

SUPREME COURT OF NIGERIA

26TH MARCH, 1993. SC.43/1989

**CORAM:- M. L. UWAI, S. KAWU, A. B. WALI, M. E.
OGUNDARE, S. U. MOHAMMED, JJSC**

IBRAHIM KANO APPELLANT
(for himself and on behalf of
the Hausa community)

AND

GBADAMOSI OYELAKIN RESPONDENT
(for himself and on behalf of
Ashipa family)

CUSTOMARY LAW - transactions relating to land held under customary law - may be subject to statute law where parties agree - how to prove customary tenancy - incident attached to customary tenancy.

EVIDENCE - burden of proof - rests on the Plaintiff to prove his case - must rely on the strength of his case - not on the weakness of the defence.

EVIDENCE - failure to tender agreement specifically relied upon - alleged admission by defence - whether sufficient.

LANDLORD &
TENANT

- failure to pay rent - claim for arrears of rent - action for forfeiture
- what a landlord must prove so as to succeed.

LIMITATION OF
ACTION

- when the defence can be raised by a party - where not pleaded
- implications thereof.

PLEADINGS

- illiteracy - existence of oral customary agreement prior to document - whether to be pleaded
- or merely speculated upon.

FACTS

The Plaintiff/Respondent for himself and on behalf of the Ashipa family, sued the Defendant/Appellant for himself and on behalf of the Hausa Community, claiming forfeiture of the Defendant's tenancy in respect of a piece of land, arrears of rent and mesne profit until possession is given up. After pleadings were filed and exchanged, the case proceeded to trial at the conclusion of which the learned trial Judge of the High Court of Oyo State found for the Plaintiff and entered judgment in his favour, for order of forfeiture of the land in question. The court also granted the Plaintiff's claim for arrears of

rent but said nothing on the claim for mesne profit. The Defendant went to the Court of Appeal and contended that the trial Judge was wrong to have concluded that the transaction between the parties being preceded by oral agreement was governed by customary law when it was not so pleaded and the written agreement which was the basis of the transaction was not tendered in evidence by the Plaintiff. He also challenged the finding by the trial Judge that the parties were illiterates when illiteracy was not pleaded by the parties.

The court of Appeal dismissed the appeal and affirmed the decision of the trial court. In the Supreme Court, contending that the two lower courts were wrong, Appellant sought to establish that the Plaintiff/Respondent's action was statute barred.

HELD (unanimously allowing the appeal but rejecting the submission on limitation of action)

1. The defence that Plaintiffs action is statute barred under the limitation law now sought to be raised by the Appellant is a special defence that must be specifically pleaded and since it was not so pleaded, it cannot be raised in the Supreme Court as it goes to no issue. (P. 106)

2. Since the Plaintiff/Respondent did not plead any oral agreement, there is nothing apart from the written agreement pleaded in the statement of claim that will indicate whether the transaction between the parties was under customary law or statutory law. (P. 113)

3. A party who wishes to rely on illiteracy must prove that fact. Where illiteracy was not pleaded by either party and no evidence was led on it, the court cannot be led to make a finding that the parties were illiterates as was done by the two lower courts. (P. 125)

4. By agreement of the parties, a transaction relating to land held under customary law may be subject to the statutory law. (p. 127)

5. Where trial is by pleadings, the judgment of the court must be based on the pleadings. Therefore, without the production in evidence of the Agreement specifically pleaded in the statement of claim, it would be mere speculation to hold that the transaction covered by that Agreement was one under customary law. (P. 127)

6. It is the duty of the Plaintiff to prove his case and in so doing he must rely on the strength of that case rather than on the weakness of the defence. If it was the case of the Plaintiff/Respondent that the Defendant/Appellant was his customary law tenant, he has failed to plead and prove it. (P.127)

7. The learned trial Judge was in error to rely on OKPATA's case (a 1960 unreported decision of the Supreme Court) in holding that the transaction between the parties was under customary law without the pleaded agreement being before him when the facts and issues in OKPATA's case are different from the present case. (P. 131)

8. One of the incidents attached to customary tenancy is that a denial by the customary tenant of his Landlord's title is a misconduct which can be a ground for forfeiture, whilst in a lease under statutory law a right of re-entry or forfeiture shall not be enforceable until the Lessor has served a prescribed notice on the Lessee. (P. 134-135)

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PER OGUNDARE JSC *"In view of the importance to the case for the Plaintiff of the Agreement pleaded in paragraph 6 of his statement of claim - which document formed the basis of his action - it is rather startling, to say the least, that learned Counsel for the Plaintiff could not regularise before the close of his case the defect that led to his withdrawing the document from evidence. Neither did he consider it prudent to amend his pleadings to include facts from which it could be inferred that the transaction leading to the Agreement was a customary law transaction."* (P. 136)

