law, Cap.25, 1963

Laws of Kano State as rendering inadmissible the Maidamma Commission of Inquiry report (Exhibit 19) and the Government White Paper (Exhibit 20) when infact the said Section does not make inadmissible such documents."

The appeal of the defendant was dismissed by the Court of Appeal, Kaduna Division as per the lead judgment of Ogundere J.C.A. in which the other Justices, Wali, J.C.A., as he then was, and Akpata, J.C.A., as he then was, concurred.
In dismissing the appeal, that court held, inter-alia –
"Be it noted, that on January 28th, 1986, by the leave of this court, the original notice of appeal which contained grounds of appeal against the two orders of refusal to set aside the award and the order granting leave to enforce the award was amended by the deletion of the grounds of appeal, and the substitution of new grounds of appeal. The original grounds of appeal were accordingly struck out, which seems to me a tactical error. In the new grounds of appeal there is no appeal against the refusal to set aside the award."

I have already set down grounds 1 and 4 of the defendant's ground of appeal in the Court of Appeal. They are very much material as regards the points above made by that court.
I now proceed to refer next to the following passage in the judgment of that court:-
"In my view, both Exhibit 18 and the evidence of Mr. Savage on it are admissible under Section 90 of the Evidence Act as a documentary evidence as to facts in issue by the maker of the document. D.W.1 was not tendering the maidama report or any part of it as such so as to be caught by the provisions of section 10 of the Commission of Enquiry Law. Be it noted that the Maidama Report was not in issue before the arbitrator but the payment and claims as related to the measurement or work done under the contract for the Kundila Housing Estate which Exhibit 18 deals with. By reason of the exclusion of this vital admissible evidence which would have affected the conclusions of the arbitrator, the appellant could have succeeded on a motion to set aside the award. And that is why it was a pity that the appellant withdrew the grounds of appeal on the decision of the lower court refusing the applicant to set aside the award of the arbitrator." (Italics mine).

What the learned Justice of Appeal, Ogundere, J.C.A. said here must be taken as being said in the alternative to the following views of his dismissing grounds 2, 3, 4 and 5 of the appellant's grounds summarily so to say, and to his view that there were no grounds of appeal in support of the appeal against the order refusing to set aside the award:-
"In ground 2, and for the purposes of grounds 3, 4 and 5 the appellant neither in its brief of argument, nor in oral submissions by his counsel has demonstrated by reference to the submission and points to be decided what points of law were submitted for decision, their erroneous determination, and what the correct determination should be. Merely picking holes in the award out of its con is not the correct approach. If even the appellant had established the errors of law, it had lost the chance since it should have applied to the High Court before leave was granted to enforce the award. (Italics mine).

It is against this judgment that the defendant has now appealed to this court on the following 8 grounds of appeal which, with the leave of this court have been substituted for the original grounds of appeal. Particulars of the 81 grounds of appeal are omitted.
"GROUND ONE
The learned Justice of the Court of Appeal erred in law in holding that the Kano High Court rightly exercised its statutory discretion under S.5 of the Arbitration Law, Cap.7 1963 Laws of Northern Nigeria (applicable to Kano State) in ordering a stay of the action pending the arbitration after the learned Justice of the Court of Appeal had found that parties had taken steps in the proceedings before the stay was ordered.
GROUND TWO
The learned Justices of the Court of Appeal erred and misdirected themselves in law when after having come to the conclusion that real grounds existed to doubt the validity of the award dismissed appellant's grounds three which criticized the High Courts decision in summarily enforcing the award.
GROUND THREE.
The learned Justices of the Court of Appeal erred and misdirected themselves in law when they failed to address the question whether the arbitrator misconstrued the real dispute between the parties thereby acting without jurisdiction, instead held as follows.
"As to ground five where the appellant complained that no payment of payment money was not a dispute under clause 31 of the contract that argument would seem to be misconceived…"
GROUND FOUR
The learned Justices of the Court of Appeal erred in law in holding that the arbitrator was right in basing his award on Exhibit 9 when it is obvious from the wordings of Exhibit 9 that it did not constitute an agreement on all issues discussed.
GROUND FIVE
The learned Justices of the Court of Appeal erred and misdirected themselves in law when after having come to the conclusion that the award was a nullity when they said-
"It is obvious from the excerpts from Exh.18 that the question of fluctuations and variations which totals N6,330,059 in the points of claim was left open, uninvestigated, and undecided by Exh.18, and in consequence, a fortiori since the arbitrator did not admit Exhibit 18 by the award itself. In view of the above, one would have declared the arbitration proceedings and the award as a nullity." yet dismissed the appeal.
GROUND SIX
The learned Justices of the Court of Appeal erred and misdirected themselves in law in holding that even if the respondent used the wrong procedure in applying to the High Court to enforce the award, it was too late to raise it on appeal stage as the Supreme Court has held that technicalities must not be allowed to defeat the course of justice.
GROUND SEVEN
Hon. learned Justices of the Court of Appeal erred in law in holding that there was no appeal against the decision of the High Court refusing the appellant's application to set aside the award.
GROUND EIGHT
The learned Justices of the Court of Appeal erred and misdirected themselves in holding

as follows:
The battle they (the appellant) fought in this court seems to me to be warfare after armistice (sic). The High Court earlier on in time was the proper theatre of war."

Brief of arguments were filed for both sides. According to the defendant, the appellant, there are 11 issues arising for determination in this appeal from the above grounds of appeal.
I will not set down now these issues which counsel for the defendant has identified as arising for determination in this appeal for the following reasons. Counsel having in one breath stated the issues said to arise for determination, proceeded in another breath in the defendant's brief of argument to proffer arguments on the defendant's appeal not by reference to the issues so identified but by reference to the grounds of appeal filed. The proper thing counsel should have done was to have argued the appeal by reference to the issues identified and no longer by reference to the grounds which are supposed to have been subsumed under one or other of the issues arising for determination. Chief Bayo Kehinde, S.A.N., has in the respondent's brief of arguments stated as follows, as regards the issues for determination in this court arising from the plaintiff's grounds of appeal.
"(1) With respect, the issues listed by the appellant as issues for determination in the Supreme Court are not such issues properly formulated.
(2) It is submitted that the proper issues for determination in the Supreme Court are as follows:
(i) can an arbitrator's award be set aside on grounds other than misconduct as provided under section 12(2) of the Arbitration Law of the Laws of Northern Nigeria applicable in Kano State
(ii) in the circumstance of this case, when the appellant accepted and did not object to the award for 13 months until it brought a motion to set aside the award 6 (six) months after the respondent had brought its own application to enforce the award, is the appellant not estopped from seeking to set aside the award under the doctrine of estoppel by conduct
(iii) can the fact that leave was granted in the Court of Appeal to the appellant to argue points not canvassed in the High Court cure the defect of not first seeking to set aside in the High Court an award on grounds of misconduct"

It is to be noted that counsel for the plaintiff then proceeded in the plaintiff's/respondent's brief to answer the arguments on the defendant's appeal as presented in the latter's brief in the manner I have just described.
It appears to me that the better view is to say that the plaintiff/respondent is contending that the issues raised in paragraph 2 of the respondent's brief also arise for determination in this appeal. It will not be correct to say as counsel for the respondent suggested in the latter's brief that the issues formulated for determination by the counsel for the appellant in the latter's brief do not properly arise for determination from the appellant's grounds of appeal in this case. So, I will consider the grounds of appeal argued by counsel for the appellant before us, having himself related them to the

issues said in the appellant's brief to arise for determination in this appeal. Then as occasions arise I will consider the additional issues said by counsel for the respondent to arise too for determination in this appeal.

Counsel for the defendant/appellant as I have said above argued the appellant's appeal in the latter's brief by reference to the grounds of appeal sued. In the oral submissions in open court counsel connected the ground of appeal with the issues said to arise for determination. It will be convenient for me to consider this appeal in the same way as counsel for both sides have argued it before us. So I will take ground one of the appellant's grounds of appeal first. I have reproduced ground one above. The issue raised by this ground of appeal according to counsel for the appellant in the latter's brief is as follows:-

"1. whether after the parties had taken steps in the action at the Kano High Court, it was still within the discretion of the learned trial D. Mustapher, J. (as he then was) to order a stay of the proceedings in the light of section 5 of the Arbitration Law. Cap. 7, 1963 Laws of Kano State."

