

SUPREME COURT OF NIGERIA

28TH MAY, 1993. SC.26/1991

**CORAM:- A. G. KARIBI-WHYTE, S. KAWU, A. B. WALI,
M. E. OGUNDARE, E. O. OGWUEGBU, JJSC**

FRANCIS ANAEZE APPELLANT

AND

UDE ANYASO RESPONDENT

*APPEALS -Concurrent findings of two lower courts - when
declared wrong by the Supreme Court.*

*CIVIL PROCEDURE - Where what is pleaded is not admitted by the
other party - how proof must be established.*

*CIVIL PROCEDURE - Counter-claim - where no reply was filed -
implications thereof.*

*CONTRACTS - Specific performance - what the claimant must prove
-breach of contract - alternate remedies open to
injured party.*

*EVIDENCE -Illiteracy -how determined - whether mere plea is
sufficient - effective rebuttal thereto.*

EVIDENCE -Mortgages - how proved in evidence.

*EVIDENCE -Documentary evidence - contract for sale of land -
purpose of tendering unregistered purchase receipt.*

*LAND LAW - Breach of contract for sale of land - when specific
performance will be granted.*

*LANDLORD & TENANT - Claim for recovery of possession and
account of rents collected - claim not proved
in evidence - where defendant's counter-*

claim was found proved - proper order to be made.

LEGAL DOCU-

MENTATION - *Mortgages - not properly executed nor proved in evidence - even where proved - whether pendency of mortgage - can annul valid title to land.*

FACTS

The Plaintiff/Respondent claimed before the Imo State High Court Aba, recovery of possession and account of rents collected in respect of a landed property. The Defendant/Appellant also filed a counter-claim.

Plaintiff claimed to be the lessee of the registered property in dispute, He granted an equitable mortgage to the A.C.B. Limited as security for a loan from that bank but the mortgage was found not to have been properly executed. During the pendency of the said mortgage, the Plaintiff's lease expired and he renewed it without forwarding the renewed lease to the bank.

Rather, the Plaintiff claimed that whilst the said mortgage was still subsisting, he borrowed the sum of £1,300.00 (One thousand, three hundred pounds) from the Defendant in 1964. Being unable to return Defendant's money, plaintiff under pressure issued a receipt (Exh C), for sale of the property to the Defendant, acknowledging receipt of £1,300.00 as the purchase price. The Plaintiff put the Defendant into physical possession for him to realise the money being owed to him. The Plaintiff merely stated in his pleadings that he was illiterate at the time he issued Exh C (the purchase receipt), without proving same.

The Defendant denied the Plaintiff's claim in toto and averred that the Plaintiff sold the property to him under a valid contract. The lease and other documents of title were delivered to the Defendant by the Plaintiff. Before the contract could be fully performed by the Plaintiff in signing the deed of assignment, the civil war broke out. The Defendant claimed for specific performance of the contract against the Plaintiff. Defendant was not aware of any mortgage in favour of

the A.C.B. Ltd at the time he paid for the land in dispute. Defendant showed that other documents in evidence executed by the Plaintiff had no jurat and therefore, Plaintiff cannot claim to be illiterate merely because the purchase receipt (Exh C) duly signed by the Plaintiff had no illiterate's jurat.

The trial Court found in favour of the Plaintiff. The Defendant's appeal to the Court of Appeal was dismissed. On further appeal by the Defendant/Appellant to the Supreme Court:

HELD (unanimously allowing the appeal and making the order for specific performance).

1. The issue of illiteracy is a question of fact that is determined, objectively on the evidence before the court. (p. 30 L 27)

2. In the instant case, Respondent's illiteracy cannot be decided on his scanty evidence or demeanor seeing that the only evidence by the Respondent is his own ipse dixit that he is illiterate. (p. 28 L 1)

3. The Appellant's claim that the Respondent was literate at the time he signed the receipt for sale of the land (Exhibit C) is supported by the overall effect of two other exhibits in evidence. Moreover, it was not the Respondent's case that the Appellant fraudulently or illegally induced him to issue the said receipt. (p. 28 L 30)

4. The receipt evidencing payment by the Appellant to the Respondent, Exhibit C, is not an inadmissible document per se. Thus, the Appellant being a third party cannot be denied the benefit of its contents by a mere plea of illiteracy by the maker since the prima facie evidence is that Exhibit C was issued by the Respondent, (p. 30 L 19)

5. Having regard to legal authorities, the findings of fact by the two lower courts that the Respondent is illiterate at the time he signed Exhibit C were wrong, being perverse, unreasonable and not supported by the evidence adduced, (p. 27 L 37)

6. The evidence before the Court did not show that the purported mortgage (Exhibit A) is first in time to the Appellant's interest in the disputed property, since the mortgage still remained undated and not signed by the mortgagee. And even if properly executed, the said mortgage is no more than a charge on the property, (p. 31 L 5)

7. Since mortgages are proved by producing admissible and properly executed documents, the evidence that A.C.B. Ltd is having a registered charge and a legal mortgage on the property in dispute is hear-say, having proved nothing, (p. 31 L 36)

8. Where what is pleaded is not admitted, its proof must be by admissible evidence. As such, there is no evidence upon which the two lower Courts can reach a conclusion that there is a subsisting mortgage (equitable or legal) by the Respondent to the A.C.B. Ltd. nor can the priority in time of such mortgages to the Appellant's interest be spoken of. (p. 32 L 2)

9. The purpose of tendering Exhibit C (the purchase receipt) is not to establish that the Appellant has an equitable interest in the disputed property but merely to show that he has a contractual right of a kind which he can seek to enforce through the Court, (p. 32 L 10)

10. A party seeking to enforce the performance of a contract must show that he has performed all condition precedents, or is willing to perform all terms which he ought to have performed. (p. 33 L 16)

11. As in this case, where there is a valid enforceable contract and one of the parties defaults in performance, the other party may either insist on the actual performance of the contract or seek damages for breach. (p. 33 L 22)

12. For a breach of contract for sale of land, the law takes the view that damages cannot usually be an adequate remedy and the purchaser is entitled to have the contract specifically performed. (p. 33 L 27)

13. The Appellant's counter-claim stands undisputed as the Respon-

dent did not file any reply thereto. (p. 34 L 1)

14. The Appellant is entitled to benefit from the remedy of specific performance seeing that the present contractual transaction between the parties does not fall within the exception under the remedy. (p. 33 L 33) 5

PER KARIBI-WHYTE JSC “Where there is a factual situation which raises the presumption of literacy, the onus of rebuttal of such presumption rests on the Respondent who asserts his illiteracy. In the instant case it is for Respondent to show that “Exhibits A and B” which were signed without a jurat explaining the contents were signed by him as an illiterate. (p. 43 L 21) 10

The provisions of the Law is for the protection of the illiterate on whose behalf the document is made. It is not for the prejudice of the rights of a third party in whose interest a right has been created. That is the situation in the instant case. (p. 48 L 25) 15

I do not consider the argument by Chief Udechukwu that specific performance cannot be made because the lessor, in this case the Respondent had not applied for consent tenable.” (p. 53 L 22) 20

REPRESENTATION 25

Chief G.C.M. Onyiuke SAN, with Miss Uzonwanne for the Appellant.

Chief U. Udechukwu for the Respondent.

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CASES REFERRED TO

1. Alimi Lawal v. G.B. Olivant (Nig) Ltd (1971)1, U.I.L.R 37.
2. Ntiashagwo v. Amodu (1959-60) WNLR (PT. 4) 273. 35
3. Alhaji R.A. Salami v. Savannah Bank of Nig. Ltd. (1990)2 NWLR (Pt. 130) 106.
4. S.C.O.A. Zaria v. A.D. Okon (1959)4 FSL 220.
5. Osefo v. Uwania (1971) C.L.R. 421

6. Ezera v. Ndukwe (1961 1 All N.L.R. (Pt. 3) 564
7. U.A.C. of Nigeria Ltd v. Edems & Ajayi (1956-58) N.R.L.R. 33.
8. Ntiaro v. Akpan (1918) 3 N.L.R. 10
9. Dulvat & anor v. Olcel 1 WACA 105
10. Lawal v. Dawodu & anor (1972) A.N.L.R. Vol. 1, pg 707.
- 5 11. Harvey v. Pratt (1965) 1 W.L.R. 1025
12. Leo Obijuru v. I.M. Ozims (1985) 4 SC (pt. 1) 142
13. Fakoya v. Saint Paul's Church Shagamu (1966) 1 ALR Commer. 459.
- 10 14. Yaya v. Magoga 12 WACA 139
15. Australian Harwoods Property Ltd. v. Commissioner for Railways (1961) 1 ALL E.R. 737
16. Nigeria Land and Sea Good Co. Ltd v. Roadside Engineering Foundry Ltd. (1987) 1 N.W.L.R. (pt. 48) 191
- 15 17. Osagie v. Oyeyinka & anor (1987)3 N.W.L.R. (pt 59) 144.
18. Cairncross v. Lorimer (1860)3 LT 130
19. Njoku v. Ekebcha & anor (1972)2 E.C.S.L.R. 199
20. Shell B.P. Dev. Co. v. Pere Cole (1978)3 SC. 183.
21. Lengbe v. Imale (1959) WRNLR 325
- 20 22. Salami v. Savannah Bank of Nig. Ltd. (1990)2 NWLR (pt 130) 106.
23. Bioku Investment & property Co. Ltd. v. Light Machine Industries Ltd. (1986)5 NWLR (pt 39) 42.
24. Obijuru v. Ozims (1985) 4 SC. 142.
- 25 25. Amizu v. Nzeribe (1989)4 NWLR (pt. 118) 755
26. Solanke v. Abed & anor (1962)1 All N.L.R. 92
27. Rufai v. Olugbeha (1986)5 NWLR (pt. 40) 162
28. Odiete & ors v. Okotie & ors (1972)6 SC 83
- 30 29. Bakare v. The State (1987) 1 NWLR (pt. 52) 579.
30. Chief Frank Ebba v. Chief Warn Ogodo & ors.
31. Ezewani v. Onwordi (1986)4 NWLR (pt. 33) 27.
32. Olisa v. Nwanosike (1973) vol. 3 pt. II E.C.S.L R. 653.
33. Ehimare v. Emhonyon

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STATUTE

1. Illiterate Protection Act Cap. 88., Cap 83. Cap 64 (Laws of Eastern Nigeria 1963) SS 3(a) and (b), 4,

LEAD JUDGMENT BY WALL JSC

By a Writ of Summons filed in the Aba Division of the Imo State High Court, the plaintiff claimed against the defendant for the following reliefs: 5

"(a) Recovery of possession of a house and land known as No. 70 Danfodio Road, Aba in the Aba Urban Division.

(b) An account of all the rents collected by the defendant from the tenants of the said house and land known as No. 70 Danfodio Road, Aba from 1964 until possession is given up." 10

Pleadings were filed, amended and exchanged. The defendant also filed a counter claim. At the end of the hearing the learned trial Judge, Mbachu J., entered the following judgment for the plaintiff:-

"In the circumstances the plaintiff succeeds in his claim for declaration that he is the lessee of the property known as Plot 5 in Block 159 Aba otherwise known as No. 70 Danfodio Road, Aba. He is therefore entitled to possession and I order that the defendant vacates the premises on or before 30th November, 1985. I deem it unfair to grant the plaintiff's claim for account of the rents collected by the defendant from tenants nor will it be fair and just to order the plaintiff to refund 1,300 pounds to the defendant; the contract between them is frustrated and unenforceable and each party should bear his own loss. I make no order as to costs." 15 20 25

Aggrieved by the judgment of the trial court, the defendant lodged an appeal against it in the Court of Appeal Port Harcourt Division. His appeal was dismissed. The Court of Appeal affirmed the judgment of the trial court. 30

The defendant has now further appealed to this court against the judgment of the Court of Appeal. 35

Henceforth both the defendant and the plaintiff will be referred to as the appellant and the respondent respectively.