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REPRESENTATION

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N. Onukogu (holding brief for T.A.B. Adenipekun For the Appelants
Chief A. Aluko For the Respondents

CASES REFERRED TO

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1. Folami V. Cole (1956) 1F.S.C. 66
2. Apena V. Barclays Bank of Nig. Ltd.(1977) 1 SC. 47
3. Abaye V. Ofili (1986) 1 NWLR 134 (pt. 15)
4. Salati V. Shehu (1986) 1 NWLR 198 (pt 15)
5. Mobil Oil V. Coker (1975) 3. SC 175
6. Yassin V. Barclays Bank (1968) 1 ALL NLR 171
7. Famuyiwa V. Folawiyo (1972) 5 SC 112
8. Lion of Africa V. Anuloha (1972) 5 SC 98

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9. Oline V. Obodo (1958) 3 F.S.C. 84
10. F.C.D.A. V. Naibi (1990) 3 NWLR (pt 138) 270
11. Okpata & anor. V. Obe & anor (unreported) FSC/201/1959
12. Durodola V. Oluwafemi (1982) 2, OYSHC 210
- 5 13. Owosho &ors V. Dada (1984) 7 SC 149
14. Lewis & Peat (N.R.I.) Ltd. V. Akhimien (1976) 7 SC 157
15. Okparaeke V. Egbuonu & Ors 7 W.A.C.A. 53
- 10 16. Etiko V. Aroyewun (1959) 4. F.S.C. 129
17. Anthony V. Onyebushi (1974) 11 SC 1
18. Uwegba V. A.G. Bendel State (1986) 1 NWLR (pt. 16)303
19. Awosile V. Sotunbo (1992) 5 NWLR 514
- 15 20. Incar (Nig) Ltd. V. Benson Trans Ltd. (1973) 3 SC 117
21. Solana V. Olusanya(1975)6 SC 55
22. Metal Construction (W.A.) Ltd. V. Migliore (1979) 6-9 SC 163
- 20 23. Oloto V. Dawodu (1904) 1 NLR 58
24. Onisiwo V. Bamigboye (1947) 7 W.A.C.A. 69
25. Eletu V. Omojewonniya (1962)2 ALL NLR13
26. Anyaduba V. Nig. Renowned Trading Co. Ltd. (1992) 5 NWLR 535 (pt. 243).
- 25 27. Okonkwo & Ors. V. Okolo (1988) 2 NWLR (pt 79) 632

STATUTES REFERRED TO

- 30 1. Limitation Laws of Oyo State Cap 64. S. 6 (2)
2. Land Instruments Registration Law Cap 56, S. 16
3. Property and Conveyancing Law Cap. 100 Laws of Western Region of Nigeria 1959. SS. 1 (2) & (3), 161 (1)
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4. Evidence Ordinance S. 131 (1) & (3)

5. Land Registration Ordinance S. 2

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6. Constitution of the Federal Republic of Nigeria 1979. S. 258 (2)

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**LEAD JUDGMENT
BY OGUNDARE, JSC**

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The plaintiff, Chief Amuda Olorunkosebi the Ashipa of Oyo, for and on behalf of himself and the Ashipa family sued the defendant (who is now the appellant before us) for and on behalf of himself and the Hausa Community, claiming forfeiture of the defendant's tenancy in respect of a piece of land situate and being at Saba market Isale-Oyo quarters in Oyo town, arrears of rent and mesne profits until possession is yielded up. Pleadings having been filed and exchanged and amended by the defence, and the plaintiff having filed a reply to the statement of defence, the case proceeded to trial at the conclusion of which the learned trial Judge of the High Court of Oyo State (Oyo Judicial Division) found for the plaintiff and entered judgment in his favour "for an order of forfeiture of the land let by the plaintiff's predecessor to the defendant in 1970 for use by the defendant as cattle enclosure." The learned trial Judge further ordered -

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"However, in view of the nature of the use to which the land is being put and perhaps the possibility of a settlement of the dispute between the parties in the near future, the order of forfeiture hereby granted is suspended for a period of six months."

5 He also granted the plaintiff's claim for N315.00 arrears of rent but said nothing on the claim for mesne profits.

10 The defendant was displeased with this judgment and appealed to the Court of Appeal. The latter court dismissed the appeal and upheld the judgment of the trial court. It is against the dismissal of the appeal and affirmation of the judgment of the trial court that the defendant has further appealed to this Court upon the following
15 four grounds of appeal.