In arguing this ground counsel for the appellant Mr. A. B. Mahmoud, director civil litigation, Kano State referred in the first place to section 5 of the Arbitration Law of the Former Northern Region of Nigeria applicable in Kano State which says:-

"If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any other person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains ready and willing to do all things necessary to the proper conduct of the arbitration may make an order staying the proceedings."

He then referred to the portions of the record of proceedings I myself have reproduced earlier on in this judgment and submitted, and rightly too, that on the application of counsel for the defendant in the Kano High Court, Aikawa, J. as he then was, made on 8/10/79 an order for pleadings in the matter now before us on appeal. The order for pleadings was before the application to refer the matter to arbitration and the order of Mustapher, C.J., as he then was, of 11/2/81 staying proceedings in the Kano High Court in this matter pending the decision of the arbitrator and adjourning the case sine die. It was the submission of counsel for the defendant, the appellant, that an application in court for pleadings followed by a court's order constituted a step in the proceedings within the meaning of that expression in section 5 of the Arbitration Law. It appears that the Court of Appeal was of this view too having allowed itself to be guided by the decisions on Obembe v. Wemabod Estates (1977) 5 S.C.115, Ives & Barker v. Willams (1894) 2 Ch. 478 at 484; Chappell v. North (1891) 2 Q.B.252; Richardson v. Le Maitre (1903) 2 Ch.222 and Vestings v. Nigerian Railway Corporation (1964) Lagos High Court Reports 135.

As regards what constitutes a step in the proceedings, in the con of arbitrations proceedings, Halsbury's Laws of England 4th Edition Volume 2 says inter alia at paragraph 563 page 290:-
"A party who makes any application whatsoever to the court, takes a step in the proceedings."
It appears to me having regard to the copious authorities on the point that an application for pleadings in court constitutes a step in the proceedings within the meaning of that expression in section 5 of the Arbitration Law.
It was the further submission of counsel that once a step had been taken in the proceedings that court, which was then seised of the matter, was the only tribunal which had jurisdiction to settle the dispute between the parties before it, the arbitration agreed to by them being no longer of any force or effect. For this submission counsel relied first on the English case of Doleman & Sons v. Ossett Corporation (1912) 3 K.B.257 which had to do with section 4 of the English Arbitration Act, 1889 which is in pari materia with section 5 of the Kano State Arbitration Law already copied above.
In that case, Moulton, L.J. said at page 268:-
"(the section) enables the defendant to an action brought in breach of an agreement to proceed by arbitration to apply to the court to stay the action, and the court is given power so to do. Prior to these statutory provisions the court could not refuse to settle any such dispute which was brought before it, because it not only had the jurisdiction but also the duty to decide that dispute if called upon so to do. It has under these provisions power to refuse its aid to a person who appeals to it in breach of an agreement to decide the matter by arbitration." (Italics mine).
Next counsel referred to the following passage in the judgment of this court in Obembe v. Wemabod Estates Ltd. (supra) at page 132 as per Fatayi-Williams, J.S.C., as he then was:-
"In order to get a stay, a party to a submission must have taken no step in the proceedings .... If the court has refused to stay an action or if the defendant has abstained, as in the case in hand from asking it to do so, the court has seizing of dispute and it is by its decision and its decision alone, that rights of parties are settled..."
Both the decision in Doleman & Sons v. Ossett Corporation (supra) and that of this court Obembe v. Wemabod Estates Ltd. (supra) recognise it that the court alone has not only the jurisdiction but also the duty to settle the dispute between the parties if called upon to do so. These cases also recognise it that under the relevant section of the arbitration law, upon the application of the defendant to an action brought in breach of agreement to proceed by arbitration the court has power to stay the proceedings. In other words, under the provisions of the Arbitration law, the court has power to refuse to entertain proceedings brought before it in breach of an agreement to decide the matter by arbitration. However the defendant is not given by the law a carte blanche as to when to apply for the stay of proceedings. As it was stated in Obembe v. Wemabod Estates Ltd. (supra) "In order to get a stay a party to a submission must having taken no step in the proceedings."
It appears therefore to me that it is in the court that the jurisdiction to try the case brought to it is vested. However in the exercise of that jurisdiction the court has power

to stay proceedings in an action brought to it in breach of agreement to settle the matter by arbitration. The exercise of this power is regulated by the statute which gives the court the power. In my judgment therefore the exercise of this power to stay proceedings is a matter within the exercise of the jurisdiction of the court to try the case itself.

I will at this stage refer to the following passages in the speeches of Lord Reid from the House of Lords in the case of Anisminic v. Foreign Compensation Commission & Anor. (1969) 1 All E.R. 208 at 213:

"It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity.

But in such cases, the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the enquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly. I understand that some confusion has been caused by my having said in Armah v. Government of Ghana (6) that, if a tribunal has jurisdiction to go right, it has jurisdiction to go wrong. So it has if one uses "jurisdiction" in the narrow original sense. If it is entitled to enter on the enquiry and does not do any of those things which I have mentioned in the course of the proceedings, then its decision is equally valid whether it is right or wrong subject only to the power of the court in certain circumstances to correct an error of law." (Italics mine).The Kano State High Court might have been wrong in its decision to stay the proceedings in this case. But it does not follow that because of that wrong decision it had not kept within its jurisdiction. See also R. v. Northumberland Compensation Appeal Tribunal Exp. Shaw (1957) 1 All E. R. 122 at page 127.

The remedy of any party aggrieved by the decision is to appeal against it. In the absence of the latter, the decision is valid rightly or wrongly.

The decision I reach on the point at issue is that the decision of the Kano State High Court staying proceedings in this case pending the decision of the arbitration is valid rightly or wrongly. It is not in a proceeding like the one leading up to the present appeal that the defendant can complain that the stay of proceedings was wrongly made.

It is true it was decided as far back as the case of Hamlyn v. Batteling (1880) 6 Q.B.D.63 that a party who protests that the arbitrator is acting either without authority or beyond

the scope of the agreement of reference but nevertheless attends the reference does not thereby waive his protest. In the instant case, there was no protest of any kind as to the authority of the arbitrator to act in the matter submitted to him. Because of this, if I had held that the stay of proceedings ordered by the High Court was irregular, I would have held that the following submission of Chief Bayo Kehinde, S.A.N. was a complete answer to the complaint of counsel for the defendant/appellant under ground one of the latter's grounds of appeal. Mr. Bayo Kehinde, S.A.N. has submitted and I agree with him, relying on the case of Macaura v. Northern Assurance Co. Ltd. (1925) A.C. 619 that a party having allowed a point to be raised before the arbitrator without objection, it was not open to him to call in question the authority of the arbitrator to entertain it. By the same token, the defendant having allowed the arbitrator to embark on the whole reference, having regard to the agreement of reference between the parties to this case and without any objection, it is now no longer open to him to challenge the authority of the arbitrator to take the reference. In my judgment, ground one fails.

Having dealt with ground one, I would like to deal with the grounds of appeal of the defendant/appellant attacking the technical points upon which the Court of Appeal based its decision dismissing the defendant's appeal in that court. It appears to me that it is only when counsel for the defendant has persuaded us that the lower court was wrong in this regard that any useful purpose will be served by considering the attack on the judgment of the lower court given, as it must be, in the alternative, on the merits of the defendant's appeal there. I will therefore proceed to consider ground seven of the defendant's grounds of appeal which I have already reproduced above.
The issue raised by this ground of appeal, according to the brief of argument of the defendant, is as follows:-
"9. Whether the appeal to the Court of Appeal constitutes a valid appeal against:
(a) The High Court's refusal to set aside the award;
(b) the High Court's leave granted to enforce to the award."
And this ground of appeal arises because of the following passage in the lead judgment of Ogundere, J.C.A. copied earlier on in this judgment, but for ease of reference I again, reproduce it:-
"... In my view, both Exhibit 18 and the evidence of Mr. Savage on it are admissible under section 90 of the Evidence Act as a documentary evidence as to facts in issue by the maker of the document. DW.1 was not tendering the Maidama Report or any part of it as such so as to be caught by the provisions of section 10 of the Commission of Enquiry Law. Be it noted that the Maidama Report was not in issue before the arbitrator but the payments and claims as related to the measurement of work done under the contract for the Kundila Housing Estate which Exhibit 18 deals with. By reason of the exclusion of this vital admissible evidence which would have affected the conclusions of the arbitrator, the appellant could have succeeded on motion to set aside the award. And that is, why it was a pity that the appellant withdrew the grounds of appeal on the decision of the lower court refusing the application to set aside the award of the arbitrator ..." (italics mine)