In addition to the original grounds of appeal filed in this ap-

peal, the appellant sought for and obtained leave to file and argue one additional ground of appeal. This was done.

The simple facts of this case as revealed in the pleadings filed and the evidence adduced by the respondent are as follows:-

The plaintiff/respondent Ude Anyaso is the lessee of State Land property registered as Plot 5 in Block 159, otherwise known as No. 70 Danfodio Road, Aba. This property was assigned to him by Nwana Kalu by a deed of assignment dated 22nd February, 1955 and registered as No. 17 at page 17 in Volume 124 of the Land Registry then in Enugu.

In order to obtain credit facilities from the African Continental Bank Aba, the respondent, sometime in 1955 created an equitable mortgage in favour of the African Continental Bank by depositing with them the title deed of No. 70 Danfodio Road, Aba. In return, the African Continental Bank granted the respondent the credit facilities and issued him with Exhibit "A" titled MEMORANDUM of DEPOSIT of DEEDS to secure the ACCOUNT of a THIRD PARTY as well as the ACCOUNT of the DEPOSITOR."

When the lease referred to above expired on 31st December, 1960, the respondent re-newed it for another term of 40 years, i.e. from 1/1/61 to 2000. The renewed lease was registered as No. 20 at page 20 Volume 368 in the Land Registry in Enugu. However the respondent did not deposit the renewed lease with the African Continental Bank, Aba.

Sometime in 1964, the respondent, as stated in paragraph 7 of his amended statement of claim, while the said equitable mortgage with the African Continental Bank was subsisting, borrowed the sum of 1,300.00 (One thousand, three hundred Pounds) from the appellant. Later as he was unable to repay his loan, and under pressure from the appellant, he reluctantly agreed to assign to the appellant the property already under an undischarged mortgage to the African Continental Bank. The respondent issued the appellant with Exh. "C" which is a receipt for the sale of the property to the appellant and acknowledging the receipt of 1,300.00 pounds as the pur-

October, 1964 signed by both parties.

(b) *The appropriate officer of the Land Office, Aba there after inspected the said premises and issued his report dated the 9th day of October, 1964.*

(c) *By a letter reference LSA: 5164/47 dated the 9th day of April, 1965 the Land Officer, Aba forwarded the Land Form B and other necessary documents to Enugu for the required statutory consent.*

(d) *By a letter reference LABA: 2579/15 dated the 17th day of June, 1965 the Principal Land Officer, Enugu communicated to the Land Officer, Aba the statutory consent for the assignment of the said premises by the plaintiff to the defendant.*

(e) *By a letter reference LSA: 5164/53 dated the 25th of October, 1965 the Land Officer, Aba called on the plaintiff and the defendant to pay the assignment fees of 34/10/ pounds (now N69.00). The defendant on the 1st day of November, 1965 paid the said amount to the Land Officer, Aba, who issued him receipts Nos. A854453 and A939292 of that date therefore.*

(f) *By another letter dated the 25th day of April, 1966 addressed to both the plaintiff and the defendant, the Land Officer called on both parties to 'call at this Office early to execute the engrossed deed of assignment' Plot 5 in Block 159, Aba (the said premises).*

(g) *Before the execution of the said engrossed deed of assignment the crisis and the Nigerian Civil War broke out.*

10. *Upon the payment by the defendant to the plaintiff of the purchase price as aforesaid (paragraph 8 above), the latter*

delivered to the former the said lease and all other documents relating to the said premises.

11. *By a letter dated the 19th day of February, 1966 the Land Officer, Aba called on the defendant to produce in his office "the Original of the head lease (the said lease) for the preparation of the deed of assignment" of the said premises. The defendant complied as directed.* 5
12. *In answer to paragraph 13 of the amended statement of claim the defendant avers that since the 5th day of October, 1964 the defendant has been in undisturbed possession of the said premises as the owner hereof until he received from the African Continental Bank Limited a letter dated 31st January, 1974 addressed to "The Landlord", 70 Danfodio Road, Aba. The said letter notwithstanding, the defendant is still in undisturbed possession of the said premises;* 10
12(a) In respect of paragraph 13 of the amended statement of claim the defendant further avers; 15
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That after the civil war he made efforts to have the assignment executed in his favour but the plaintiff was all along frustrating his efforts. The Land Officer Aba wrote him (the defendant) a series of letters to renew the assignment transaction. These are letter Nos. LSA/5164/91 of 12th January, 1972 and letter No. LSA; 5164/101 of 6th March, 1974; but the plaintiff was nowhere to be seen. 25

When the defendant managed to get the plaintiff's address he wrote him through P. O. Box 103, Victoria, United Republic of Cameroon, a letter dated 28th March, 1974, soliciting his co-operation for the assignment but he failed to co-operate." 30

Both the appellant and the respondent filed and exchanged briefs of arguments. In the appellant's brief the following seven issues were raised for determination in this appeal:- 35

"(1). Whether the plaintiff/respondent had established that he was an illiterate person under section 3 of the

Illiterates Protection Law.

- 5 (2) *Whether the trial court and the Court of Appeal were right in saying that the onus had shifted to the defendant/appellant to establish that the plaintiff/respondent was not an illiterate, and that the defendant/appellant had not discharged that onus.*
- 10 (3) *Whether the plaintiff/respondent understood the purport of his action at the material time, and if so, whether the lower courts were right in holding that the plaintiff/respondent could take advantage of the Illiterates Protection Law.*
- 15 (4) *Whether the remedy of specific performance could avail the defendant/appellant in the circumstances of the case.*
- 20 (5) *Whether the Lower Courts were right in holding that there was a subsisting mortgage (whether legal or equitable) of the property in question in favour of the African Continental Bank Ltd.*
- 25 (6) *Whether the Lower Courts were right in saying that there was a clause in the head lease Exhibit B containing a limitation clause prohibiting assignment of the property without the Governor's consent and that Exhibit C could not therefore be the subject of an order for specific performance.*
- 30 (7) *Whether judgment could have been entered for the plaintiff/respondent by the lower court when the plaintiff/respondent's evidence had departed on many material occasions from his pleadings."*
- 35 The respondent on his part formulated the following four issues for determination:
 "(i) Whether the appellant has made out any sufficient case to move this court to interfere with the concurrent findings of the High Court and the Court of Appeal to the effect that the

respondent is an illiterate person and did not write Exhibit C though he signed it.

- (ii) *Whether Exhibit C can be enforced against the respondent, an adjudged illiterate person when it was the finding of both the court of first instance as well as that of the Court of Appeal that the writer did not comply with Sections 3(a) and (b) of the illiterates Protection Law Cap. 64 Laws of Eastern Nigeria 1963 in force in Imo State, and when there was no evidence given as to the circumstances when the respondent signed Exhibit C.*

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- (iii) *Whether the transaction in Exhibit C can be enforced by an order for specific performance when:-*

(a) *There was evidence of a prior subsisting encumbrance by way of a legal mortgage of the same property in favour of A.C.B. Ltd., and*

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(b) *The head lease Exhibit C contained a covenant against assignment or transfer of possession without prior consent and there was no evidence that the respondent applied for or obtained the requisite consent before 5th October, 1964 when Exhibit C was signed or at any time thereafter.*

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- (iv) *Whether the High Court or the Court of Appeal ought to have found in favour of the Counter-claim of the appellant in the peculiar circumstances of this particular case, granted that the respondent did not file any reply to the counter-claim.*

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The issues formulated by the parties can be condensed into the following: -

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1. *Whether the respondent is illiterate and can therefore take the advantage of the Illiterates Protection Law, Cap. 64 Laws of Eastern Nigeria, 1963 applicable to Imo State of Nigeria.*

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2 *Whether both the trial court and the Court of Appeal were right in their findings that Exh. B was a subsisting lease by the respondent in favour of A.C.B. containing a limitation*

clause prohibiting any further assignment of the property in dispute.

3. *Whether, without Governor's consent, the appellant could rely on Exhibit C and ask for a specific performance.*

4. *Whether the respondent was entitled to judgment when the evidence he adduced had on material occasion departed from his pleadings. Issue one as framed above covers issues 1, 2, and 3 of the appellant's brief as well as issues (i) and (ii) of the respondent's brief.*

It was the submission of learned counsel for the appellant that the mere ipse dixit of the respondent was not sufficient proof for the respondent's illiteracy as averred in his pleadings, and that both the trial court and the Court of Appeal were wrong in finding him to be illiterate on that evidence. Learned Senior Counsel referred to Exhibits A and B as the two earlier documents the respondent signed his name without any jurat before he signed Exhibit C in the same manner. He cited and relied on several decided cases to support his submissions, amongst which are - Alimi Lawal v. G.B. Olivant (Nig) Ltd (1971) 1 U.I.L.R. 37; Ntiashagwo v. Amodu (1959-60) WNLR (Pt.4) 273 and Alhaji R.A. Salami v. Savannah Bank of Nigeria Ltd. (1990) 2 NWLR (Pt.130) 106.

Learned counsel for the respondent submitted that upon a proper construction of Section 3(b) of the Illiterates Protection Law the Court of Appeal was right in its conclusion that the respondent is illiterate and therefore Exhibit C cannot be binding on him. He also cited several authorities in support of the submission, particularly - S.C.O.A. Zaria v. AD. Okon (1959) 4 F.S.C. 220: (1959) SCNLR 562; Osefo v. Uwallia (1971) Commercial Law Report (ALR) 421 and Ezera v. Ndukwe (1961) 1 All NLR (Pt.3) 564.