"GROUNDS OF APPEAL

20 *1. The learned Justices of the Court of Appeal erred in law when they held that they 'agreed with the finding of the learned trial Judge that the transaction was one of native law and custom and not intended to be governed by English law', and thereby reached a wrong decision.*

PARTICULARS OF ERROR

30 *(1) When in the transaction, none of the incidents of customary grant was present nor complied with, namely, when there was no pleading nor printed evidence to the effect that the grant was made in the presence of witnesses contrary to the decision in Folami v. Cole (1956) SCNLR: (1956) 1 F.S.C 66.*

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(2) When the agreement of the learned trial Judge and the learned Justices of Appeal could NOT transfer NOR convert transaction that was clearly intended and carried out in accordance with rules of English Law into one under native laws and customs. 5

(3) When the agreement itself that is, the lease was the transaction relied upon by the plaintiff and which transaction was executed very many years before the respondent acceded to the title of the Ashipa of Oyo. 10

(4) When the lease, that is the document containing the agreement was not before the learned trial Judge. 15

(5) When on the pleadings the document was the LEASE relied upon by the plaintiff and not just a record of transaction under native laws and customs. 20

GROUND 2: 25

The learned Justices of the Court of Appeal erred in law by holding that the lease on which the plaintiff's case rested in the Court of first instance was only a record of transaction under native law and custom when the lease was not before the High Court nor the Court of Appeal and when the respondent did not seek leave of the Court of Appeal to tender additional evidence in order to make the lease part of the records and yet reached a conclusion that the transaction is one under native law and custom. 30 35

GROUND 3:

5 *The learned Justices of the Court of Appeal erred in law in holding that the Limitation Laws of Oyo State have no application to the case in hand when there is no material before them on which such a conclusion could be based and thereby allowed a miscarriage of justice.*

10 GROUND 4:

15 *The learned Justices of the Court of Appeal erred in law in refusing to grant leave to counsel to the appellant to argue Limitation Law when in fact the points contained in grounds 10 and 11 were canvassed both in the appellant's brief and in oral argument by Appellant's counsel.*

20 PARTICULARS OF ERROR

25 *When the learned Justices of the Court of Appeal failed to consider in their judgment the aforesaid argument raised in the grounds.*

30 "Pursuant to the rules of this Court the parties filed and exchanged their written briefs of argument. In the defendant/appellant's brief the following issues are set down as calling for determination in this appeal:

35 *1. Whether the learned Justices of the Court of Appeal were right or could hold that the agreement dated the 11th day of January, 1970 between the parties was -*

(i) one entered into under native laws and customs.
 (ii) evidence only of a transaction between the parties and
 (iii) an agreement to which the provisions of the Limitation
 Laws of Oyo State are inapplicable when the agreement i.e.
 the lease on which the contract and the case of the plaintiff
 was fought, was not tendered in evidence and did not form⁵
 part of the records before the Court of Appeal.

2. Whether in view of the foregoing the Court of Appeal was¹⁰
 right in not allowing arguments to be proffered in support of
 grounds 10 & 11 of the Grounds of Appeal in that Court -
 See pages 151 & 152 of the records or whether IN THE
 ALTERNATIVE.

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The Court of Appeal was right in refusing to follow the ratio
 decidendi of the Supreme Court in the case of

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(1) *Apena v. Barclays Bank of Nigeria Limited* (1977) 1 S.C.
 47 and affirmed in

(2) *Abaye v. Ofili* (1986) 1 NWLR (Pt. 15) 134

(3) *Salati v. Shehu* (1986) 1 NWLR (Pt. 15) 198 to the effect²⁵
 that an appellate Court would allow to be raised and
 considered in the appeal Court matters/issues not raised in
 the Court of trial where

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(1) The question involves substantial points of law

(2) No further evidence could have been adduced which
 would affect the decision on it the court would allow the
 question to be raised and points taken as to prevent an
 obvious miscarriage of justice.

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3. *Whether a written agreement reached or entered into as affecting land by parties who are undoubtedly illiterates per se amounts to an agreement under native laws and customs. And whether such presumption also operates where the parties do not belong to the same ethnic or cultural system.*

4. *Whether in view of the state of pleadings - particularly at paragraph 6 of the Statement of Claim that the agreement relied upon was dated 11th day of January, 1970 and paragraph 18 of the Statement of Defence, to the effect that the plaintiff's claim is incompetent - the proper course the learned trial Judge should have taken was dismissal of the plaintiffs case when it was clear to the learned trial Judge that 'The action was instituted in January, 1984 and the agreement was entered into in January, 1970 - a period of 14 years.*

The provision of the Oyo State Limitation Law Cap. 64 at Section 6(2) proscribes the institution of any cause of action in such matter after the expiration of twelve years. And that the learned trial Judge was bound to enforce such law - unconditionally."