In arguing this ground of appeal counsel for the defendant/appellant, Mr. A.B. Mahmoud, directed us to the notice of appeal of the defendant in the lower court. The notice of appeal shows clearly that the defendant's appeal there was against:
"1. The refusal to set aside the award of the arbitrator.
2. Leave granted to the respondent to enforce the award of the arbitrator in the matter of dispute between the parties."
The reliefs sought in the lower court were as follows:-
"1. The order granted on the 27th January, 1983 to the respondent by the Hon. High Court be set aside.
The refusal
2. A declaration that the refusal of the Honourable High Court to set aside the award is wrong."
I have reproduced the notice of appeal earlier on in this judgment.
It is true as observed by Ogundere, J.C.A ... counsel for the defendant there, with the leave of court, withdrew the original grounds of appeal in the notice of appeal and substituted for them five new grounds of appeal which I have also reproduced earlier in this judgment. It is the submission of counsel for the defendant to us that the withdrawal of the whole of the original grounds of appeal does not mean that there were no longer any grounds of appeal in support of the appeal against the refusal of the trial court to set aside the award of the arbitrator. This is so, counsel submits, because of the new grounds of appeal which were substituted for the original grounds. Counsel then made a special reference to grounds 1, 4 and 5 of the new grounds of appeal which for ease of reference I reproduce again here:
"GROUND ONE
The learned Chief Judge erred in law in allowing the matter to proceed to arbitration after the defendant (now appellant) had taken steps in the proceedings before the High Court. The arbitration was accordingly a nullity and consequently of no effect whatsoever.
GROUND FOUR
The learned High Court Judge ought not to have granted leave to enforce the award when it was obvious that the award is bad in law.
GROUND FIVE
The learned High Court Judge erred in law in granting leave to enforce the award when the award is illegal, null and void and of no effect whatsoever as the arbitrator erred and misdirected himself as to the real disputes between the parties and therefore acted without jurisdiction."

Counsel then submits, and I dare say I agree with him that any of these grounds of appeal, if upheld, is a valid ground for overturning the order of the trial court refusing to set aside the arbitrator's award. These grounds of appeal have clearly given the court and the other side adequate notice of the complaint of the defendant against the order of the trial court to set aside the arbitrator's award. In my judgment, they cannot be said to be bad because they were not tied specifically to the appeal against the refusal order. It is patently clear that each of these grounds of appeal challenges the validity of the arbitrator's award. They are in my judgment good to support not only the appeal

granting leave to enforce the award but also the appeal against the refusal of the trial court to set aside the award. So, in my judgment, the Court of Appeal was in error in holding that there were no grounds of appeal before it against the order of the trial court refusing to set aside the arbitrator's award.
The other ground of appeal dealing with the technicalities raised by the lower court is ground 8 which I have already copied above. The attack is on the following passage from the judgment of the lower court as per the lead judgment of Ogundere, J.C.A.:-
"...With the greatest respect, the Ministry of Justice, Kano State, did not sit down to consider the provisions of the Arbitration Law, and the relevant judicial precedents, during the preparation of their case, and even in the preparation of their brief in this court. Be it noted also that the case file at the lower court was passed from one officer to another, the one contradicting the other in court showing the Ministry of Justice in Kano State in complete disarray. The battle they fought in this court seems to me to be warfare after armstice. The High Court, earlier on in time, was the proper theatre of war."
The issue raised by this ground of appeal, according to counsel for the defendant/appellant is as follows:-
"...Whether by allowing the appellants to raise new points of law not canvassed at the High Court, the Court of Appeal was not therefore bound to consider those issues as though they had been raised at the court below"

Counsel for the defendant on the point at issue directed us to the fact which I have earlier recorded in this judgment that the defendant in its appeal in the lower court sought and obtained leave of that court to raise new points of law not canvassed at the trial court. It is the submission of counsel and again I agree with him, that the Court of Appeal having, pursuant to the leave granted to take new points, heard arguments on the new points it must consider the arguments and decide the appeal before it with due regard to the new points taken. It is evidently wrong of the Court of Appeal in the circumstance, not to give effect to the arguments on the new points just because the points were not taken at the trial court.

Having disposed in favour of the defendant/appellant on the technical points which according to the Court of Appeal stood in the way of the consideration of the appellant's appeal on its merits I can now proceed with the consideration of the other grounds of appeal argued before us in this case.
I will now turn to ground three of the appellant's ground of appeal which I have reproduced above.
According to the defendant the issues arising for determination on this ground of appeal are as follows:-
"3. Whether the arbitrator properly construed the dispute between the parties.
4. If the answer to 3 above is in the negative whether he did not therefore act without jurisdiction;
5. Whether the reference to the arbitrator in this case amounted to a reference of specific question(s) of law for his determination."

For a proper appraisal of submissions made to us on the above issues, it is necessary for us to remind ourselves of the meanings, in the con of arbitration proceedings, of the following expression:-
(a) Arbitration;
(b) Dispute or difference between parties; and
(c) Dispute or difference submitted to arbitration.
Happily, the points at issue are not free of authorities.
Halsbury's Laws of England 4th Edition paragraph 501 at page 255 says as follows as to the meaning of an arbitration itself:-
"501. An arbitration is the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction.
The persons to whom a reference to arbitration is made are called arbitrators. Where provision is made that in the event of disagreement between the arbitrators (usually in such case two in, number) the dispute is to be referred to the decision of another, or third, person, such person is called the umpire. The decision of the arbitrator or umpire is called the award."
As to the nature of the dispute or difference, the same work says at page 256 paragraph 503:-
"503. The dispute or difference which the parties to an arbitration agreement agree to refer must consist of a justiciable issue triable civilly. A fair test of this is whether the difference can be compromised lawfully by way of accord and satisfaction. Thus an indictment for an offence of a public nature cannot be the subject of an arbitration agreement, nor can disputes arising out of an illegal contract nor disputes arising under agreements void as being by way of gaming or wagering. Equally, disputes leading to a change of status, such as a divorce petition, cannot be referred, nor, it seems, can any agreement purporting to give an arbitrator the right to give a judgment in rem.
Similarly, there is no dispute within the meaning of an agreement to refer disputes where there is no controversy in being, as when a party admits liability but simply fails to pay, or when a cause of action has disappeared owing to the application, where it now continues to apply, of the maxim, actio personalis mortitur cum persona."
The same work also notes at paragraph 504 at page 257 that although an arbitration agreement may relate to present or future differences, an arbitration is the reference of actual matters in controversy.
Further on arbitration, the same work says at paragraph 507 page 259:-
"507. Classification. Every arbitration by consent originates in an agreement of reference.
Agreements of reference are of two classes:
(1) common law submissions, and
(2) arbitration agreements under the Arbitration Act 1950.
Arbitrations properly so called arise either out of an agreement between the parties thereto or out of the terms of an Act of Parliament or some other instrument of statutory force. Where they are not otherwise defined by law, the subject matter of the reference and the arbitrator's authority in references arising out of an agreement

between the parties derive from and are prescribed by the agreement of reference."
As I have said earlier on in this judgment the Arbitration Law of Northern Nigeria applicable in Kano State is in pari materia with Arbitration Act, 1950 (U.K.).
The same work has the following to say under the sub head:
Whether disputes have been submitted to arbitration.
"532. Two preliminary questions arise in all cases, namely:
(1) Whether there has been any valid agreement to submit any disputes to arbitration, and,
(2) whether the dispute that has in fact arisen is one within the scope of any agreement to refer.
Both these questions are questions of construction of the agreement, and as such are questions of law. As to the first question, the courts strive to uphold arbitration agreements so that even loose and brief expressions such as "arbitration to be settled in London" or "suitable arbitration clause" will often be given sufficiently precise meanings to ensure arbitration. But an ambiguous arbitration clause will be treated as a nullity. If the parties arbitrate under a mutual mistake that they are bound to do so by agreement, this will not amount to an ad hoc arbitration."
As regards the second preliminary question i.e. whether the dispute that has in fact arisen is one within the scope of any agreement to refer, the same work says inter alia at paragraph 533:-
533 ...
A general reference of all disputes by a contract with an arbitration clause, as, for instance, a commercial contract, articles of partnership or the articles of association of a limited company, is generally limited by the nature of the instrument to disputes arising out of or in connection with the main articles of the agreement. In such cases, the question may arise, for example in proceedings to stay the action or to enforce or set aside the award, whether the arbitration claim covers a particular dispute or claim."