From the pleadings filed in this case it seems that the main issue for the determination in this appeal is the illiteracy of the respondent. In paragraph 1 of the Amended Statement of Claim, the respondent pleaded:-

"... (he) is an illiterate (and) is the owner and lessee of all that State Land/property registered at Plot 5 in Block

*159, otherwise known as No. 70 Danfodio Road.
Aba."*

To support this averment, the respondent gave evidence wherein he said:

*"I am an illiterate who cannot read and write but I can sign
my signature."* 5

To further buttress the illiteracy averment, the respondent tendered Exhibit A in evidence. Exhibit 'A' is the memorandum relating to the title deed of the property in dispute and which was given to the respondent by the A.C.B. when the latter granted him the Credit facilities and holding the title deed as a security. 10

In civil claims, the duty rests on a plaintiff to prove his case. It is the substance of the respondent's case that he is an illiterate person who only knows how to sign his signature and no more. He said he can neither read nor write. 15

To refute the respondent's allegation of illiteracy, and controvert the evidence adduced in support thereof, the appellant specifically denied paragraph 1 of the Amended Statement of Claim by paragraph 2 of the Amended Statement of Defense. Paragraph 2 reads as follows: 20

*"2. The defendant denies paragraph one of the amended
Statement of Claim in its entirety and shall at the trial of this
suit put the plaintiff to the strict proof of the facts therein
alleged. In particular, the defendant states that the plaintiff is
not an illiterate and shall at the trial of this suit rely on the
Building Lease dated the 7th day of August, 1963 and regis-
tered as No. 20 page 20 in Volume 368 of the register of
Deeds then kept at Enugu but now at Owerri (hereinafter
referred to as the said Lease), a receipt for the purchase money
of Plot 5 in Block 159, otherwise known as No. 70 Danfodio
Road, Aba, the subject matter of this suit (hereinafter referred
to as the said premises) and Land Form B dated the 5th day
of October, 1964 all of which were signed by the plaintiff."* 25 30 35

In his evidence D.W.1 (as the defendant) said-

*"I know the property known as No. 70 Danfodio Road, or
No.5 in Block 159, Aba. I am the owner of the property 70*

Danfodio Road, Aba. I bought it from the plaintiff in 1964 for 1,300 (One thousand, three hundred pounds) now N2,600.00 and he gave me a receipt for it. This is the receipt the plaintiff gave me, tendered

5 After over-ruling the objection on its admissibility, it was admitted in evidence as Exhibit C. Also admitted in evidence as Exhibit "B" through the respondent under cross examination is the Building Lease (renewed). It is to remain valid from 1st January 1961 to the year 2000.

10 Apart from these exhibits, other documents to which the respondent was a party and also admitted in evidence are Exhibits D, E and F.

15 In resolving this issue of illiteracy, the learned trial Judge made the following observations and conclusions:

20 *"In the first place it is necessary to resolve the literacy or illiteracy of the plaintiff. I have seen what he wrote on Exhibits A, Band C; they look alike and easily identifiable from their appearance as the writer's signature, and I hold the view that plaintiff signed them. Judging by the contents, wording and nature of the documents, Exhibits A, B and C, even though the plaintiff signed them, he is not the maker or writer of each of those three documents. Section 3 of the Illiterates Protection Law requires the writer of a document made at the instance of an illiterate person to enter his name on the document as the writer and also his address. The failure on the part of the makers of those three documents Exhibits A, Band C to comply with the requirements of the law is not a matter that should attract sanctions against the illiterate plaintiff and he should not be blamed for the default of other persons who wrote the documents.*

35 *Section 3(b) of the Illiterates Protection Law provides that jurat having been inserted and the requirements of the law regarding the maker having been fulfilled, this is equivalent to a statement that prior to signing or thumb printing the document, it had been read over and explained to the illiterate and that he (the illiterate) was the person who thumb-printed or signed the document - Italics mine. The mere fact that a person puts down, scribbles or even signs a document does not necessarily confer on him the status of literacy.*

The plaintiff whom I have watched closely throughout his evidence and the proceedings is certainly an illiterate in spite of what he wrote as signature on the documents mentioned above as tendered in evidence.

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Defence relies on Exhibit C and several other documents as proving that there was a sale of No. 70. That document reads in part 1, Ude Anyaso of No. 70 Danfodio Road, Aba today 5th day of October, 1964 sold my plot 5 in Block 159 Aba otherwise known as No. 70 DanFodio Road, Aba to Mr. Francis Nwafor Anaeze of c/o 41 Jubilee Road, Aba for 1,300 pounds. This document however is deficient in the sense that it contravenes the Illiterates Protection Law in so far as the plaintiff, an illiterate, is concerned."

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In affirming the decision of the trial court, Onu, J.C.A. giving the lead judgment of the Court of Appeal, (with which Olatawura, J.C.A. (as he then was) and Kolawole, J.C.A. agreed) said:-

"...I agree with the submission of learned counsel for the respondent, that a person as in the case in hand may know how to sign his signature and yet be quite illiterate. In other words, the ability to sign one signature, as amply demonstrated in this case, is no proof of literacy. See S.C.O.A. Zaria v. A. D. Okon (1959) 4 F.S.C. 220; (1959) SCNLR 562. For instance, although a self-confessed illiterate, the respondent admitted signing a Form B (not tendered) at the Land Office at Aba (See page 68 line 17 of the trial court's record). The learned trial Judge being also a Judge of facts, heard evidence from both parties in support of their pleaded facts, saw and watched them give evidence and eventually rejected appellant's evidence on the point while expressing preference for the respondent's evidence on the point. This court as an appellate court will therefore be loath to upset such findings of fact, unless it can be shown that the decision arrived at is perverse, the result of an improper exercise of judicial discretion or that the trial court made wrong deductions or drew wrong inferences from admitted or established facts."

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As I have said earlier, the issue of illiteracy is a question of fact to be decided objectively on the evidence presented to the court. In the present case, the only evidence by the respondent is his own ipse
 5 dixit that he is illiterate. The court cannot decide the issue of the respondent's illiteracy on the scanty evidence given by him and his demeanor. As the learned counsel for the appellant observed the best evidence of the respondent's illiteracy could have come from P.W.2 and who said nothing on that.

10 Against this scanty evidence, there are Exhibits A and B. These are documents, complicated as they are, and signed by the respondent without any jurat. There was no issue of illiteracy raised in them. These exhibits go to affirm the contention of the appellant that the
 15 respondent is literate.

The learned trial Judge had rightly in my view made a correct finding on Exhibit C and that it was signed by the respondent. There is no appeal against this finding. Having done so, was it open to him then to say "judging by the contents of Exhibits A,
 20 B and C even though the plaintiff signed them, he is not the maker or writer of each of these three documents"? I shall answer the question in the negative for the following reasons:-

*1. The authority and validity of both Exhibits A and B were not being challenged. Whereas Exhibit A was put in evidence to show that the
 25 property in dispute was pledged to A.C.B. Ltd, by the respondent as security for the credit facilities granted him by the said Bank. Exhibit B was in evidence for showing that the appellant was put in possession of the property in dispute by the respondent voluntarily.*

30 *2. Exhibit C was put in evidence to show the existence of a binding contract for the sale of the property by the respondent to the appellant.*

The overall effect of Exhibits A and B go to support the appellant's claim that the respondent was literate at the time he signed and issued Exhibit C to the appellant. He was aware, conscious and fully
 35 knowledgeable of the effect of what he was doing. It was not the respondent's case that Exhibit C was written on his behalf by the appellant or his agent to deprive the appellant of the benefit therein

he is seeking to enforce, nor was it the respondent's case that the appellant fraudulently or by use of threat, force or any other illegal means induced the respondent to issue Exhibit C to him (the appellant).

In S.C.O.A. Zaria v. Okon (supra), there was evidence that Exhibit A was written by the appellant's manager as agent, and without strictly complying with section 3 of the Illiterates Protection Ordinance, (which is in pari materia with section 3 of the Illiterates Protection Law (Cap 64) of Imo State) sought to enforce it against the respondent. The Federal Supreme Court held at page 223 (per Quashie- Idun). 5 10

"I agree with the learned Chief Justice that the contents should have been explained to him by the Manager of the plaintiff's company who prepared it and asked the defendant to sign it. As the learned Chief Justice pointed out in the judgment no-where does the Illiterates Protection Ordinance Cap 83 say that failure to comply with the provisions of the Ordinance renders a document unenforceable. " 15

In the other case of U.A.C. of Nigeria Ltd. v. Edems & Ajayi (1956-58) NRLR 33, the trial court refused to enforce the contents of a document against the 2nd defendant on its finding upon the evidence before it That:- 20

"It is a bond under seal in the name of the second defendant for 300 pounds dated 12th October, 1956. The second defendant placed his thumbprint thereon and this has been witnessed by Garuba Ibrahim, the plaintiff's clerk. The document has been cyclostyled with blank spaces for the name and address of the bondor, the amount, the date, and the name and address of the person bonded. These particulars have been filled in by the plaintiff's clerk Garuba Ibrahim. 25 30

I find that the fact that the second defendant thumb printed the bond is prima facie evidence that he is illiterate.

The attestation clause to the bond does not contain a statement to the effect that the bond was read over and explained to the second defendant before he thumb printed it, nor is there an endorsement thereon of the name and address of the writer of the document, as required by Sec 35

tion 3 of the Illiterates Protection Ordinance. Cap. 88.

5 *"The object of the Ordinance is to protect an illiterate person from possible fraud. Strict compliance therewith is obligatory as regards the writer of the document. If the document*
10 *creates legal rights and the writer benefits there under those benefits are only enforceable by the writer of the document if he complies strictly with the provisions of the ordinance. If a document which does not comply with the provisions of the Ordinance creates legal rights between the illiterate and a third party then evidence may be called to prove what h*
15 *appened at the time the document was prepared by the writer and the parties signed it. But the writer himself cannot adduce evidence in his own favour to remedy the omission."*

15 The principle laid in U.A.C. v. Edems & Ajayi as regards the interpretation of Section 3 of the Illiterates Protection Ordinance was approved and followed by the Federal Supreme Court in S.C.O.A Zaria v. Okon (supra).

20 The facts in both U.A.C. v. Edem & Ajayi and S.C.O.A. Zaria v. Okon are dissimilar to the facts of the present case and therefore are not apposite. As I said earlier, Exhibit "C" is simply a receipt evidencing payment by the appellant to the respondent; and the prima facie evidence in this case is that it was issued by the respondent.
25 There is no any other evidence to the contrary. As far as Exhibit C is concerned, the appellant is a third party who cannot be denied the benefit of its contents by a mere plea by its maker that he was illiterate at the time he made it, since Exhibit C is not per se an inadmissible document. See Ezera v. Ndukwe (1961) All NLR 404. Having
30 regard to the authorities referred to above I am of the opinion that there was no sufficient evidence upon which the trial court could return a verdict that the respondent was illiterate at the time he signed Exhibit "C" and the Court of Appeal was equally wrong to sustain such a verdict. The findings of fact on this issue are perverse, unreasonable and not supported by the evidence adduced. See Ntiaro v. Akpan (1918) 3 NLR 10; Duval & Anor. v. Orcel 1 WACA 105; Lawal

v. Dawodu & Anor (1972) All NLR Vol. 1. page 707.

On the issue of whether there was a subsisting mortgage in favour of A.C.B. Ltd. on the property in dispute, as averred in paragraph 4 of the Amended Statement of Claim, it is my view that this is not an important matter to the decision of the appellant's case. And even if it is, the evidence before the court did not show that the purported mortgage of the A.C.B. Ltd. is prior in time to the appellant's interest in the property in dispute since, as argued by learned Senior Counsel to the appellant, the purported mortgage evidenced in Exhibit A still remained undated and not signed by the mortgagee i.e. representative of A.C.B. Ltd. The question of its registration is therefore non issue, since it is not a valid and enforceable document. See Harvey v. Pratt (1965) 1 WLR 1025. If even Exhibit "A" had been properly executed, it is no more than a charge on the disputed property for the loan granted.

In paragraph 5 of the Amended Statement of Claim, the respondent averred that-

"The equitable mortgage referred to in paragraph 4 above was converted into a legal mortgage by the A.C.B. Ltd. in 1974 and registered as No. 52 at page 52 in Volume 728 of the Lands Registry in Enugu. The said legal mortgage will also be founded upon."