Contrary however, to the rules of the Court and numerous decided cases both of this Court and of the Court of Appeal, learned counsel proceeded to argue the grounds of appeal rather than the issues formulated by him. Learned counsel for the plaintiff/respondent has not fared better either for although he too set out issues for determination, it was the grounds of appeal that he argued in his brief. Considering the relative age at the Bar of both learned counsel, I would say that the lapse is rather unfortunate and disappointing.

The three issues set down in the respondent's briefs are as follows:

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*"1. When a relationship of landlord and tenant existed between the Respondent and the Appellant as found by the learned trial Judge and as unanimously affirmed by Justices of Appeal even though the tenancy agreement being a record of the transactions between them as illiterates, was not 10
tendered in evidence, moreso when the terms and conditions of the said agreement were admitted by the parties not only on their pleadings but also in their oral testimonies. 15*

2. If so, whether the Appellant had disclaimed and or denied the respondent's title to the land in dispute, thereby incurring a forfeiture as also found by the learned trial Judge and as also, unanimously affirmed by the Justices of Appeal. 20

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3. Whether, this case reveals exceptional circumstances such as:-

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a. that the two judgments appealed against were perverse, or

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b. that there was radical error of law or procedure leading to such a miscarriage of justice that will compel the Supreme Court to intervene to redress the imbalance in the interest of justice by NOT UPHOLDING the concurrent findings of the two courts below." Having regard however, to the judgment appealed against and the Grounds of Appeal, it would appear in my considered view that the main issue is as to whether or not on the pleadings and evidence, it could be said that the agreement entered into by the parties and dated 11th day of January 1970 was one entered into by illiterates under customary law.

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I must say, with all respect to learned counsel for the defendant/appellant, that all arguments by him based on the provisions of the Limitation Law of Oyo State do not amount to much as it was not part of the defence raised in the amended statement of defence that the plaintiff's action, or any part of it was barred under the Limitation Law. That defence being a special defence and available to the defendant at the time of the action must have been specifically pleaded and not having been pleaded by him, he could not now raise it even in this Court. See *Yassin v. Barclays Bank Limited* (1968) 1 All NLR 171; *Mobil Oil v. Coker* (1975) 3 SC. 175; *Famuyiwa v. Folawiyo* (1972) 5 SC. 112, *Lion of Africa Insurance v. Anuluoha* (1972) 5 S.C 98; *Oline v. Obodo* (1958) SCNLR 298, (1958) 3 FSC 84; *F.C.D.A. v. Naibi* (1990) 3 NWLR (Pt.138) 270. 281. Consequently, I find no merit in the grounds of appeal attacking the judgments of the court below on the ground of Limitation Law.

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I now come to what I consider to be the main issue arising in this appeal, but before doing so, I like to point out that during the pendency of this appeal, the plaintiff died and on the application of one Gbadamosi Oyelakin the latter was, by order of this Court, substituted as respondent in place of the deceased Chief Amuda Olorunkosebi. 5

In the statement of claim the following facts were pleaded; 10

1. That the plaintiff is the Ashipa of Oyo and the Head of Ashipa Family, Isale Oyo Quarters, Oyo and lives at Aafin Ashipa in Isale Oyo Quarters, Oyo. 15

2. That the plaintiff is a traditional Chief, a farmer and also a businessman. 20

3. That there is only one Ashipa Family which also constitutes the Ashipa Chieftaincy family in Isale Oyo Quarters, Oyo. 25

4. That the defendant is the Head and or leader and or Chairman of the Hausa Community in Isale Oyo Quarters, Oyo and he is commonly designated and referred to as Oba Sabo, or 'SERIKI HAUSA', Sabo being the concentration of the Hausa Community in Isale Oyo. 30

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5. *That the land in dispute is situate, lying and being at Sabo market, Isale Oyo Quarters, Oyo, and it is a portion of the landed property of Ashipa family.*

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6. *That by virtue of an Agreement dated the 11th day of January, 1970, and executed by Chief Bello Oyekola (the then Ashipa of Oyo) as landlord, and the Hausa Community as represented by the defendant, as the tenants the land in dispute was let to the Hausa Community at an annual rent of 10.10 (now N21.00).*

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7. *That the defendant was to pay the rents as they fell due and payable being the Chaiman and or Seriki of the Hausa Community in Isale Oyo.*

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8. *That only the rent for the 1st year was paid, and the rents from 1971 up-to-date have not been paid despite repeated demands made for same by the plaintiff to the defendant.*

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9. *That the plaintiff later succeeded Chief Bello Oyekola as the Ashipa of Oyo, thus becoming the Head of Ashipa of Oyo Chieftaincy family and thereby succeeding to all the rights and claims in respect of the land in dispute.*

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10. *That the plaintiff since becoming the Ashipa of Oyo has both orally and in writing demanded the payment of the rents from the defendant who has refused and or neglected to pay same on the ground that the Ashipa family has never been, and can never be the owner of the land in dispute.*

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11. That the defendant has on several occasions threatened to sue the plaintiff to court in respect of the land in dispute, and has made pronouncements adverse to, and in denial of plaintiff's family's title to the land in dispute.