I can now go to the consideration of submissions of counsel on ground 3. Counsel for the defendant/appellant submitted to us that the dispute or difference submitted to arbitration centres on the following:-
"(a) The respondent claimed to be entitled to certain sums as fluctuations and variations claims and the value of certain certificates all of which amounted to N7,522,740.00.
(b) The appellant on the other hand contended that the respondent was not entitled to those sums and it had made over payment to the respondent and consequence counter claimed N6,922,742.00".
I agree with counsel for the appellant in this submission of his. The plaintiffs/respondent's claim, the points of claim and the points of defence filed in the arbitration proceedings and the addresses of counsel to the arbitration clearly bear out this submission of counsel for the defendant/appellant. In fact, counsel for the plaintiff/respondent has not argued to the contrary before us.
Counsel for the defendant/appellant next submitted to us, and again I agree with him that having regard to the clear authorities on the point, that the arbitrator has jurisdiction to decide only what has been submitted to him by the parties for

determination. And if he decides something else, he will be acting outside his authority and consequently, the whole of the arbitration proceedings including the award of the arbitrator will be null and void and of no effect.

Counsel for the defendant/appellant then referred to the following passages from the decision of the arbitrator:-
first: “On page 2 of Exhibit 9, it was agreed that the board received the letter enclosing the two claims, but the defence did not show in any evidence before me that those claims have been paid. I, therefore also award to Fanz Company Limited their two heads of claims as contained in Exhibit 9. That is to say N3,939,493.73 and N2,391,162,11.43 respectively” (Pg 180 of the record).
second: ” have gone through the evidence carefully and there is no evidence to show that these claims had been paid … Therefore on the strength of the evidence of Exhibits 7 and 8 and in the absence of any prove (sic) of payment of these claims I award to the plaintiffs their claims 3, 4 and 5 (Pp.183 – 184 of the record). ”
It is counsel’s submissions that the above passages show that the arbitrator did not appreciate the nature of the dispute submitted to him for determination that he was under the erroneous impression that the dispute related to a claim for money which is not disputed and the failure of the defendant to pay.

I have identified above the dispute or difference referred to arbitration. It is certainly not a case where a party admits liability and but simply fails to pay. The latter is not a dispute within the meaning of an agreement to refer disputes to arbitration, as the passages quoted above from Halsbury Laws of England 4th edition by me show. See also on the same point the following cases cited to us by counsel for the defendant/appellant:-
“London and North Western Railway Coy v. Jones (1915) 2 KB 35; Commercial Arbitration By Sir Michael. J. Mustill and Stewart G. Boyd (London Butterworths 1982).”
It appears clear to me on such authorities as Anisminic v. Foreign Compensation Commission (1969) 1 All E.R.208 at 213. and Nigeria Ports Authority v. Panalpina World Transport (1973) 5 S.C. 77 that if the arbitrator even in perfect good faith misconstrued the provisions giving it power to act and thereby failed to deal with the questions remitted to it but decided some question which was not remitted to it, his decision in the arbitration proceedings will be a nullity. In other words if the complaint of the appellant to the effect that arbitrator did not decide the issue remitted to it but decided some other issue not remitted to it is valid. I must perforce declare the whole of the arbitration proceedings a nullity. The question is this: is the complaint in actual fact valid
The arbitrator in his decision made it clear that the contentions of the plaintiff before him were present to his mind. See the following passages from his judgment:-
“The main agreement is Exhibit 1. It is a contract agreement entered into between the plaintiff/claimant and the defendant/respondent on the 16th of July, 1975 between Fanz Holding Ltd. and the Metropolitan Planning and Development Board, Kano State…

The claims of the plaintiff/claimant are contained in their points of claim. I believe it is/will be pertinent to set them out here:
POINTS OF CLAIM
(he set them out verbatim)
WHEREUPON the claims:-

(1) Fluctuation claims submitted in April, 1978	N2.390.620.43
(2) Variation/claims submitted in April, 1978	N3,939,439.73
(3) Value of unpaid certificates Nos.30 and 31	N192.681.84
(4) Provisional claim on fluctuation on materials not included in previous claims	N900,000.00
(5) Provisional claim for fluctuation on materials used site for period not covered by (1) above	N500,000.00
TOTAL	N7,522,742.00

I would like to set out the following paragraphs of the points of defence. Quote Nos.11, 12, 13, 14, 15, 16, 25 and 27.
(He set them out verbatim)
29. Whereupon based on the recommendations and findings of the above Commission and the subsequent Government White Paper on same the respondent counter claim from the claimant the sum of N6,922,742.00 as a result of breach and various overpayments made to the claimant as follows:-
1. That the claimant claimed and was paid fluctuation claims of N4,524,940.00 as against the correct amount payable and paid to the claimant of N952,440.00. The respondent therefore claims the sum of N3,572,500.81 as unwarranted and excess payment made to the claimant by the respondent.
2. The sum of N1,250.000.00 as advances to the claimant which the claimant admitted receiving and which sum was not settled by claimant up to the time the claimant abandoned site and when finally the contract was determined or revoked by the government.
3. Liquidated damages of N19,020.00 per month from April, 1978 up to 20th March, 1980 N4,902,319.06
4. N79.818.25
5. That certificates Nos.30 & 31 submitted being claimed by the claimant are denied and not to be considered by the arbitrator for any award, since the claimant was paid a total amount of N10,512,534.49 as against the actual value of the work on site which was N10,375,164.46."
He considered the evidence in support of the plaintiff's claim and that in support of the

defendant's counter claim. The arbitrator gave his decision on the claim and counter claim separately.
On the plaintiff's claim, he awarded it N7,522,742.00. On the defendant's counter claim, he awarded it N2,358.126.00. He eventually arrived at a net balance of N5,164,616.00 in favour of the plaintiff. He then made an award of this amount to the plaintiff.

I cannot find anything in the decision of the arbitrator suggesting that the arbitrator treated the claim of the plaintiff as having been admitted by the defendant and that the only issue before him was simply one relating to the failure of the defendant to pay what is due under the claim. An overall view of the decision of the arbitrator shows that he addressed himself to the issues referred to him, i.e. the claims of the plaintiff and the counter claim of the defendant signifying why it is disputing the plaintiff's claim.
The conclusion I reach therefore is that I find no substance in ground 3 of the grounds of appeal.
It will be necessary to refer here and now to the following passage Halsburys Laws of England, Fourth Edition paragraph 611 page 323 as to the binding effect of an award by an arbitrator on the parties concerned:"
"611. Effect of award. The effect of the award is such as the agreement of reference expressly or by implication prescribes. Where no contrary intention is expressed and where such a provision is applicable, every arbitration agreement is deemed to contain a provision that the award is to be final and binding on the parties and any person claiming under them respectively.
The publication of the award thus extinguishes any right of action in respect of the former matters in difference but gives rise to a new cause of action based on the agreement between the parties to perform the award which is implied in every arbitration agreement:'
To this passage must necessarily be added the following passages in the same work dealing with setting aside of award:-
First: "621. Grounds for setting aside award. The grounds on which an award may be set aside are:
(1) that the arbitration or award has been improperly procured, as for example, where the arbitrator has been deceived, or material evidence has been fraudulently concealed; and
(2) that the arbitrator or umpire has misconducted himself on the proceedings.
If the arbitration is in several stages, the ground for setting aside the award must be found in the stage that has been reached. If the ground on which a party seeks to set aside an award is that there is an error of law on the face of it, that party is by law limited in his address to the court to the award itself and such documents as are incorporated in the award. On the other hand, in cases of misconduct, or in cases alleging want of jurisdiction, the party challenging the award is not so limited."
Second: "622....
Misconduct occurs, for example;
(1) ....
(4) if there has been irregularity in the proceedings, as, for example, where the arbitrator failed to give the parties notice of the time and place of meeting, or where the