Apart from the ipse dixit of the respondent that:

"Subsequently A.C.B. Ltd. converted the equitable mortgage to the said property into a legal mortgage and registered it." and the evidence of PW.2 that:

"My employers have a charge on the property registered as 52/52/728 Enugu now Owerri"

There is nothing to show that the purported equitable mortgage was converted into a legal mortgage. The evidence of P.W.2 only showed that the mortgagee instructed their Solicitor P.K.Nwokedi Esq. to write to the Lands Officer at Aba intimating the Lands Registry that the A.C.B. Ltd. as mortgagee has an interest on the disputed property secured by a deposit of its title deed, which was not even put in evidence. The letter of 18th February, 1974 alleged to have been written to the Lands Registry at Aba by P.K. Nwokedi was not in evidence in this case. The evidence that A.C.B. Ltd. is having a regis-

tered charge and a legal mortgage on the disputed property is hear-say. It proved nothing. Both specie of mortgages are proved by producing admissible and properly executed documents. What is pleaded, if not admitted must be proved by admissible evidence. There is no evidence before the trial court, nor the Court of Appeal, to reach the
5 conclusion that there is subsisting equitable mortgage or legal mortgage by the respondent to A.C.B. Ltd., much more to speak of their priority in time to the appellant's interest on the disputed property as evidenced in Exhibit "C". See *Leo Obijuru v. I.M.Ozims* (1985) 4 SC. (Pt.1) 142 at 163. (1985) 2 NWLR (Pt.6) 167.
10

The purpose of tendering Exhibit C in evidence is not to establish that the appellant has an equitable interest in the property in dispute but simply to show that he has a contractual right of a kind
15 which he can seek to enforce through the court. See *Fakoya v. Saint Paul's Church, Sagamu* (1966) 1 ALR Commer. 459 and *Yaya v. Mogoga* 12 WACA 139.

Issues 4 and 6 deal with the order of specific performance of
20 the contract evidenced in Exhibit C.

It is the submission of learned Senior Counsel for the appellant that this is a case in which this court should exercise its discretion and grant an order for specific performance to the appellant for the
25 following reasons:

1. There was clear evidence that the appellant had paid the purchase price of the property as evidenced by Exhibit C.
2. The respondent handed over to the appellant the title deed
30 of the property - Exhibit B.
3. The appellant has been in undisturbed possession of the property since 1965.
4. The respondent in company of the appellant went to the Lands Office, Aba where both of them signed Land Form for the assignment of the property as evidenced in Exhibit H2
35
5. That the Hon. Minister for Land matters had given his approval in principle for the assignment of the property as shown in Exhibit H1
6. That the appellant had paid to the Treasury the sum of

34.10.0pds for the preparation, registration and stamping of the Deed of Assignment as directed by the Principal Land Officer Exhibits D1 and D2,

7. That all these steps were taken for the completion of the assignment which would have been completed but for the outbreak of the civil war.

8. That at the end of the civil war, the appellant traced the whereabouts of the respondent in the Cameroon Republic and invited him to come to complete the execution of the assignment; but the latter became elusive and commenced the present suit.

All these facts were pleaded by the appellant in his amended Statement of Defense to which no reply was filed. The appellant gave evidence and put in documents to prove the averments. Learned counsel cited and relied on several authorities in support of these submissions.

It is now trite that a party seeking to enforce the performance of a contract must show that all conditions precedent to such performance have been performed by him, or is ready and willing to perform all the terms which he ought to have performed. See Australian Harwoods Property Ltd. v. Commissioner for Railways (1961) 1 All E.R. 737 particularly at 747.

Where there is a valid enforceable contract and one of the parties there to defaults in performance, as in this case, the other party has two options:

- (a) Insist on the actual performance of the contract or
- (b) Seek damages for breach.

The law takes the view that, for a breach of contract for the sale of land, damages cannot usually be an adequate remedy and the purchaser is entitled to have the contract specifically performed. See Nigeria Land and Sea Food Co. Ltd. v. Roadside Engineering Foundry Ltd. (1987) 1 NWLR (Pt.48) 191 and Osagie v. Oyeyinka Anor (1987) 3 NWLR (Pt.S9) 144.

It is my view that the present contractual transaction between the appellant and the respondent does not fall within the exceptions under the remedy of specific performance and the appellant is entitled to benefit from the remedy.

It is pertinent to mention as done by the learned Senior Counsel for the appellant that the respondent filed no reply to the appellant's counter-claim, which therefore stands undisputed.

5 The appeal has merit and it succeeds. The judgment and orders contained in the judgments of the courts below are set aside and in place thereof, the following orders are substituted:-

10 *that the appellant is granted an order of specific performance of the sale of plot 5 in Block 159 otherwise known as 70 Danfodio Road, Aba and that the respondent is hereby ordered to execute in favour of the appellant a deed of assignment of the said property, within 30 days of the date of this judgment.*

15 Plaintiff/respondent's claims are dismissed. The appellant is awarded N1,000.00 costs against the respondent in this Court, N700.00 and N500.00 costs respectively in the Court of Appeal and the trial court.

20

KARIBI-WHYTE JSC

25 I have read the judgment of my learned brother Wali J.S.C. in this appeal. I agree entirely with his conclusion that the appeal of the appellant should be allowed, both in respect of the substantive claim and the counter-claim.

30 The gravamen of the plaintiff/respondents claim is founded on his illiteracy; and particularly on the non-compliance of the document relied upon by the defendant with the provisions of section 3 of the Illiterate's Protection Law. The defendant's counter-claim seeks specific enforcement of the agreement of the parties.

35 The relevant facts of this interesting and unusual case ought to be compendiously stated before it will be appropriate to consider the judgment of the Court of Appeal.

According to the statement of claim and his oral testimony at the trial, plaintiff/respondent acquired the property in dispute, namely,

70 Danfodio Road, Aba from one Nnana Kalu in February, 1955. In the same year he used the property as security for a loan with the African Continental Bank Ltd. He deposited his title deeds with the Bank for the purpose and executed a Memorandum of deposit, Exhibit A with the Bank. Subsequently, he obtained a loan of 1,300.00pds (N2, 600) from the defendant/appellant. For this purpose he handed over to him, the renewed lease, "Exhibit B," The African Continental Bank Ltd, was still holding the lease which expired in 1960.

The plaintiff/respondent gave to defendant/appellant a receipt and put him in possession of 70 Danfodio Road, Aba, in addition to handing over the renewed lease of the property. Plaintiff/respondent was out of the country and was living in the Cameroons for quite a long time. He only returned to the country at the end of the civil war, to request the defendant/appellant to surrender the property to him. When the defendant/appellant refused, he instituted this action claiming as follows:

- "(a) *Recovery of possession of a house and land known as No. 70 Danfodio Road, Aba in the Aba Urban Division.*
- (b) *An account of all the rents collected by the defendant from the tenants of the said house and land known as No. 70 Danfodio Road, Aba from 1964 until possession is given up.*"

Defendant's story is different in certain respects, it was that plaintiff/respondent agreed to sell the property to him at the price of 1,300 pounds (N2,600). He paid the amount agreed and plaintiff/respondent issued him with "Exhibit C" and surrendered to him the renewed lease of the property "Exhibit B" The defendant/appellant said that in pursuance of the transaction plaintiff/respondent took him to the Land office at Aba, and completed all the vital formalities for the transfer of the property to him. He was put in possession of the property. The defendant/appellant relied on several letters from the Land office with respect to the transfer of possession, and the fact that the Governor had given his consent, in principle, to the transfer before the outbreak of the civil war.

At the end of the civil war defendant/appellant could not

trace the plaintiff/respondent for the completion of the transfer of the property to him. When eventually he was found on his return from the Cameroons, plaintiff/respondent refused to co-operate in the transfer of the property. It was at this time he claimed the transaction with
 5 the defendant/appellant was a loan, recoverable from the rents of the property. It was a transaction for the sale of the property. Hence, when plaintiff/respondent brought the action as indicated, defendant /appellant counterclaimed as follows-

10 Particulars of Counter-claim

1. *On or about the 5th day of October, 1964 the plaintiff sold Plot 5 in Block 159, otherwise known as 70 Danfodio road, Aba to the defendant for N2, 600.00, put the defendant into possession of the same surrendered to the
 15 defendant the Building Lease thereof and all the documents relating thereto.*
2. *The defendant claims to have specific performance of the aforementioned transaction and that the plaintiff may be ordered to take all the necessary steps required by law and
 20 execute a proper assignment of the said premises to the defendant."*

The action was tried in the High Court, on the pleadings of the parties. At the end of the trial, the learned Judge Mbachu J.
 25 entered judgment for the plaintiff. He ordered the defendant to give up possession of the property to the plaintiff. He dismissed defendant's counterclaim.

In his judgment the learned Judge found as a fact that plaintiff signed "Exhibits A, B and C." He also found out that plaintiff was not the maker of writer of "Exhibits A, B and C." He found out that plaintiff though capable of signing his name was incapable of making the documents. The failure of the maker of "Exhibits A, B and C." to
 35 write his name and address on the document is noncompliance with section 3 of the Illiterates Protection Law. "Exhibits C" the purchase receipt contravened the illiterate Protection Law and "Exhibit C" was not enforceable against the plaintiff.

He also held that "Exhibits C" being an instrument in respect

of transfer of interest in land is registerable under Section 15 of the Land Instruments Registration Law. Since it was not registered it is of no use to the defendant as an instrument of title.

The document "Exhibit B" prohibits assignment without the prior consent in writing of the Governor or other persons to whom such powers are delegated. This consent was not obtained. Thus the defendant received no legal estate. Since plaintiff had none to assign.

On the counterclaim the learned Judge held that the defendant was caught by the doctrine of laches and should not succeed. Again, since the plaintiff by virtue of "Exhibit C" had no legal interest in the property, there is nothing to enforce. Defendant dissatisfied, appealed to the Court of Appeal. The Court of Appeal affirmed the decision of the trial Judge.

It accepted the finding of fact of the learned trial Judge that plaintiff is an illiterate. It held that

".....the appellant had adduced no compelling argument to warrant an interference by this court with the finding made by the trial court on the issue of whether the respondent is illiterate or not."

In the view of the Court of Appeal, the onus of illiteracy vel non was on the appellant.

The Court of Appeal also dismissed the counterclaim. Defendant appealed to this court relying on eleven grounds of appeal. As the grounds of appeal are amply covered by the issues for determination formulated. I deem it unnecessary to set out the grounds. The appellant's issues for determination are as follows:

- "(1) Whether the plaintiff/respondent had established that he was an illiterate person under section 3 of the Illiterates Protection Law.*
- (2) Whether the trial court and the Court of Appeal were right in saying that the onus had shifted to the defendant/appellant to establish that the plaintiff/respondent was not illiterate, and that the defendant appellant had not discharged that onus.*
- (3) Whether the plaintiff/respondent understood the purport of*

his action at the material time, and if so, whether the lower courts were right in holding that the plaintiff/respondent could take advantage of the Illiterates Protection Law.