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12. WHEREOF the plaintiff claims as per his writ as follows:

Forfeiture of the Defendant's tenancy on the parcel of land situate, lying and being at Sabo Market, Isale Oyo Quarters, Oyo let out to the HAUSA COMMUNITY as per agreement dated the 11th day of January, 1970 executed by Chief Bello Oyekola (the then Ashipa of Oyo) as Landlord, and the Hausa Community as represented by the defendant as tenants, and arrears of rent up-to-date plus mesne profit until possession is yielded up."

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In the amended statement of defence the defendant averred as follows:

"1. The defendant is not in a position to deny or admit paragraphs 1, 2, 3, 9, 10, 15 and 16 of the statement of claim and puts the plaintiff to the strictest proof thereof.

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2. The defendant admits paragraph 4 of the statement of claim and says further that he is as much a Chief of the Alaafin of Oyo as the plaintiff. The defendant avers further that he is responsible only to the Alaafin of Oyo and not the plaintiff or any other Chief for that matter.

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3. *The defendant admits paragraph 5 of the statement of claim as to the description and location of the land in dispute but denies that the said land is a portion of the landed property of the Ashipa family.*

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4. *The defendant shall contend at the hearing of this suit that the Ashipa Chieftaincy has no Chieftancy land and that, in any event, does not own the land in dispute which belongs to the Alaafin of Oyo.*

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5. *The defendant admits paragraph 6 of the plaintiff's statement of claim but contends that Chief Oyekola acted in his personal capacity and that, either in his personal, representative or official capacity, he had no right to let out the land in dispute to either the defendant or any other person having not sought and obtained the approval of the Alaafin of Oyo.*

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6. *The defendant avers further that it was one Yesufu Carpenter, a member of the Obagbori family who misled him into believing that the land in dispute belonged to Ashipa Oyekola and subsequently into entering into the said agreement.*

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7. *The defendant admits paragraph 7 of the statement of claim but denies the whole of paragraph 8 and states categorically that he never paid any rent to either the plaintiff or his predecessor in office and that he had made it very clear, so soon after the said agreement, to both the plaintiff and his predecessor in office that they did not own the said land and were therefore not entitled to any rents thereof"*

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Thus the agreement pleaded in paragraph 6 of the statement of claim was admitted by the defendant in paragraph 5 of his amended statement of defence. The defendant, however averred that Chief Oyelakin acted in his personal capacity. The evidence preferred appears not to support this averment. An attempt by the plaintiff to tender his copy of the agreement was resisted by learned counsel for the defendant. Rather strangely enough, learned counsel for the plaintiff withdrew the document from being tendered in evidence and made no further attempt throughout the trial to tender the written Agreement. In his final address at the trial, learned counsel for the defendant made an issue of the non-tendering of the Agreement. In his judgment the learned trial Judge has this to say at pages 48 - 49 of the record:

"The first one relates to the agreement entered into by the parties over the lease of the land in dispute. An attempt was made to tender the agreement during the proceedings, but due to the objection to the same by counsel for the defendant on the ground that it was a registrable instrument under the Land Instruments Registration Law Cap. 56 and not having been registered offended against Section 16 of that Law, plaintiff's counsel withdrew from tendering the same.

I have, in considering that issue in this judgment, looked further into the matter. Both parties are undoubtedly illiterates and in my view the agreement, from the nature of the case put forward and the nature of the transaction indicated was one more in the nature of a Native Law and Custom transaction. Here was an illiterate Chief of the higher class in Oyo granting a yearly tenancy of an area of land for

cattle enclosure to a lesser Chief in Oyo also an illiterate. I do not consider that such transaction is one envisaged to be governed by English law rather than Native Law and Custom and accordingly not required to be registered under the Land Instruments Registration Law. I am fortified in such view
5 by an unreported judgment of the then Federal Supreme Court in *Ekeke Okpata & anor. v. Chief Ekem Obo & anor.* F.S.C 201, 1959 delivered by Brett F.J. on the 18th of March 1960 to which Ademola F.C.J. and Hubbard Ag. F.J.
10 concurred and quoted in a judgment by Aderemi J. in *Durodola v. Oluwafemi* (1985) 2 OYSHC 210 at 215-216 as follows:

15 'It is well known that under Native Law and Custom in all parts of Nigeria, dealings in land of every kind, were traditionally carried out orally, and not by means of a written document. The modern tendency is to have some sort of
20 written memorandum and as illiteracy disappears and more and more people come to see the advantages of having a written record of any transaction in land, it may well be normal practice to enter into a written memorandum. This
25 will not necessarily mean however that the parties intend that their dealings should be regulated by English law, and where a written document records a transaction between persons subject to Native Law and Custom of a kind which by native law and custom was required to be carried out orally, it seems
30 to me that court may well hold, without excessive refinement that the oral agreement was the essence of the transaction, and the document merely a record of it. If it should be thought desirable to insist on the registration of such document as a condition of their admissibility in evidence that is a matter for
35 the legislature.'

Accordingly, I am of the view that the agreement which the plaintiff withdrew from tendering on account of the objection raised on behalf of the defendant was one which, having regard to the law as stated in the aforesaid judgment of the Federal Supreme Court ought to have been admissible. For the purposes of this judgment, however, that issue is no longer of much moment."

(Italics mine)

I pause here to observe that the learned trial Judge was right in concluding that the issue of admissibility of the written agreement was

"no longer of much moment".

This is so because he was not called upon to rule on the admissibility of the document sought to be tendered by the plaintiff in evidence, as learned counsel withdrew same.

I need, however, to point out that nowhere in the statement of claim was any oral agreement pleaded. There is thus nothing apart from the written agreement pleaded in paragraph 6 of the statement of claim to indicate the nature of the transaction between the parties, that is, whether it was one under Customary Law or Statute, (otherwise referred to in the judgment as English Law). I say statute here because at the time the agreement was entered into, the Property and Conveyancing Law, Cap. 100 Laws of Western Region of Nigeria 1959 was very much alive. Thus, the agreement pleaded in

paragraph 6 could have related to a transaction under Customary Law or under the Property and Conveyancing Law.

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The learned trial Judge continuing his judgment observes:

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"The paragraphs of the statement of claim which raised the issue as to the agreement are its paragraphs 6 and 7 which aver as follows:

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(6) That by virtue of an agreement dated the 11th day of January, 1970, and executed by Chief Bello Oyekola, (the then Ashipa of Oyo) as landlord, and the Hausa Community as represented by the defendant, as the tenants the land in dispute was let to the Hausa Community at an annual rent of 10.10 pounds (now N21.00).

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(7) That the defendant was to pay the rents as they fell due and payable being the Chairman and or Seriki of the Hausa Community in Isale Oyo.'

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Those paragraphs of the statement of claim were unconditionally admitted in paragraphs 5 and 6 of the statement of defence. The issue then arises whether in view of such admission by the defendant it was necessary to have the agreement tendered for the purpose of establishing the facts in relation thereto as averred in paragraphs 6 and 7 of the statement of claim. In *Owosho & Ors v. Dada* (1984) 7 S.C. 149, the Supreme Court dealt with the issue whether proof was necessary in regard to a deed of conveyance which was specifically admitted by a defendant and seemed to be admitted by the other six defendants. *Eso J.S.C* stated at p.150:

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'Having regard to the state of pleadings whereby the grantee of the land the 7th defendant specifically admitted paragraph 23 of the statement of claim and the 1st to 6th defendants did not deny specifically this paragraph which stated the fact of a purported execution of a deed of conveyance specifically stated to be registered as No.69 at page 69 in volume 1433 of the Lands Registry in Lagos and which indeed relates to the land in dispute, I am of the firm view that the plaintiff herein did not need to prove this admitted fact; see Lewis and Peat (N.R.I) Ltd. v. Akhimien (1976) 7 S.C. 157 as per Idigbe J.S.C. The defendants called no evidence and on the balance of probabilities the plaintiff was bound to succeed.'

Aniagolu J.S.C. Who read the lead judgment stated as follows at pp.165-166:

'In the instant case, there was no need having regard to the state or pleadings for the respondent/plaintiff to apply to recall the plaintiff in order to tender the deed of conveyance registered as NO.69/69/1433 which had been admitted specifically by the 7th defendant and deemed to be admitted by the 1st to 6th defendants in the pleading.'

'It must be pointed out that the matters in issue were not the terms of the deed of conveyance in which case it would be necessary that the document should be produced in order that the Court might determine the precise contents of the document. What the plaintiff pleaded was that the 1st to 6th defendants purported to convey the estate which was already vested in him to the 7th defendant. The 7th defendant had admitted that it was that estate which was conveyed to him by the deed of conveyance registered as 69/69/1433 of the Lagos Land Registry.'