agreement required the evidence to be taken orally and the arbitrator received affidavits, or where the arbitrator refused to hear the evidence of a material witness, or where the examination of witnesses was taken out of the parties' hands, or where the arbitrator failed to have foreign documents translated, or where, the reference being to two or more arbitrators, they did not act together, or where the umpire, after hearing evidence from both arbitrators, received further evidence from one without informing or hearing the other or where the umpire attended the deliberations of the appeal board reviewing his award.
(5) if the arbitrator or umpire has failed to act fairly towards both parties…" (italic mine)
Third: 623. Error of law on face of award. An arbitrator's award may be set aside for error of law appearing on the face of it, though the jurisdiction is not lightly to be exercised. Since questions of law can always be dealt with by means of a special case this is one matter that can be taken into account when deciding whether the jurisdiction to set aside on this ground should be exercised. The jurisdiction is one that exists at common law independently of statute. In order to be a ground for setting aside the award, an error in law on the face of the award must be such that there can be found in the award, or in a document actually incorporated with it, some legal proposition which is the basis of the award and which is erroneous."
I have to reproduce here the provisions of section 12(2) of the Arbitration Law of Northern Nigeria applicable in Kano State under where the defendant applied to the Kano State High Court to have the arbitrators award in favour of the plaintiff set aside:-
"(2) Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the court may set the award aside."

I have dealt with ground one of the defendant's grounds of appeal which attacked in effect the jurisdiction of the arbitrator to embark on the reference and I have held that the complaint is not valid. I can now go on to consider the other grounds of appeal complaining about the refusal of both the trial court and the Court of Appeal to set aside the award of the arbitrator. It will be recalled that I have held, contrary to the view of the Court of Appeal, that there was a valid appeal before it by the defendant against the order of Fernadez, J. of 25/11/82 refusing the application of the defendant under section 12(2) of the Arbitration Law of Northern Nigeria to set aside the arbitrator's award. It will also be recalled that the Court of Appeal made as I have shown earlier on in this judgment, some findings on the assumption that there was a valid appeal by the defendant in the lower court against the aforesaid order of Fernandez, J. of 25/11/82. Since I have held that that was in fact and in law a valid appeal against that refusal order of Fernandez, J. of 25/11/82 the way is now clear for me to consider ground 5 of the defendant's grounds of appeal, which is predicated on the following finding of the Court of Appeal, made on the supposition that there was before it a valid appeal against the order of 25/11/82.
"It is obvious from the excerpts from Exhibit 18, that the question of fluctuations and variations which totals N6,330,059 in the points of claim has left open, uninvestigated

and undecided by Exhibit 18, and in consequence, a fortiori since the arbitrator did not admit Exhibit 18, by the award itself. In view of the above, one would have declared the arbitration proceedings and the award as a nullity."

Earlier in its judgment, the Court of Appeal had held that both Exhibit 18, the report of a firm of quantity surveyors, Messrs Widerele and Trollope Nigeria, and the evidence of Mr. Savage on it in the arbitration proceedings, were admissible. It will appear that Exh.18 and the evidence of Mr. Savage were excluded from the proceedings by the arbitrator in the consideration of his decision in the arbitration. In effect the Court of Appeal held that the document and the whole of the evidence of Mr. Savage were wrongly excluded from the proceedings before him by the arbitrator.
The Court of Appeal then held as per the leading judgment of Ogundere, J.C.A.:-
"By reason of the exclusion of this vital admissible evidence which would have affected the conclusions of the arbitrator, the appellant could have succeeded on a motion to set aside the award."
He even then sent on to express his regrets that, according to him, there was no valid appeal against the decision of the trial court refusing the application of the defendant in that court to set aside the award of the arbitrator. I have held that the Court of Appeal was wrong in the latter regard.
The passage from the judgment of the Court of Appeal, upon which counsel for the defendant relied, and which I have reproduced above does not wear a badge of clarity. So, I am inclined to agree with counsel for the respondents, Chief Bayo Kehinde, that the reasons why the court was saying the arbitration was nullity is not easily discernable from this passage which made reference to Exh.18 and Mr. Savage's evidence, said by the Court of Appeal to have been wrongly excluded from the arbitration proceedings. One thing however is clear, the passage in question is a follow up to the finding of the Court of Appeal on the admissibility of Exh.18 and its view on its wrongful exclusion from the arbitration proceedings. So the passage now in question read along with the earlier findings of the Court of Appeal, on Exh.18 which I have also reproduced in this judgment tells us in unmistakable language why the Court of Appeal would have declared the arbitration proceedings a nullity if there had been valid appeal against the order of the trial Judge refusing to set aside the arbitrator's award. The reason for ease of reference is reproduced below again:-
"By reason of the exclusion of this vital admissible evidence which would have affected the conclusions of the Arbitrator, the appellant could have succeeded on a motion to set aside the award."

It now behoves me to consider the arguments of counsel for the respondent, Chief Bayo Kehinde, S.A.N. to the effect that this alternative finding of the court is wrong in law. I am aware that the respondent has not filed a cross appeal against this finding. But the finding is not the basis or one of the basis upon which the Court of Appeal found in favour of the respondent and against the appeal. So, I am prepared in the instant case, in the interest of justice, to consider the arguments of counsel for the respondent in his reply. It will appear to me to be a great pity if this appeal is allowed on a bare technicality.

It was submitted by counsel for the respondent, Chief Bayo Kehinde, S.A.N. that exclusion of evidence from arbitration proceedings would not amount to a misconduct warranting the setting aside of an arbitrator's award under section 12(2) of the Arbitration Law of Northern Nigeria applicable in Kano State. I have no doubt that this submission is not valid. The passages from Halsbury Laws of England, 4th Edition Volume 2 paragraphs 622 page 330 which I have quoted earlier on in this judgment, show that it is not valid.
On the same point Russell on Arbitration 19th Edition page 284 says:-
"Arbitrator should generally hear all the material evidence tendered. The arbitrator should hear all the evidence material to the question which the parties choose to lay before him as on a trial before a jury. It has been said that he may exercise some discretion as to the quantity of evidence he will hear, but declining to receive evidence on any matter is, in ordinary circumstances, a delicate step to take for the refusal to receive proof where proof is necessary is fatal to the award." (italics mine)

It is to be noted that the Court of Appeal held, and this is not challenged in the submissions of counsel for the respondent, that Exh.18 and the evidence of Mr. Savage on it were admissible. The evidence of Mr. Savage was tied to Exh.18. By excluding Exh.18 from the proceedings, the arbitrator had thereby excluded the evidence of Mr. Savage on it from the proceedings. To exclude the evidence of a material witness from the proceedings having first been admitted in evidence is tantamount, in my view, to refusing to hear a material witness.
It is true that the Court of Appeal in its consideration of Mr. Savage's evidence before the arbitrator based on Exh.18 said that the latter document contained some flaws. This is a far cry from saying that the Court of Appeal took the view that the document in view of the flaws was of no moment in the arbitration proceedings. The correct view appears to me to be this. The Court of Appeal have examined the negative and positive points of Exh.18, according to the evidence of Mr. Savage in the arbitration proceedings, which evidence was not considered there, came to the conclusion that the exclusion of this material evidence had deprived the defendant of a fair hearing before the arbitrator and consequently its proceedings would have been a nullity if not for the technicalities, which I have already discussed, which the court below raised against the defendant's appeal.
So, I do not also think that Chief Kehinde, S.A.N. is correct in his submission that the Court of Appeal made no finding as to the proceedings before the arbitrator being a nullity. I cannot find anything in the judgment of the Court of Appeal remotely suggesting as submitted to us by Chief Kehinde. S.A.N. that wrongful exclusion or admission will not amount to a misconduct. That court only said that challenge to an interlocutory decision on admissibility of evidence should be as follows as per the lead judgment of Ogundere, J.C.A.:-
"... Firstly, as regards interlocutory appeals during the arbitration on matters like the wrongful admission or exclusion of evidence, a party may apply to the court under section 15 of the Arbitration Law, that the arbitrator do state in the form of a special case for the opinion of the court any question of law arising in the course of the reference. Obviously, the appellant did not avail itself of this procedure."