- (4) *Whether the remedy of specific performance could avail the defendant/appellant in the circumstances of the case.*
- (5) *Whether the Lower Courts were right in holding that there was a subsisting mortgage (whether legal or equitable) of the property in question in favour of the African Continental Bank Ltd.*
- (6) *Whether the Lower Courts were right in saying that there was a clause in the head lease Exhibit B containing a limitation clause prohibiting assignment of the property without the Governor's consent and that Exhibit C could not therefore be the subject of an order for specific performance.*
- (7) *Whether judgment could have been entered for the plaintiff/respondent by the Lower Court when the plaintiff/respondent's evidence had departed on many material occasions from his pleadings."*

The respondent has formulated the following four issues which are as follows:

- (i) *Whether the appellant has made out any sufficient case to move this court to interfere with the concurrent findings of the High Court and the Court of Appeal to the effect that the respondent is an illiterate person and did not write Exhibit C though he signed it.*
- (ii) *Whether Exhibit C can be enforced against the respondent, an adjudged illiterate person when it was the finding of both the Court of first instance as well as that of the Court of Appeal that the writer did not comply with Sections 3(a) and (b) of the Illiterates Protection Law Cap 64 Law of Eastern Nigeria 1963 in force in Imo State, and when there was no evidence given as to the circumstances when the respondent signed Exhibit C"*
- (iii) *Whether the transaction in Exhibit C can be enforced by an order for specific performance when:*

- (a) There was evidence of a prior subsisting encumbrance by way of a legal mortgage of the same property in favour of A.C.B. Ltd, and
- (b) The head lease Exhibit C contained a covenant against assignment or transfer of possession without prior consent and there was no evidence that the respondent applied for or obtained the requisite consent before 5th October, 1964 when Exhibit C was signed or at any time thereafter.
- (iv) Whether the High Court or the Court of Appeal ought to have found in favour of the counterclaim of the appellant in the peculiar circumstances of this particular case, granted that the respondent did not file any reply to the counterclaim."

The issues could be classified into those relating to the issue of literacy vel non. Those concerning the issue of specific performance and whether judgment could be given could be given in the case.

Learned counsel to the appellant sought and was granted leave of the court at the hearing of the appeal to argue an additional ground of appeal. The additional ground of appeal is:

"That both trial court and the Appeal Court erred in law in failing to consider any of the circumstances which clearly showed that plaintiff/respondent fully understood the purport of his action at the time of the sale transaction; and that once the plaintiff understood the purport of his action at the time of the sale transaction, and that once the plaintiff/respondent understood what he was doing. He could not plead the Illiterates Protection Law."

This court has always discouraged and disapproved of the proliferation of issues for determination. The appellant is guilty of that vice. The better approach has always been to formulate issues tersely to cover a number of grounds of appeal which are governed by the same applicable principles of law. Verbosity is not a merit in the formulation of issues. Similarly the economy of words in the formulation of issues should not be made at the expense of clarity. Brevity

should not result in obscurity. Clarity, succinctness and terseness are the guiding indicia. Out of the issues formulated by the two parties, the following can be distilled:

1. Whether the respondent is illiterate and therefore can take advantage of the Illiterates Protection Law Cap. 64 of Eastern Nigeria 1963 applicable to Imo State of Nigeria.
2. Whether both the trial court and the Court of Appeal were right in their findings that Exh. B was a subsisting lease by the respondent in favour of A.C.B. containing a limitation clause prohibiting any further assignment of the .property in dispute.
3. Whether, without Governor's consent, the appellant could rely on Exhibit C and ask for a specific performance.
4. Whether the respondent was entitled to judgment when the evidence he adduced was in material respects at variance with his pleadings.

The issue 1 above formulated is designed to cover appellant's issues 1, 2, and 3, and issues (i) and (ii) of the respondent. This is the claim that respondent is an illiterate, who is protected by the provisions of section 3(b) of the Illiterates Protection Law, Cap. 69.

It is important to refer to the pleadings in this case. Plaintiff in paragraph 1 of his amended statement of claim averred as follows:

"1. The plaintiff who is an illiterate, is the owner and lessee of all that State land/property registered as Plot 5 in Block 159 otherwise known as No. 70 Danfodio road, Aba."

The defendant joined issues with the plaintiff as to the claim of illiteracy and specifically denied the claim, when he averred in paragraph 2 of the Statement of Defense as follows:

"2. The defendant denies paragraph one of the Statement of Claim in its entirety and shall at the trial of this suit put the plaintiff to the strictest proof of the facts alleged therein. In particular, the defendant states that the plaintiff is not an illiterate and shall at the trial of this suit rely on the Building Lease dated the 7th day of August, 1963 and registered as No. 20 at page 20 in Volume 368 of the Register of Deeds then kept at Enugu now at Owerri (hereinafter referred to as the said Lease) a receipt for the purchase money of Plot 5

Block 59, otherwise known as No. 70 Danfodio Road, Aba, the subject matter of this suit (hereinafter referred to as the premises and Land Form dated the 5th day of October, 1964, all of which were signed by the plaintiff."

In support of his averment, plaintiff in his evidence in Chief said:

"I am an illiterate who cannot read and write but I can sign my signature.

He repeated this assertion during cross-examination (see p.55 lines 26-29). To establish this assertion plaintiff tendered in evidence as "Exhibit A" the Memorandum relating to the title deed of the property in dispute which he gave to the African Continental Bank as security for obtaining credit facilities from that Bank. The renewed building lease was admitted in evidence as Exh. B.

In rebuttal of plaintiff's claim to illiteracy, the defendant in his evidence stated as follows:

"I know the property known as No 70 Danfodio Road, or No.5 in Block 159 Aba. I am the owner of the property- 70 Danfodio Road, Aba. I bought it from the plaintiff in 1964 for 1,300pds (One thousand, three hundred pounds) now N2, 600.00 and he gave me a receipt for it. This is the receipt the plaintiff gave me, tendered."

The receipt was admitted in evidence as "Exhibit C" The other documents admitted in evidence are "Exhibits D" "Exhibit E" Letter No. LSA 5164/58 of 19/2/66 and "Exhibit F" Letter No. LSA 5164/101 of 6/3/74.

The learned trial Judge faced with the issue whether plaintiff is an illiterate as claimed by him denied by the defendant observed:

"I have seen what he wrote on "Exhibits A, B, and C" they look alike and easily identifiable from their appearance as the writer's signature, and I hold the view that plaintiff signed them. Judging by the contents, wording and nature of the documents, "Exhibits A, B, and C" even though the plaintiff signed them, he is not the maker or writer of each of those three documents...."

The learned trial Judge then referred to the consequences of the non compliance by the writers of "Exhibits A, Band C" with section

3 of the Illiterates Protection Law, as regards the plaintiff, and said,
"Section 3 of the Illiterates Protection Law requires the writer
of a document made at the instance of an illiterate person to
enter his name on the document as the writer and also his
address. The failure on the part of those makers of those
5 three documents Exhibits A, Band C to comply with the re
quirements of the law is not a matter that should attract sanc
tions against the illiterate plaintiff and he should not be blamed
for the default of other persons who wrote the documents."

10 The learned trial Judge went on to explain the effect of a jurat to a
document signed by an illiterate. He pointed out that the mere fact
that "a person puts down, scribbles or even signs a document" does
not necessarily confer on him the status of literacy.

He then concluded with a finding of fact by saying;

15 "The plaintiff whom I have watched closely throughout his
evidence and the proceedings is certainly an illiterate in spite
of what he wrote as signature on the documents mentioned
above as tendered in evidence."

20 Finally, the learned Judge referred to the effect of 'Exhibit 'C' and
other documents as proof that there was a sale of the property and
said, "..... I agree with the submission of learned counsel for the
respondent, that a person as in the case in hand, may know
how to sign his signature and yet be quite illiterate. In other
25 words, the ability to sign one's signature, as amply
demonstrated in this case is no proof of literacy. See S.C.O.A.,
Zaria v. A.D. Okon (1959) 4 F.S.C. 220; (1959) SCNLR 562.
For instance, although a self confessed illiterate, the respon
dent admitted signing a Form B (not tendered) at the Lands
30 Office, at Aba (See page 68 line 17 of the trial Court's record).
The trial Judge being also a judge of facts, heard evidence
from both parties in support of their pleaded facts, saw and
watched them give evidence and eventually rejected
appellant's evidence on the point whilst expressing prefer
35 ence for the respondent's evidence on the point. This court
as an appellate court will therefore be loath to upset such
findings of facts, unless it can be shown that the decision
arrived at is perverse, the result of an improper exercise of
judicial discretion or that the trial court made wrong

deductions or drew wrong inference from admitted or established facts."

There is clearly no doubt that the question of whether a person is illiterate or not is one of fact, which can be determined on the evidence before the trial court. It can also be determined from a presumption drawn upon the facts before the court. The decisions of *Lawal v. G.B. Ollivant Nig. Ltd* (1972) 3 S.C. 124; *Ntiashagwo v. Amodu* (1959) WRNLR 273 cited by learned counsel to the appellant are to the point. In the instant case the evidence available to the court arose first from the pleading in paragraph one of the statement of claim of the plaintiff that he is an illiterate. He repeated this claim in his evidence in Chief. This is his ipse dixit and not sufficient to establish such a claim. He relied for his claim on documents in which he merely signed his signature. The P.W. 2 the Advances and Recoveries officer of the Bank did not give evidence that Respondent is an illiterate. The learned Judge has rightly found and this was also admitted by the respondent that he signed the signature. In the absence of such evidence the presumption is that the maker of the signature is literate, understood the content of the document which he has signed without interpretation and was capable of reading and writing, hence his signature.

Where there is a factual situation which raises the presumption of literacy, the onus of rebuttal of such presumption rests on the respondent who asserts his illiteracy. In the instant case it is for respondent to show that "Exhibits A and B" which were signed without a jurat explaining the contents were signed by him as an illiterate. These documents, none of which contain a jurat and all in contravention of the provisions of the Illiterates Protection Law disclose a consistent pattern of conduct on the part of the respondent that he is clearly not an illiterate. I agree entirely with the submission of Chief G.C.M. Onyuike, S.A.N that respondent did not discharge the onus of proof on him that he was an illiterate person and entitled to the protection of the law. Plaintiff is therefore stopped from denying the fact of his literacy. It is a well settled principle of the English common law applicable in this country that where a person by his conduct represented to another of the existence of a state of affairs and has induced such other person to act in reliance thereof, he will be bound

by the fair inference to be drawn from his word or conduct -See Cairncross v. Lorimer (1860) 3 LT 130. Plaintiff having signed a document without the assistance of any person to explain its content cannot be heard to challenge its legality on that ground: See Njoku v. Ekeacha & anor (1972) ECSLR 199 at p. 205. It therefore does not
5 lie in his mouth, as he has done in the instant case, to plead his illiteracy. Having raised the presumption of literacy, which is inconsistent with his claim of illiteracy, the onus to rebut the presumption lies on him. Where he fails to rebut it, it becomes conclusive of the fact.

10 Learned counsel to the respondent, Chief Udechukwu, has submitted that the onus to establish the respondent's literacy is on the appellant. I do not think so. Respondent bears the burden of satisfying the court that he is illiterate. The principle is well settled that he
15 who asserts must prove the assertion. The courts below have held that respondent is not the maker of Exhibits A, B and C even though he signed them. I have said in this judgment that where a person signed a document which signature is found as a fact to be his own, and there is no evidence on the document itself, or aliunde to show
20 that he could not have made the document, the presumption is that he is the maker. In the absence of any evidence in Exhibits A, B and C, particularly C that respondent is not the maker, the trial judge was in error in holding that he was not the maker. The Court of Appeal
25 was also wrong to affirm that finding.