In the Supreme Court judgment referred to above one defendant admitted the facts stated above a deed of conveyance in a statement of claim whilst the other defendant were deemed to have admitted the same. In the case under consideration the defence admission is specific and not left to implication as regards the averments in relation to the yearly agreement described in the statement of claim. Not only were the averments in the statements of claim admitted in the statement of defence, the defendant, D.W.1 Asiru Adeyemi and D.W.4 Oba Lamidi Adeyemi, the Alaafin of Oyo, all gave evidence confirming the said agreement as pleaded in the statement of claim. I am therefore bound to hold that such agreement need not be proved or produced having been specifically admitted both in the statement of defence and defence evidence and therefore raising no Issue."

This conclusion reached by him came under attack in the Court of Appeal. In the lead judgment of Ogwuegbu J.C.A. (as he then was) the learned Judge observed at pages 147-148 of the record:

"There is no doubt that, the appellant specifically admitted paragraphs 5, 6 and 7 of the statement of claim in paragraphs 3, 5 and 6 of his statement of defence. These paragraphs of the statement of claim set out the location of

the land, the parties and the annual rent payable. The appellant admitted those paragraphs of the statement of claim in his evidence in the court below at p.34 lines 10-16 of the record. The only fact which the appellant denied was the ownership of the land which he contended is in the Alaafin. 5
 From the averments and the evidence, the identity of the land in dispute is well known to both parties as well as the annual rent although the title of the respondent was put in issue by the appellant which issue coupled with non- 10
 payment of rent led to this action for forfeiture. Both learned counsel submitted that parties are bound by their pleading. But for different reasons, the appellant based his argument on non-registration of the agreement pleaded and the respondent's contention was that the appellant having 15
 admitted those averments, there was no need for the respondent to prove them. I do not share the view of the learned counsel for the appellant that the terms or conditions of the agreement were not before the court. There 20
 was evidence to that effect even though the document was not admitted in evidence because learned counsel for the respondent withdrew it when objection was raised that it was caught by S.16 of the Land Instruments Registration Law of Oyo State." 25

(italics are mine)

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 After referring to a portion of the judgment of the trial court the learned Justice of the Court of Appeal concluded thus on this issue at pages 148 - 149:

"I agree with learned trial Judge that there was no need having regard to the state of the pleadings for the respondent to tender the agreement which had been specifically admitted by the appellant in his pleadings and evidence. The matters in issue were not the terms of the agreement. See the judgment of Aniagolu, J.S.C. in Lawal Owosho and ors. v. Michael Adebawale Dada (1984) 7 S.C. 149 at p. 165.

I also agree with the learned trial Judge that the parties did not envisage that their transaction was one to be governed by English Law as opposed to native law and custom which does not require the agreement to be registered.

This part of the judgment is again under attack in the appeal before us.

Learned counsel for the appellant in his brief adopted at the hearing of this appeal submits as follows:

"It is submitted with due respect to both the learned trial Judge and the learned Justices of Appeal that there is nowhere in the records where reference was made to the terms of the agreement or worse still anything which could have formed, the basis for approval to the learned trial Judge's conclusions at pages 48 - 49 and the Justices approval at page 148 of the records. It is further submitted that the judgment of the Court of Appeal in that regard clearly occasioned a miscarriage of justice in this instance and the Supreme Court should not allow such clear and obvious injustice to be perpetuated.

There certainly was not a shred of evidence with regard to the terms of the agreement. It was not before the learned trial Judge, it was also not before the Court of Appeal and any attempt to rationalise the nature of the agreement is speculative and not in the interest of justice between the parties.

5

Furthermore, at pages 25-33 of the records it was also not part of the plaintiff's case that the incidents of customary tenure were present or complied with in 1970. The Respondent merely relied on his agreement - and just rightly as that was all he pleaded in paragraph 6 of his Statement of claim at page 3 of the records. This was also reproduced at page 136 of the records.

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None of the plaintiff's witnesses also testified on this point. That is not surprising as the agreement antedated the plaintiff's incumbency by six years: and the cause of action not taken for another eight years. In so far as the elementary but fundamental rudiments of customary tenure as enunciated in Folami v. Coker (sic) (1956) SCNLR 180: (1956) 1 F.S.C 66 are absent, it is wrong and the Supreme Court is being urged to hold that both the learned trial Judge and the Court of Appeal were wrong in holding that what was pleaded in paragraph 6 of the plaintiffs statement of claim amounted without more to a transaction steeped in customary laws and customs. It did not.