It is the submission of Chief Kehinde, S.A.N., to us that it was too late for the defendant to have applied to the trial court to set aside the arbitrator's award. His submissions in this regard are as follows as per the brief of arguments for the respondent:-
"(e) The penultimate paragraph on page 8 of the brief quoting Russell on arbitration 18th (sic) Edition page 343 to the effect that it was too late to seek to set aside the award after it was sought to be enforced supports the respondent's contention that the Court of Appeal did not intend to declare the award a nullity.
and (c) ... it is too late to seek to set aside an award made 13 months earlier to the time the application to set aside was made and six months after application to enforce the award was made."
As to the proposition of law credited to Russell on Arbitration, 19th Edition, page 343, namely, it is too late to sack to set aside any award after it was sought to be enforced, I must say that the passage referred to is misconceived. I will say more on this anon.
All can find in that book on time for setting aside award is as fellows at page 496:-
"Time for application. An application to set aside or remit an award may be made at any time within six weeks after the award is made and published in the parties. But this time may be extended.
An "application", for the purposes of time, may be treated as equivalent to service of the notice of motion, and if this is done within the time specified in the rule, the proceedings will be in time, even though the motion is not heard until after the time has expired."
In an application to court for an extension of time within which to apply to have the award set aside all relevant matters will be considered like whether it has already been sought to have the award enforced. I do not think however it is a true proposition of law to say it is too late to seek to set aside an award after it was sought to be enforced.
The important thing to note about the Arbitration Law of Northern Nigeria applicable in the instant case is that in the schedule to the law containing the provisions to be implied in submission, there is no time limit as to when an application to court under section 12(2) of that law to set aside an award is to be made. The better view appears to me to be that once an award has been enforced, as opposed to an application for it to be enforced, under section 13 of that law, it is too late to apply to have the award set aside under section 12(2) of that law.
The following passage from the lead judgment of Ogundere, J.C.A., in the lower court gives the erroneous impression that an application to set aside an award must be made before the winning party applied to the court to enforce the award:-
"...Nevertheless, a party dissatisfied with the award can apply to set it aside provided that he brought his application to court without undue delay and before the winning party applied to the court to enforce the award. See Ekeng Ita v. Edet Idiok 4 NLR p.100 where an application to set aside the award three years later was refused."
Ita v. Idiok 4 N.L.R. 100 does not say anything resembling this proposition.
The judgment of Webber, J., in the case is very short and it is as follows:-
"This is a motion to set aside an award dated 23rd May, 1919. The motion was filed nearly three years after the publication of the award, and as this case was referred by the court to arbitration an action having been first instituted, any application to set the award aside must be made within 15 days after publication thereof.

But apart from this I am not satisfied that any ground has been shown to justify this court in setting aside the award. Motion dismissed with 5 guineas costs."
I have said above that this proposition is not valid under the English law. Our local law does not support it. The case law cited by the Court of Appeal does not support it either.
I can now talk briefly about the passage in Russell on Arbitration upon which counsel for the plaintiff, the respondent founded his submission that it is too late to apply to set aside an award after it was sought to be enforced.
The passage reads as follows:-
"Misconduct or mistake of arbitration:
The defendant cannot, in an action on an award, plead as a defence misconduct or irregularity on the part of the arbitrator. His proper course, if these grounds exist, is to move to have the award set aside." (italics mine)
This passage recognises the right of the defendant to an action on an award to move to have the award set aside if there exists on the part of the arbitrator misconduct or irregularity. Obviously by an action on an award the plaintiff is seeking to enforce the award. So that passage cannot support the proposition of counsel for the respondent that it is too late to apply to set aside an award after it was sought to be enforced. The passage, in my view, is only saying that the application to set aside the award must be a separate proceeding independent of the action on the award.
The instant case is unlike that before Webber, J. above. Here the trial Judge referred to the following submissions of counsel for the defendant/applicant to him namely:-
"(3) The rules which say that an award of an arbitration to be set aside must be brought within 15 days does not apply in this case. The rules apply only to cases where an arbitrator is appointed by the court. He refers to the case of Elias Khawan v. Messrs Eddiiji (1967) Lagos Law Report 125. He contends that the arbitrator was appointed by consent of both parties."
He did not precisely resolve the point but went on to entertain the application on its merit, the impression being then that it was not too late to bring it.
In effect, I uphold ground 5 of the appellant's ground of appeal.
I am not here suggesting that an undue delay in bringing an application under section 12(2) of the law to set aside an award can never militate against the application. Whether or not the latter will be the case will depend upon the circumstances surrounding such an application as it must be, seeing that a matter of discretion of a Judge or court is involved.
I therefore reject the submission of counsel for the plaintiff/respondent that it was too late to apply to have the award set aside.
What I have said on ground 5 is enough to dispose of this appeal in favour of the defendant. However, arguments were heard on the other grounds of appeal. In deference to the industry which counsel for both sides put into these arguments, I will express my opinions on them.

I will now take ground 4 of the defendant's grounds of appeal. This ground is covered by issue 6 which says:-
"6. Whether Exhibit 9 before the arbitrator could properly be held to represent an agreement on all issues discussed in it so as to amount to a binding agreement that can

legally be enforced."
The complaint here is not that Exh. 9 is inadmissible. The complaint is about the use to which it was put. As regards inadmissible evidence Russell on Arbitration 19th Edition says:-
"Receiving inadmissible evidence which goes to the root of the issue submitted.
An arbitrator who wrongfully admits and acts on evidence which goes to the root of the question submitted to him is guilty of legal misconduct, and his award will be set aside."
Earlier on the same work has said at page 282:-
"Errors as to law of evidence
In deciding as to admissibility of evidence tendered, the arbitrator must act honestly and judicially, and if while so acting he decides erroneously that evidence is or is not admissible, that is not in itself misconduct, and (as with other mistakes) his award will not be set aside on that ground, unless the error appears on its face."
It is not suggested that there is any error on the face of Exh.9.
A consideration of this ground of appeal necessarily involves the consideration of issues 10 in the appellant's brief of arguments which says:-
"10. Whether paragraph (h) of the schedule to the arbitration law of Kano State that the award of the arbitration is final precludes the courts from examining the award so as to determine its validity."
Provision (h) in the schedule to the Arbitration Law of Northern Nigeria says:-
"(h) The award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively."

In line with provision (h) is the decision in such cases as Jones v. Lebenthal in re (1998) 58 L.T. 406 C.A. at page 408 to the effect that parties took their arbitrator for better or worse both as to decisions of fact and decision of law. This however is subject to the provisions of sec.12(2) of the arbitration law to the effect that where an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured, the court may set the award aside. I have also earlier in this judgment discussed what amounts to misconduct on the part of an arbitrator or improper procurement of an award in this con.
Exh.9 is the minute of a meeting held between the parties to this case on 16/10/78. May be the arbitrator misconceived, as submitted by counsel for the defendant, the import of Exh.9 by holding that it constituted a concluded agreement by them on the dispute between them when in fact and in law it was not, being as regards the dispute only inchoate and therefore could not constitute a concluded contract or agreement. Where an agreement is inchoate and has not gone beyond negotiations it cannot be enforced as a concluded contract.
See Scammell v. Ouston (1941) All E. R.14 and Courtney & Fairbaine Ltd. v. Tolaimi Brothers Hotels Ltd. & Anor (1975) 1 WLR.297 cited to us by counsel for the defendant. It is to be noted that both cases were concerned with actions for breach of contract and not an action oil award or an application to set aside an award.
Put at its highest, the complaint of the defendant/appellant would be that the decision of the arbitrator was erroneous as to the legal effect of an admissible document which on the face of it is regular. That on the authorities which I have referred to earlier on in