One of the reasons relied upon for finding for respondent's illiteracy was his demeanor in the witness box, whilst watching him give evidence. The Court of Appeal was reluctant to interfere with
30 such a primary finding of fact. The learned Judge said,

"The plaintiff whom I have watched closely throughout his evidence and the proceedings is certainly an illiterate in spite of what he wrote as signature on the documents mentioned above as tendered in evidence."

35 With due respect, the right of the trial Judge to determine the veracity of evidence before him based on the demeanor of the witness which, in truth, is founded on the exercise of discretion cannot be promoted into the regime of fact which can be established without the assistance of the demeanor of the witness or in the man-

ner the witness gave evidence. Whether a person is illiterate or not is not a matter of the veracity of his evidence. It is not necessarily based on the credibility of the witness. The witness can tell lies about his literacy. His mien and comportment in court can be calm, reassuring, and yet completely false and deceptive. The issue of whether a person is illiterate or literate is a matter of fact to be established by evidence of the circumstances surrounding the act claimed to represent illiteracy. It is not a primary finding in respect of which Court of Appeal is ill-equipped to interfere.

It is a finding which can be based on the evaluation of the evidence surrounding the act. Thus where the trial court has been unable or failed to properly evaluate the evidence before it, an appellate court can do so and make proper findings on the evidence: See *Shell B.P. Dev. Co. v. Pere Cole* (1978) 3 S C 183. In my view the finding of the courts below that respondent is an illiterate is not supported by the established evidence. It is merely the ipse dixit of the respondent and accordingly perverse. This court is perfectly entitled in the circumstance to interfere: See *Lengbe v. Imale* (1959) WRNLR 325.

It is important to observe in this case that the plea is not one of non est factum. Respondent is not contending that Exhibit C is not his act. It is not his contention that there has been any fraud by the appellant or that the document was the product of a threat of violence or other illegal means. Respondent was fully aware of the consequences of the transaction in Exhibit C and it was he who gave it together with other documents to appellant.

Counsel to the respondents and the courts below have relied on Section 3 of the Illiterates Protection Law to impugn the validity and enforceability of Exhibit C. It is important to reproduce the section which reads:

"Any person who shall write any letter or document at the request, on behalf, or in the name of any illiterate person shall also write on such letter or document his own name as the writer thereof and his address; and his so doing shall be equivalent to a statement:

(a) That he was instructed to write such letter or document

by the person for whom it purports to have been written and

that the letter or document fully and correctly represents his instructions; and

(b) *If the letter or document purports to be signed with the signature or mark of the illiterate person, that prior to its being so signed it was read over and explained to the illiterate person, and that the signature, or mark was made by such person."*

10 It is clear from the section that there is no duty imposed on the illiterate person subject matter of the section who cannot be the maker of the document. The duties which are on the maker is to ensure that contents of the document made, fully and correctly represents the instructions of the illiterate on whose behalf it has been made. Sub-
15 paragraph (b) of section 3 is quite revealing. Where the illiterate person has signed the document or made his mark to the document, and the document contains the name of the writer and his address, the inference is that prior to being signed the document had been read over and explained to the illiterate and the signature or mark
20 was made by the illiterate. Similarly where there is no such endorsement the statutory duty has not been discharged. There is incidentally no sanction against the illiterate. The penalty in section 4 for non-compliance with section 3 is against the maker of the document. It provides as follows:

25 *"4. If the writer of any such letter or document shall fail to write thereon his name and address, or if having done so, any statement which under the last preceding section is in consequence implied, shall be found to be untrue, the writer
30 shall be liable to a fine of fifty pounds or in default of payment to imprisonment for six months"*

Thus the provisions of the law contemplate the illiterate and the maker of the document.

35 I have already held in this judgment that the courts below were wrong to have held that respondent is an illiterate and entitled to protection of the law. Since the presumption of literacy was not rebutted respondent is not entitled to protection. The Illiterates Protection Law applies to protect persons who have established that they

are illiterate and that they did not understand the documents they are alleged to have signed, and that the documents were not read over to them. Thus in such circumstances the provisions of section 3 of the Illiterates Protection Law have been complied with. The situation seems to me ought to be different where even if illiterate the signatory understood the contents of the document and acted with full knowledge of the contents. In such a case the protection of the law is unnecessary. The law is not designed to cover such a situation.

In S.C.O.A. Zaria v. Okon (1959) 4 F.S.C. 220; (1959) SCNLR 562, appellant was alleged to have entered into security for 200pds as a guarantee on a letter on behalf of one Tobe Orok. Appellant claimed that he was an illiterate and could neither read nor write. He said that although he signed the letter which is now being taken as the security, this is because he can only sign his name. The letter was not read and explained to him; and that he would not have signed it if he understood the contents. The learned Chief Justice who tried the case and relied on UAC of Nigeria Ltd v. Edems & Ajayi (1958) NRNLR 33 held;

"upon the whole of the evidence in this case it is more probable that the defendant did not understand that he was signing a bond as surety for #200 than that he did understand."

The Federal Supreme Court agreed with the finding of the learned Chief Justice that on the evidence before him the defendant did not understand the nature of the document he signed. The Supreme Court went further to hold that on the evidence before the court the defendant could not have understood the contents of the document even if he had read it. After pointing out that nowhere in the Illiterates Protection Ordinance, Cap 83 is it provided that failure to comply with the provisions renders a document unenforceable, the Federal Supreme Court concluded as follows:

"I do not think it was necessary for the trial court on the evidence to have made a finding that the defendant was totally illiterate before coming to the conclusion that Exhibit A could not be enforced against him. The conclusion was based on the evidence that although he could sign his name he was not sufficiently literate to have been expected to read and understand the contents of the document and that he had signed the document on the understanding that he was

doing so as a witness for Tobe Orok in respect of the

Company's Provident Fund. In my view the learned Chief Justice was justified in coming to that conclusion and in effect in regarding the defendant as illiterate."

- 5 It follows inexorably therefore that where the illiterate understood the content of the document and acted correctly on the faith of it, different considerations might apply.

The earlier decision of the High Court of U.A.C. of Nigeria Ltd v. Edems & Ajayi (supra) approved in SCOA Zaria v. Okon (supra) has held that where the signature on the document was a thumb impression this is prima facie evidence of illiteracy of the defendant, and that since the Illiterates Protection Law was not complied with the Bond was null and void against the 2nd defendant.

- 15 An important consideration of the effect of the Illiterates Protection Law is that strict compliance with its provisions by the maker is obligatory. The section C does not seem to envisage the rights of third parties derived from the document. But if the document creates
20 legal rights and the writer benefits there under, those benefits are enforceable by the writer of the document only if he complied strictly with the provisions of the law. Where however, the document creates legal rights between the illiterate and a third party, such rights are
25 enforceable by the third party notwithstanding the non-compliance if there is evidence to show that the writer understood the contents and have derived benefits there from: See Ezera v. Ndukwue (1961) All NLR at p. 568. The provision of the law is for the protection of the illiterate on whose behalf the document is made. It is not for the
30 prejudice of the rights of a third party in whose interest a right has been created. That is the situation in the instant case. Respondent understood the content of Exhibit C. and has been paid for the transaction. The fact that there is no endorsement as to the explanation of the content of the document should not affect the relationship between appellant and the respondent. In the recent decision of the
35 Court of Appeal in Salami v. Savannah Bank Nig. Ltd (1990) 2 NWLR (pt. 130) 106, Sulu-Gambari J.C.A. referring to the application of the Illiterates Protection Law said, and I agree.

"My conclusion from the review of the above cases is that

while the writer or preparer of a document signed by an illiterate cannot take advantage under it unless the provisions of the Illiterates Protection Law are strictly complied with, where the document creates legal rights between the illiterate and the third person other than the writer or the preparer of the document, not only is the document admissible but also other pieces of evidence may be adduced or introduced to prove what happened at the time the document was prepared and signed."

It is important to point out the material differences in the cases of U.A.C Nigeria Ltd v. Edems & Ajayi (supra), SCOA Zaria v. Okon (supra), Ezera v Ndukwe (supra) on the construction of the provisions of the Illiterates Protection Law, is that in each of these cases, the defendants were able to establish the fact not only that they are illiterates, and could merely sign their names, or make thumb impression, but also that the documents were not read to them. In fact they could not have signed if the documents were read to them. Thus the documents contravened not only the specific provisions of the law, but also the fundamental basis and precondition of agreement.

In the instant case respondent is not saying that he did not understand the content Exhibit C, or that he would not have signed if he understood the contents. The only point is that the writer has not complied with the statutory mandatory obligation towards the respondent. As I have held the provision does not refer to third parties and will not affect rights vis-à-vis third parties.

The question whether respondent signed the "Exhibit C," is not an issue in this case. It was also not an issue that the contents of "Exhibit C," were read and explained before respondent signed. The only complaint was non-compliance with the provisions of section 3(a). Since respondent is not complaining about the contents of "Exhibit C." it seems to me that non compliance will not affect its admissibility.

It is clear that non-compliance with section 3 does not affect the admissibility of the document. Accordingly Exhibit C confers on the appellant a right which cannot be denied him merely on the fact of the un-established assertion of illiteracy by the respondent.

5 I now turn to the issue of the Counterclaim and the contention by the court below and the respondent that since there was a subsisting mortgage in favour of A.C.B. Ltd. on the property, the claim for specific performance cannot be granted.

10 Chief Onyiuke, S.A.N. for the appellant has submitted that since there was no reply to the counterclaim which remained unchallenged, judgment should have been entered for the defendant. The court below has refused the counterclaim because as it was said;

15 (1) *Exhibit C is unenforceable for non-compliance with section 3 of the Illiterates Protection Law. Again being an instrument transferring interest in land is registrable and not registered under the Land Instruments Registration Law. It is therefore caught under S.8 (1) of that Law.*

20 (2) *That there is a prior existing deed of Legal Mortgage and therefore nemo dat quod non habet.*

25 (3) *That Exhibit B contains prohibition of alienation without prior consent has been proved.*

(4) *Plaintiff having succeeded, the counterclaim must fail.*

30 In his submission Chief Onyiuke submitted citing *Fakoya v. St Paul's Church, Shagamu* (1966) 1 All NLR 74, for the contention that Exhibit C was not tendered in evidence for the purpose of proving an equitable interest in the appellant in the property, but only to show that he had contractual rights concerning the property which
35 the court can enforce by the remedy of specific performance. Learned counsel relied on the other circumstances surrounding the transaction. For instance, respondent handed over the title deeds of the property to appellant, and put him in possession of the property since 1965. Respondent accompanied appellant to the Lands Office

to fill the relevant forms for the transfer of the property to appellant. Approval in principle was given for the transfer and appellant paid the sum for the preparation and registration etc, for the Deed of Assignment.

It was submitted that this was a most deserving case for the order for specific performance, Learned counsel cited and relied on *Bioku Investment & Property Co. Ltd. v. Light Machine Industries Ltd.* (1986) 5 NWLR (Pt. 39) 42, *Obijuru v. Ozims* (1985) 4S.C. 142; *Osagie v. Oyeyinka & anor* (1987) 3 NWLR (Pt. 59) 144; *Land & Sea Foods Co. Ltd v. Roadside Engineering Foundry Ltd* (1987) 1 NWLR (Pt. 48) 191. 5 10

Chief Onyiuke, S.A.N. referred to respondent's contention that the prior subsisting mortgage of the property to the African Continental Bank Ltd. Precluded a transfer of any interest in the property to the appellant. It was submitted that issue was joined in the pleadings of this mortgage which was by deposit of the title deeds with the Bank. The contention is that the Memorandum of Deposit was undated, there is no signature of the Bank's representative authorized to sign, and it was not registered at the Lands Office and no stamp duty has been paid. It was therefore submitted that in the circumstance, no equitable mortgage was created: See *Harvey v. Pratt* (1965) 1 WLR 1025; *Amizu v Nzeribe* (1989) 4 NWLR (Pt. 118) 755. 15 20 25

Chief Udechukwu's reply to this submission tantamounts to a concession that the evidence of P.W.2 that the Bank had a charge on the property is not an effective reply. It is this charge which is challenged as non-existent. 30

Again, the evidence before the Court is that appellant's interest was created in 1965, and there is no evidence to show that the purported mortgage to the Bank was prior in time to the appellant's interest in the property in dispute. 35

It is relevant to refer to paragraph 5 of the statement of claim where the respondent averred that

"The equitable mortgage referred to in paragraph 4 above

was converted into a legal mortgage by the A.C.B. Ltd. in 1974 and registered as No. 52 at page 52 in volume 728 of the Lands Registry in Enugu. The said legal mortgage will also be founded upon."

In his evidence he also stated that:

5 *"Subsequently A.C.B. Ltd converted the equitable mortgage to the said property into a legal mortgage and registered it."*

In addition PW. 2 who was the Advances and Recoveries Officer of the Bank stated that his "...employers have a charge on the property registered as 52/52/728 Enugu now Owerri." Notwithstanding the
10 above the only effort towards the conversion of the equitable into a legal mortgage was in the evidence of PW.2 that the ACB Ltd. instructed their solicitor, PK. Nwokedi Esq. to write to the Lands office at Aba that as mortgagee they had interest in the disputed property
15 secured by deposit of its title deed. This alleged letter was not put in evidence at the trial. In effect this evidence proved nothing. Accordingly, the issue of priority in time to the appellant's interest in the property in dispute did not arise. The court below was therefore wrong to hold that there was a mortgage by A.C.B. Ltd. which was first in
20 time.

It is trite law that a party seeking specific performance of a contract must show that he has performed all conditions precedent to the performance of the contract. Or that he is ready and willing to perform all the terms which he ought to have performed.
25

Learned counsel to the respondent submitted with some force that by virtue of the covenant in Exhibit B prohibiting assignment without the prior consent in writing of the Governor or other officer
30 to whom the powers are delegated, the respondent is not in a position to transfer a valid title: Without such prior consent: See Chidiak v. Coker 14 WACA 506. This it is submitted is the legal position even If appellant's possession of the building lease as well as the premises known as 70 Danfodio Road, Aba is regarded as sufficient part per-
35 formance to justify an Order of specific performance. Learned counsel submitted that an approval in principle which appellant had did not satisfy the condition of prior consent. Since the responsibility to obtain the consent is that of the Lessor: See Nigeria Land & Sea Foods Co. Ltd v. Roadside Engineering Foundry Ltd (1987) 1 NWLR

(Pt. 48) 191 at p. 201. Respondent in this case who is the Lessor has not taken any step to apply to obtain consent for assignment. It was not established that there was an assignment despite the evidence of D.W.3 that the document was executed by the parties.

Chief Onyiuke S.A.N. in his submission argued that the limitation clause in Exhibit B which prohibits assignment without prior consent of the Governor in writing did not preclude the making of an order of specific performance. He submitted that a reading of exhibits D, E, F, H, H1 and H2 clearly show that the consent of the relevant Minister had been obtained. Approval had been granted in principle. All that was being awaited is the final consent. This was implicit in Exhibit F warning the parties to execute the Deed of Assignment and giving them 30 days after which the issue would be considered closed. On a careful consideration of the arguments of counsel, one fundamental issue is agreed, and that is, it is the responsibility of the lessor to obtain the requisite consent for assignment of the property to the assignee. In this case it is the respondent. See *Solanke v. Abed & anor* (1962) 1 SCNLR 371; (1962) 1 All NLR 92; *Rufai v. Olugbeha* (1986) 5 NWLR (Pt. 40) 162. It is also not disputed that consent in principle has been given by the relevant Minister. All that is being awaited is the final consent which would invariably be given on the application of the party on who the responsibility lies.

I do not consider the argument by Chief Udechukwu that specific performance cannot be made because the lessor, in this case the respondent, had not applied for consent tenable. The principle is and has always been that where there is a valid enforceable contract between parties relating to transactions in respect of land, and one of the parties defaults in performance of his part the other contracting party who has performed his part; has the option either to seek the enforcement of the performance of the contract, or to claim for damages for its breach.

This being an action for recovery of possession in respect of sale of land, damages cannot be an adequate remedy. The appellant having completely performed his part of the contract he is entitled to have the respondent perform his own part: See *Nigeria Land & Sea Foods Co. Ltd v. Roadside Engineering Foundry Ltd.* (1987) 1 NWLR

54 Anaeze v. Anyaso (1993) 6 KLR Karibi-Whyte JSC
(Pl. 48) 191; Osagie v. Oyeyinka & anor. (1987) 3 NWLR (Pt. 59) 144.

There are no elements in this case which bring it within the recognized exceptions to the well settled principles of the remedy of specific performance. On the facts of this case and under all the circumstances it appears to me just and equitable to ask the respondent to complete the formalities for the assignment of the property to the appellant.

The counterclaim of the defendant/appellant therefore succeeds. The judgment and orders of the court below are hereby set aside. The following orders are hereby substituted.

The defendant/appellant is granted an order of specific performance of the sale of Plot 5 in Block 159 otherwise known as 70 Danfodio Road, Aba. The respondent is hereby ordered to execute in favour of the appellant a deed of assignment of the said property, or in the alternative.

That the appellant is the person entitled to be granted a statutory certificate of occupancy of or in respect of the said property.

Appellant is entitled to the costs of this appeal as follows: N1,000 in this court, N600 in the court below.

25 **KAWU JSC**

I have had the advantage of reading, in draft, the lead judgment of my learned brother, Wali, J.S.C. which has just been delivered. I am in complete agreement with him that the appeal ought to be allowed for all the reasons lucidly set out in the lead judgment. Accordingly I also allow the appeal and set aside the judgments of the two lower courts. I abide by all the orders made in the lead judgment, including the order as to costs.

35 **OGWUEGBU JSC**

I have had the privilege of reading in draft the judgment just delivered by my learned brother Wali, J.S.C. I am completely in agreement with the reasons and conclusions arrived at therein.

The main issue for determination in this appeal as rightly identified by my learned brother Wali. J.S.C. is illiteracy of the plaintiff/respondent. This is a question of fact which is to be proved by evidence. Seeing and hearing the witness and watching his demeanor are not helpful here and are no substitute for the proof. 5

The learned trial Judge made a correct finding that the respondent signed Exhibits "A, B, and C" but came to a strange conclusion when he held that he is not the maker or writer of them. Curiously enough, the Court of Appeal agreed with this conclusion which ran counter to the finding of the trial court and thereby erred. 10

The surrounding circumstances, namely:

- (a) *The fact that the plaintiff/respondent handed over to the defendant/appellant the deed of lease of the property (Exhibit "B")* 15
- (b) *The appellant having remained in undisturbed possession since 1965;*
- (c) *The respondent and the appellant going to the Land Office, Aba to sign Exhibit "H2"* 20
- (d) *The approval in principle given by the Hon Minister for Lands for the assignment Exh. "H1" and*
- (e) *The payment by the appellant of the fees for preparation, registration and stamping of the Deed of Assignment Exhibit its "D1" and "D2"* 25

go to show that the plaintiff/respondent fully understood the nature and purpose of the transaction he had entered with the defendant/appellant. 30

In this appeal, is an order of specific performance appropriate? Damages in my view will not be adequate and the appellant had done everything that is required of him to assign the property to him. To award damages will not compensate him adequately. Land is property which has a fixed location and a special value and ordinarily damages are not to be regarded as an adequate substitute for the right either to acquire or dispose of an interest in it. Even if the appellant intends to purchase it merely in order to be able to sell it later at a profit or even keep the property as it is, damages will not under the 35

present state of our economy be, regarded as a complete remedy for him. That, also, is a reason to compel the performance of the terms upon which the respondent agreed to assign the property.

For the above reasons and the fuller reasons contained in
5 the judgment of my learned brother Wali, JSC, I also allow the ap-
peal and it is hereby allowed by me. The decision of the court below
is set aside. An order of specific performance of the sale of Plot 5 in
Block 159 otherwise known as No. 70 Danfodio road, Aba is hereby
10 granted. The plaintiff/respondent is hereby ordered to execute a deed
of assignment in favour of the appellant. I abide by the order as to
costs made in the lead judgment. Appeal allowed.

15 **OGUNDARE JSC**

I have had the advantage of a preview of the judgment of my learned brother Wali, J.S.C. just read. I agree with the conclusion and the reasoning leading thereto, that this appeal be allowed. I only
20 want to add a few words of my own relating particularly to the plaintiff/respondent's claim to illiteracy and its effect on Exhibit C, the receipt issued by him to the defendant/appellant.

25 In paragraphs 1 & 7 of his amended statement of claim, the plaintiff pleaded as follows:-

"1. The plaintiff, who is an illiterate, is the owner and lessee of all that State Land/property registered as Plot 5 in Block 159, otherwise known as No. 70 Danfodio Road, Aba.

7. Sometime in 1964 while the said equitable mortgage was subsisting, the plaintiff borrowed the sum of 1,300 (One thousand three hundred pounds) from the defendant. Later, as the plaintiff was unable to repay this loan and under pressure from the defendant the plaintiff reluctantly agreed to assign to the defendant the property already under an undischarged mortgage to The African Continental Bank with the only consideration as the said loan of 1, 300pds. (One thousand, three hundred pounds.)

In reply, the defendant in paragraphs 2, 7 and 8 of his amended statement of defense averred thus:

"2. The defendant denies paragraph one of the amended statements of claim in its entirety and shall at the trial of this suit put the plaintiff to the strictest proof of the facts therein alleged. In particular, the defendant states that the plaintiff is not an illiterate and shall at the trial of this suit rely on the Building Lease dated the 7th day of August, 1963 and registered as No. 20 at page 20 in volume 368 of the register of Deeds then kept at Enugu but now at Owerri (Herein after referred to as the said Lease), a receipt for the purchase money of Plot 5 in Block 159, otherwise known as No. 70, Danfodio Road, Aba the subject matter of this suit (herein after referred to as the said premises) and Land form B dated the 5th day of October, 1964, all of which were signed by the plaintiff.

X X X X 20

7. The defendant denies paragraphs 7 and 8 of the amended statement of claim and describes the same as completely false. In September, 1964, the plaintiff agreed to sell the said premises to the defendant through a commissioned agent called Anaeme Onwuachunam. During the negotiations for the purchase of the said premises, the defendant in the company of P.O. Ezife went to the Land Office, Aba and made a thorough search in the said office about the title to the said premises. The erstwhile Land Officer produced the file of the said premises and after going through the said file advised the defendant and P.O. Ezife that the plaintiff was the State Lessee of the said premises and that the same was not in any way encumbered.