this judgment cannot be a ground for setting aside an award of an arbitrator.
I am satisfied that in the instant case the parties did not submit some specific question of law in express terms to the arbitrator for determination. What was submitted to the arbitrator for determination was the whole question of the dispute between the parties whether it depended on law or on fact. This brings me to the rule in Hodgkinson v. Fernie (1957) 3 C.B. N.S 189 as expounded in Absalom v. G.W. Garden Village Society (1933) All E.R. 616. The question for determination in the House of Lords in the latter case was whether an award was had by reason of error of appearing on the face of it. The rule is stated thus by Lord Wright in his speech at page 624 – 5:-
"Indeed, the rule presupposes that the decision of some question of law is at the basis of the award, and must have been involved in the submission; otherwise it would be impossible to express the rule as it is stated by Williams, J., in his often quoted dictum in Hodgkinson v. Fernie (1) 3.C.B.N.S. at p. 212. After stating the general principle that the parties, having chosen their tribunal, are bound by the arbitrator's decision, he proceeds. The only exceptions to that rule are cases when the award is the result of corruption or fraud; and one other, which, though it is to be regretted, is now, I think, firmly established, namely, where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award."
In Hodgkinson v. Fernie (1) there was no error of law apparent on the face of the award, but the principle stated has frequently been applied, in particular by the House in British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Co. of London (5), where an award was set aside as containing an error on its face."
Expounding the rule, Lord Wright further said:-
"The rule was again re-stated with approval by Lord DUNE-DIN, giving the opinion of the privy council in Champsey Bhara & Co. v. Jiraj Balloo Spinning and Weaving Co. Ltd, (7). I know of no authority that limits its application so as to exclude cases in which a question of law must necessarily arise; indeed, if that were so the rule would be in effect meaningless. The rule in truth applies to the ordinary case where in the words of LORD DUNE-DIN the submission refers "to the arbitrator the whole question whether it depends on law or on fact." To be contrasted with such cases, there is the special type of case where a different rule is in force, so that the court will not interfere even though it is manifest on the face of the award that the arbitrator has gone wrong in law. This is so when what is referred to the arbitrator is not the whole question whether involving both fact or law, but only some specific question of law in express terms, as the separate question submitted; that is to say, where a point of law is submitted as such that is, as a point of law, which is all that the arbitrator is required to decide, no fact being quoad that submission, in dispute. Such a case is illustrated by the Kelantan Government v. Duff Development Co. Ltd. (2), where Lord Cave, L.C., said (1923) A.C.395 at p.409:
"But where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the court only because the court would itself have come to a different conclusion."
This house held in that case that the only questions to be determined by the arbitrator, there being no facts in dispute, were the questions of law as to the construction of the contract. That decision followed Re Arbitration between King and Duveen and others

(4) in which Channel, J., said (1913) 2 K.B. at p.36, in distinguishing British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Co. of London (5).
"It is equally clear that if a specific question of law is submitted to an arbitrator for his decision, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside."
The conclusion reached is that the rule in Hodgkinson v. Fernie does not prevent this court from examining the award in this case because no specific question of law was submitted to the arbitrator for his decision. But I refuse to interfere with the decision of the arbitrator on the arguments advanced to us on ground 4 dealing with Exh.9, because (1) Exh.9 an admissible document contains no error of law on its face; (2) The arbitrator only misconceived, according to the appellant, the legal effect of the document.
I have held earlier on in this judgment that the arbitrator did not misconceive the issues referred to him for his decision.

I now go on to ground 2. The issue raised in this ground according to the defendant/appellant is as follows:-
"2. Whether summary enforcement of an award as a judgment under S.13 of the Arbitration Law of Kano State should be allowed where the validity of the award is in obvious doubt"
Section 13 of the Arbitration Law says:-
"13. An award on a submission may, by leave of the court or a Judge, be enforced in the same manner as a judgment or order to the same effect.
Cases when award will not be enforced as a judgment are stated as follows in Russell on Arbitration 19th Edition pp. 403 – 4:
"When award will not be enforced as a judgment. An award will not be enforced as a judgment under the section, but the successful party will be left to bring an action on the award in the following cases:
1. When the submission and agreement to refer (if any) are by parol. Such submissions and agreements are not "arbitration agreements" within the meaning of the act, so that section 26 does not apply to an award based upon it.
2. Where the award is declaratory only, for instance, where it ascertains only the amount to be paid and not the liability in law to pay. "Where there has been nothing more than a quantum or amount adjudicated as to the liability of the person who is called upon to pay the amount, in my judgment the section does not apply. Compensation was awarded for injury to land under the Public Health Act, 1875 and an application to make the award a rule of court (as provided by the same act) was refused, on the ground that the title to the land affected was not proved, the arbitrator not having the power to do anything beyond settling the amount of compensation. Enforcing the award in such circumstances must be by action Re Walker and Beckenham District Local Board (1884) 50 L.T.207.
3. Where there is a real ground for doubting the validity of the award. Formerly, it was thought that "this summary method of enforcing awards is only to be used in reasonably clear cases but now the opposite emerges as the true test, and the summary method of

enforcement is to be used in nearly all cases."
In view of a real ground, for doubting the validity of the award in the instant case, namely the issue of the award being a nullity, summary enforcement of the award ought not to have been made.
I will not bother to consider the arguments on ground six of the appellant's grounds of appeal which raises the question as to whether the plaintiff had adopted the proper procedure in enforcing under section 13 of the Arbitration Law the award in its favour. I say this because counsel for the defendant/appellant himself conceded it having referred to Adedoyin v. Adedoyin (1966) NMLR 77; Nofiu Surukatu v. Nigeria Housing Development Society (1981) 4 S.C.26 that a technical point like the present even if well founded will not preclude the court from going into the merits of a case with a view to doing justice.
I am indebted to counsel on both sides for the able assistance they have given me both in their briefs of arguments and oral submission in court. In the result the appeal of the defendant is allowed by me. The judgment of the Court of Appeal is hereby set aside. The decision of the trial court of 25th November, 1982, refusing to set aside the award of the arbitrator of 18th September, 1981, is hereby set aside. The leave granted by the trial court on 27th January, 1983 to the plaintiff to enforce the award of the arbitrator is also set aside. In their place I enter the following orders:-
(1) The award of the arbitrator of 18th September, 1981 is hereby set aside;
(2) The application of the plaintiff to enforce the said award is hereby struck out;
(3) The order of Mustapher, C. J. (as he then was) on 11th February, 1981 staying proceedings in this case pending the decision of the arbitrator is hereby set aside;
(4) The case shall now proceed to trial in the Kano State High Court before another Judge that is a Judge other than Fernandez, J.
The defendant/appellant is entitled to its costs against the plaintiff/respondent in the Court of Appeal and in this court which I assess at N300.00 and N500.00 respectively. Costs of the abortive trial in the High Court will abide the result of the re-trial.

ANDREWS OTUTU OBASEKI, J.S.C.: I have had the advantage of reading in advance the draft of the judgment just delivered by my learned brother, Agbaje, J .S.C., and I agree with him that the appeal be allowed. I hereby set aside the decisions of the Court of Appeal and the High Court. In their place, I hereby substitute the following orders:
(1) The award of the arbitrator of the 18th of September, 1981 is hereby set aside;
(2) The application of the plaintiff to enforce the said award is hereby struck out;
(3) The order of Mustapher, C. J., (as he then was) on 11th February, 1981, staying the proceedings in this case pending the decision of the arbitrator is hereby set aside;
(4) The case is remitted to the Kano State High Court to proceed to trial before another Judge, and
(5)The defendant is entitled to costs in this appeal fixed at N500.00 in this court and N300.00 in the Court of Appeal.
Costs in the High Court is to await the conclusion of the trial of the cause. Having regard to the importance of the case and the submissions before us, I will add my comments on the issue of the order of stay of proceedings pending the determination of the arbitration proceedings made by Mustapher, C.J. Proceedings in this matter were

initiated by the plaintiff/respondent when he took out a writ of summons in the Kano State High Court against the defendant claiming:

"1. Value of unpaid
certificates No. 30 and 31 N192,681.48
2. Fluctuation claims submitted
by plaintiff in 1978 N2,390,620.43
3. Variation claims submitted
by plaintiff in April, 1978 N3,939,439.73
4. Provisional claim on
fluctuation on materials used on
site for period not covered by
(3) above N500,000.00
Total N6,922,742.00"

On the 8th day of October, 1979, parties appeared by counsel. The defendant's counsel, Tijani Ahmed, applied for an order of pleadings and the court, Aikawa, J., ordered pleadings to be filed, giving the plaintiff a period of 21 days and the defendant a period of 40 days after service as requested by counsel. On the 22nd day of January, 1980, after the plaintiff had filed his statement of claim as ordered by the court on 6/10/79, Nnadi, learned counsel for the plaintiff/respondent informed the court that he had written to the defendant's counsel notifying him of the fact that he had written to the defendants giving them notice of the existence of a dispute between the parties and that their reply was that as an inquiry was in progress, they could not appoint an arbitrator. He then applied to or moved the High Court under the provision of clause 31 of their agreement for the court to appoint the arbitrator.

Tijani, learned counsel for the defendant/appellant, opposed the application contending that the application was premature as the non-payment of certificates Nos. 30 and 31 was stopped by the "act of the state by means of an enquiry set up by the state with the aim of stopping all works and necessary payments"

The learned Judge was of the view that the matter must be referred to an arbitrator and as the appointment of an arbitrator was within the competence of the Chief Judge, he transferred the case to the Chief Judge for the necessary order.

Subsequently, the defendant filed a motion to strike out the case but later withdrew it and it was struck out. He still on that day 4/2/80 maintained his objection to the matter being referred to an arbitrator. The plaintiff had on 30/10/79 filed its statement of claim. However, he still pressed his application to refer the matter to arbitration.

The parties agreed on an arbitrator and on 11/2/81. Mr. Nnadi, learned counsel for the plaintiff informed the court that they had started the arbitration proceedings.

Mr. Modibho, learned counsel for the defendant confirmed the statement and said: "That is so, we want the matter stayed."

The court then made the order staying the proceedings as follows "The matter is hereby stayed, pending the decision of the arbitrator. Case is adjourned sine die.

The arbitrator concluded the arbitration proceedings and made his award in favour of the plaintiff. The defendant moved the court to set aside the award while the plaintiff

moved the court for leave to enforce the award.
The High Court dismissed the application to set aside the award and granted the plaintiff leave to enforce the award. The defendant was dissatisfied and appealed unsuccessfully to the Court of Appeal. This is a further appeal.

The main issue for determination in this appeal is whether the High Court is vested with jurisdiction to stay the proceedings in the case before the court and refer the matter to an arbitrator under the terms of the agreement after the plaintiff has obtained an order for pleadings and filed his statement of claim.
The defendant/appellant formulated several issues for determination but failed to argue his appeal along the lines of the issues so formulated. Instead, counsel argued the appeal by reference to the grounds one by one.
I must comment that the purpose of formulating issues is to proffer arguments in answer to the questions raised by the issues. An issue may or may not deal with several grounds of appeal. But more often than not, the same issue is raised in several grounds of appeal and the treatment of the issue avoids the repetition of argument and submission that must of necessity be made if the grounds of appeal are argued seriatim. Thus, the argument of an appeal by reference to and along the lines of the issues formulated is trim, neat and concise in its treatment of the question raised in the appeal.

However, the respondent in its brief dismissed the contention that the issues formulated by the appellant were issues when counsel for the appellant observed as follows:
“With respect, the issues listed by the appellant as issues for determination in the Supreme Court are not such issues properly formulated.”
Learned counsel then proceeded to formulate the following 3 issues:
“(i) Can an arbitrator’s award be set aside on grounds other than misconduct as provided under section 12(2) of the Arbitration Law of the Laws of Northern Nigeria applicable in Kano State
(ii) In the circumstances of this case when the appellant accepted and did not object to the award for 13 months until it brought a motion setting aside the award 6 months after the respondent had brought its own application to enforce the award, is the appellant not estopped from seeking to set aside the award under the doctrine of estoppel by conduct
(iii) Can the fact that leave was granted in the Court of Appeal to the appellant to argue points not canvassed in the High Court cure the defect of not first seeking to set aside in the High Court an award on the ground of misconduct
I agree with my learned brother, Agbaje, J.S.C., in his opinion that the issues formulated by the appellant in its brief do not properly arise for determination. But at the oral hearing, learned counsel for the appellant properly formulated the main issue for determination in this appeal as:
“Whether after the parties had taken steps in the action at the Kano High Court, it was still within the discretion of the (High Court) learned trial Judge (D. Mustapher, C.J., as he then was) to order a stay of the proceedings in the light of section 5 of Arbitration Law, Cap.7, 1963, Laws of Kano State.”

It is therefore necessary to set out the provisions of the said section 5 of the Arbitration Law. It reads:
"If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any other person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when proceedings were commenced, and still remains ready and willing to do all things necessary to the proper conduct of the arbitration may make an order staying proceedings."
What is a pleading A statement of claim is a pleading and on the admission of respondent's counsel, the statement of claim was filed on 30/10/79 long before the application to refer the matter to arbitration was made and an order for a stay of proceedings pending the determination by the arbitrator was made by the High Court (Mustapher. C. J.). This deprives the learned Chief Judge of the jurisdiction to stay proceedings and refer the dispute to an arbitrator. Even then, in contravention of the provisions of section 5 of the Arbitration Law, a step had been taken when an application for an order for pleadings to be filed was made. An application for pleadings constitutes a step within the provision of section 5 of the Arbitration Law.
See Ibembe v. Wemabod Estates (1977) 5 S.C 115; Vestings v. Nigerian Railway Corporation (1964) Lagos High Court Reports 135. Vol.2 Halsbury's Laws of England, 4th Ed., paragraph 563 page 290.
Since pleadings had been ordered and the statement of claim filed, The Kano State High Court, in my view. is the only tribunal with jurisdiction to resolve the dispute between the parties to the action. By that time, the agreement providing for arbitration had been overtaken by events and rendered ineffective by the Arbitration Law stipulating the time and application for reference to arbitration can be entertained by the court and granted. See
Doleman & Sons v. Cessett Corporation (1912) 3 KB.257. At that point of time, the court had not only jurisdiction but also the duty to settle the dispute between the parties.
The exercise of the power to stay proceedings in the court pending the determination of arbitration proceedings can only be and must be exercised in accordance with the provisions of the law section 5 of the Arbitration Law. Failure to exercise the power in accordance with the provisions of the law renders the decision or order a nullity. See Anisminic v. Foreign Compensation Commission & Anor. (1969) 1 All E.R.208 at 213.
However, the appellant submitted to the arbitration and the matter before this court is an appeal against the order refusing to set aside the arbitration award and an order granting leave to enforce the award. It is not an appeal against the order staying the proceedings pending the decision of the arbitrator. The exercise of the power to stay proceedings does not in anyway affect the validity of the exercise of the power to refuse an application to set aside the arbitration award or to grant leave for its enforcement.

Having dealt with this issue, I adopt the opinions of my learned brother, Agbaje, J.S.C.

on the complaints in the grounds of appeal. I also agree with him that the appeal be allowed and I hereby allow the appeal and set aside the decision of the Court of Appeal. I hereby order costs as set above in the opening paragraphs of this judgment to be paid to the appellant.

KAYODE ESO, J.S.C.: I have had a preview of the judgment of my learned brother, Agbaje, J.S.C, and I agree with his reasoning and conclusion. I adopt the judgment as mine and make the same consequential order.

SAIDU KAWU, J.S.C.: I have had the advantage of a preview of the judgment just delivered by my learned brother, Agbaje, J.S.C. I agree entirely with his reasoning and also with his conclusion that the appeal should be allowed. I too will allow the appeal. I abide by the consequential orders made in the lead judgment, including the order as to costs.

SALIHU MODIBBO ALFA BELGORE, J.S.C.: I had a preview of the judgment of my learned brother, Agbaje, J.S.C., with which I am in agreement. The jurisdiction of the High Court subsists despite remittance of the matter to arbitration whilst adjourning the substantive suit. For the reasons ably advanced in the lead judgment, which I fully agree with and adopt as my own, I allow this appeal with N500.00 costs to the appellants as costs in this court, N300.00 in the court below. Appeal allowed.

Appearances

1. B. Mahmoud, Director, Civil Litigations, Kano State Ministry of Justice (with him, T. Yahaya, Assistant Director, Civil Litigation, Kano State Ministry of Justice) For Appellant

AND

Chief Bayo Kehinde, S.A.N. (with him, Chief O. T. Nnadi, O. T. Asuquo, Esq. Miss Jean Chiazor and F. Akerele, Esq., For Respondent

CHIEF ADEMOLA OGUNNIYI & Anor. v. DR. FUNSHO ADARAMOLA & Anor.(1973)

October 12, 2019

EUGENE MERIBE V. JOSHUA C. EGWU -1976

October 12, 2019

THE M. V. “CAROLINE MAERSK” SISTER VESSEL TO M.V. “CHRISTIAN MAERSK” & ORS V. NOKOY INVESTMENT LIMITED(2002)

October 20, 2019