8. After all necessary inquiries, the defendant paid to the plaintiff the agreed purchase price of 'C2'a3 1.300/'97/'97 now N2,600.00 for and on the said premises and the latter

58 Anaeze v. Anyaso (1993) 6 KLR Ogundare JSC
 issued to the former therefore a receipt dated the 5th day
 October, 1964."

As the plaintiff relied on his illiteracy, the onus was on him to prove that fact. What evidence did he lead on his alleged illiteracy? In his evidence, he deposed:

5 *"I am an illiterate who cannot read and write but I can sign my signature.*

In the light of the evidence that he signed many documents relating to the property in dispute none of which has the verification required by section 3 of the Illiterates Protection Law Cap. 64 Laws of Eastern
10 Nigeria 1963 applicable in this case, and he did not disown any of such documents, I can hardly hold that his above evidence is sufficient to establish his alleged illiteracy, more so that the defendant vigorously challenged the plaintiff on the issue. The Court of Appeal, per Onu, J.C.A. observed in the lead judgment as follows:

15 *"On the plea of illiteracy, I am satisfied that in paragraph 1 of his amended Statement of Claim (see page 39 of the trial court's record) the respondent had unequivocally claimed same to leave anyone in doubt. He stated therein thus:*

20 *The plaintiff who is an illiterate, is the owner and lessee of all that state land/property registered as Plot 5 in Block 159, otherwise known as No. 70 Danfodio Road, Aba'*
It is also clear, in my view, that the respondent gave evidence of his illiteracy when at page 44 of the trial court's record he
25 *said among others that*
'...I am an illiterate who cannot read and write but I can sign my signature.

And when subjected to cross-examination, he confirmed this by asserting at page 55 of the record when he said inter alia:-
30 *'I said I am an illiterate but I can sign my name'*
Admittedly, the appellant for his part, denied the respondent's illiteracy both in his pleading (see paragraph 2 of the Amended Statement of Defense at page 58 of the trial court's record)
and in his evidence (see page 72 of the trial court's record)
35 *wherein he stated among others:*

'It is not true that No. 70 Danfodio Road. Aba is on mortgage to the A.C.B. Ltd. Plaintiff signed the documents for me and so he is literate: he signed the receipt he gave me for the

1,300 pounds that is Exhibit C.

It cannot be said from the foregoing that the appellant had traversed the respondent's pleading on illiteracy or offered evidence in challenge thereof (see Odiete & Ors. v. Okotie & Ors. (1972) 6 S.C. 83 at 89) for the view to be held, albeit inferentially, that the respondent is literate. While therefore. I agree with learned counsel for the appellant's submission that by their pleadings both parties to the case in the instant appeal had joined issue as decided in Ehimare v. Emonyon (supra) and F.H.A. v. Sommer (supra) and the onus of proving his illiteracy lay on the respondent, I agree with the submission of the learned counsel for the respondent, that a person as in the case in hand, may know how to sign his signature and yet be quite illiterate. In other words, the ability to sign one's signature, as amply demonstrated in this case, is no proof of literacy. See S.C.O.A. Zaria v. A.D. Okon (1959) 4 F.S.C. 220: (1959) SCNLR 562. For instance, although a self-confessed illiterate, the respondent admitted signing a Form B (not tendered) at the Land Office at Aba (see page 68 line 17) of the trial court's record) The learned trial Judge being also a judge of facts, heard evidence from both parties in support of their pleaded facts, saw and watched them give evidence and eventually rejected appellant's evidence on the point while expressing preference for the respondent's evidence on the point. This court as an appellate court will therefore be loath to upset such findings of facts, unless it can be shown that the decision arrived at is perverse, the result of an improper exercise of judicial discretion or that the trial court made wrong deductions or drew wrong inferences from admitted or established facts. See Bakare v. The State (1987) 1 NWLR (Pt.52) 579 at 584: Chief Frank Ebba v. Chief Warri Ogodo & ors. (supra); Ezewani v. Onwordi (1986) 4 NWLR (Pt.33) 27."

With profound respect, I find myself unable to subscribe to the views above whereby the defendant is taken to bear a heavier burden of disproving a fact when the party (plaintiff) upon whom the primary duty to prove the fact merely relied on his conclusory evidence without facts to support the conclusion, in discharging that

duty. Plaintiff has been shown to have signed many documents and, according to him, to possess his own letter-headed papers, yet his ipse dixit of his illiteracy was held to be sufficient. This approach, with respect and without intending insult, cannot be said to be analytical and logical. Defendant offered some explanation for his conclusion
5 that plaintiff was literate; plaintiff offered none.

Curiously enough, the learned trial Judge after observing in his judgment as follows:

10 *"In the first place it is necessary to resolve the literacy or illiteracy of the plaintiff. I have seen what he wrote on Exhibits A, B and C; they look alike and easily identifiable from their appearance as the writer's signature, and I hold*
15 *the view that plaintiff signed them went on to say: Judging by the contents, wording and nature of the documents Exhibits A, B and C, even though the plaintiff signed them, he is not the maker or writer of each of those three documents. Section 3 of the Illiterates Protection Law*
20 *requires the writer of a document made at the instance of an illiterate person to enter his name on the document as the writer and also his address. The failure on the part of the makers of those three documents Exhibits A, B and C to*
25 *comply with the requirements of the law is not a matter that should attract sanctions against the illiterate plaintiff and he should not be blamed for the default of other persons who wrote the documents.*

30 *Section 3(b) of the Illiterates Protection Law provides that jurat having been inserted and the requirements of the law regarding the maker having been fulfilled, this is equivalent to a statement that prior to signing or thumb-printing the document, it had been read over and explained to the*
35 *illiterate and that he (the illiterate) was the person who thumb-printed or signed the document. The mere fact that a person puts down, scribbles or even signs a document does not necessarily confer on him the status of literacy. The plaintiff whom I have watched closely throughout his evidence and*

the proceeding is certainly an illiterate in spite of what he wrote as signature on the documents mentioned above as tender in evidence."

I find this last passage rather strange. The views expressed therein are not based on the case put up by the parties in their pleadings nor on any evidence adduced. The learned trial Judge, with respect to him, merely went on a voyage of discovery without regard to the case put before him.

The Court of Appeal affirmed the findings of the learned trial Judge that plaintiff was an illiterate and that Exhibit C was of no legal avail to the defendant. These are concurrent findings of the two courts below and the attitude of this court to such concurrent findings is clear and that is, that this court will not disturb same unless exceptional circumstances are shown for doing so.

With profound respect to their Lordships of the two courts below, I think such exceptional circumstances exist in this appeal to justify our setting aside those findings. It is not plaintiff's case that he was not the writer of any of the documents Exhibits A, B, and C nor that he procured anyone to write them for him. Indeed, the learned trial Judge found that plaintiff signed the three documents and plaintiff has not appealed against that finding. In his evidence he specifically admitted under examination-chief that he "gave a receipt to the defendant for the money he gave me. Although he denied under cross examination that Exhibit C was the receipt he gave to the defendant, the Court of Appeal ought to have found that his denial was a lie having regard to the learned trial Judge's finding that plaintiff signed Exhibit C. If, therefore, Exhibit C was the receipt he gave to the defendant, would this then not raise a presumption that the plaintiff was the writer or maker of Exhibit C, the receipt he gave to the defendant. The obvious answer is that such a presumption exists. I am not unaware that when the defendant sought to tender the document in evidence as the receipt the plaintiff gave him, learned counsel for the plaintiff objected to its admissibility on the ground that plaintiff was not the maker. The learned trial Judge, quite rightly, in my view overruled the objection. The learned trial Judge's finding that plaintiff signed Exhibit C has debunked that denial. Unfortu-

nately, the Court of Appeal did not advert its mind to this finding. I find it hard to accept that the literacy or otherwise of a witness can be discerned from his demeanor in the witness box.

The learned trial Judge further observed in his judgment thus:

5 *"Defence relies on Exhibit C and several other*
documents as proving that there was a sale of No. 70. That
document reads in part 'I, Ude Anyaso of No. 70 Dan Fodio
Road, Aba. Today 5th day of October, 1964 sold my Plot 5
10 *in Block 159 Aba otherwise known as No 70 Dan Fodio road*
Aba to Mr. Francis Nwafor Anieze of c/o 41 Jubilee Road
Aba for 1,300pds' This document however is deficient in the
sense that it contravenes the Illiterates Protection Law in so
far as the plaintiff, an illiterate, is concerned. Again as an
15 *instrument recording the transfer of an interest in land it is*
registerable under Section 15 of the Land Instruments
Registration Law but since it is not registered it is no use to
the defendant as an instruments of title to No. 70; See Olisa
v. Nwanosike (1973) Vol. 3 Part II E.C.S.L.R p. 653. Exhibit
20 *C is not altogether useless; it is a receipt of payment of money*
to the plaintiff but not a document enforceable against him
as evidencing sale of No. 70."

The statement that Exhibit C contravened the Illiterates Protection Law is, with profound respect to the learned Judge, erroneous. Not only did the plaintiff not make that his case, in the absence of any evidence that someone other than the plaintiff was the writer of the document, there could be no contravention of the law. Exhibit C was tendered by the defendant as a receipt to evidence payment to the plaintiff of the purchase price of the property in dispute. The plaintiff admitted letting the defendant into possession of the property in 1964 and the latter had remained in possession for over 12 years before plaintiff instituted his action leading to this appeal in 1977. At no time did the African Continental bank register its equitable interest in the property. Plaintiff even played a fraud on the bank in that although he deposited his old title deed with the bank on securing a loan, with the renewal of his leasehold title and a new lease deed issued to him by Government, he did not lodge that new document with the bank but handed it over to the defendant. There

was unchallenged evidence that when defendant investigated plaintiff's title at the Lands Ministry he found it unencumbered. If the courts below had adverted their minds to all these salient pieces of evidence they would have found that defendant was a purchaser without notice of the bank's equitable interest. There was evidence that necessary consent has been obtained to the sale transaction. On the totality of all these facts the defendant was entitled to a decree of specific performance as claimed by him in his counterclaim. 5

Furthermore, under customary law there was a complete sale of the property in dispute to the defendant in that he paid the purchase price as evidenced by Exhibit C and the plaintiff let him to possession. As it is, however, not defendant's case on the pleadings that the sale transaction was under customary law. I would refuse his alternative counterclaim that he "is the person entitled to be granted a statutory certificate of occupancy of or in respect of the" property in dispute known as 70 Danfodio Road, Aba. 10 15

I am satisfied that there was no proper evaluation of the evidence adduced at the trial. Had the learned trial Judge properly appraised the case before him and had not wrongly found the plaintiff to be an illiterate and applied the Illiterates Protection Law, he would have unhesitatingly dismissed plaintiff's claim. The Court of Appeal is clearly wrong to affirm the decision of the trial High Court. 20

For the reasons given above and the fuller reasons given in the lead judgment of my brother Wali. J.S.C. I allow this appeal and set aside the judgment of the courts below. I enter judgment for the defendant/appellant on the counterclaim granting him an order of specific performance of the sale to him by the plaintiff/respondent of Plot 5 in Block 159 otherwise known as 70 Dan Fodio Road, Aba and the plaintiff/respondent is hereby ordered to execute in favour of the defendant / appellant a deed of assignment of the said property within 30 days of the date of this judgment. Plaintiff's claims are dismissed. I subscribe to the order for costs made in the lead judgment. 25 30 35