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In any event it is being submitted with utmost respect that Courts should not construe documents not placed before them and should also not attempt an apology for such a

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5 In reply to the above submissions, learned counsel for the
respondent in his brief submits as hereunder:

10 "5.01 It is submitted with due respect that the learned trial
Judge, after carefully going through the pleadings
and thoroughly reviewing and evaluating the evidence
adduced by the parties before him, was right to hold
that the agreement need not be tendered in evidence,
15 the defendant (Appellant herein) having admitted in
his Amended Statement of Defence (paragraphs 3,
5, 6, 7, 9 and 11-pages 22-23 of the Record) the
averments contained in paragraphs 5, 6 and 7 of the
Statement of claim - pp. 3 - 4 of the Record.

20 5.02 In coming to this conclusion the learned trial Judge
found support in the unreported case of Ekede
Okpata & ors. v. Chief Edem Obo & 5 Ors, F.S.C
25 201/1959 delivered on 18/3/60, followed and
applied by Aderemi J. in Durodola v. Oluwafemi
(1982) 2 OYSHC 210 at 215-216 and also the case
of Owosho & ors v. Dada (1984) 7 S.C.149 where
in dealing with the issue whether proof was neces
30 sary in regard to a deed of conveyance which was
specifically admitted by a defendant and seemed to
be admitted by the other six defendants the SU
PREME COURT said as per ESO J.S.C at page 150-

35

'Having regard.....
.....as per
Idigbe J.S.C"

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See also ANIAGOLU J.S.C at pages 165 - 166. 5.03

5. 03 In the case in hand, the matters in issue were not the 10
terms and conditions of the agreement. There is no
dispute about that at all, and no issues have been
joined thereto. The question of rationalising
the nature of the agreement does not therefore arise. 15
Reviewing further the evidence placed before him, 15
the learned trial Judge said in the case under
consideration, the defence admission is specific and
not left to implication as regards the averments in
relation to the yearly agreement described in the 20
statement of claim. Not only were the averments in
the statement of claim admitted in the statement of
defence, the defendant (pp.34 - 35) D.W.1 Ashiru
Adeyemi (pp.36 - 37) and D.W.4 Oba Lamidi
Adeyemi (pp.39 - 41), the Alaafin of Oyo all gave 25
evidence confirming the said agreement as pleaded
in the statement of claim. I am therefore bound to
hold that such agreement need not be proved or
produced having been specifically admitted both in 30
the statement of defence and defence evidence and
therefore raising no issue, - pages 50 - 51 of the
Records (Letters and figures in brackets are mine).

5.04 It is trite that admitted averments in pleadings need 35
not be proved since one of the objects of pleadings is

to shorten proceedings by ascertaining what facts are
agreed so that evidence need not be led to prove
them and the court should accept agreed facts as e s -
tablished.

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See:-

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(1) Okparaeké v. Obidike Egbuonu & ors. 7 WACA
53 at 55.

(2) Etiko v. Aroyewun (1959) 4 FSC 129.

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(3) Beatrice Anthony v. Obi Onyebushi (1974) 11 S.C 1
at 5.

20

(4) Lewis and Peat (N.R.I) Ltd v. Akhimien (1976) 7 S.C.
157.

(5) Owosho v. Dada (1984) 7 S.C. 149 at pp. 50 and
at 165 -166.

25

(6) Uwegha v. A.G. Bendel State (1986) 1 NWLR
(Pt.16) 303 at 307 and 329.

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5.05 In view of all the above therefore the Court of
Appeal was perfectly right and in order for not
sharing the view of the learned Counsel for the
Appellant that the terms and conditions of the
agreement were not before, the Court and that there
was evidence to the effect even though the
document was not admitted in evidence because the
learned counsel for the respondent withdrew it.

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5.06 In this case, the following facts are not in dispute;
that:-

- (a) the appellant and the respondent are two illiterate 5
Chiefs at Isale-Oyo. The appellant is a Bale while the
Respondent is an Oyomesi.
- (b) the land subject/matter of litigation is situated at 10
Isale Oyo.
- (c) there was a transaction or arrangement whereby the 15
land was let by the respondent to the appellant for
cattle trade at an annual rent of N21.00. Appellant
said at page 34 of record - 'There was a transaction
between us on the land in dispute. When we needed 20
the land in dispute for cattles, one Yesufu Carpenter
informed us that the land belonged to the Ashipa. I
then approached Ashipa Oyekola who confirmed his
ownership but insisted that he would allow the land
to us only on the payment of an annual rent of 25
N21.00. I agreed to such an arrangement but also
informed the Alaafin about it.' The Respondent also
said at pages 25 - 26 of records - 'There is a
transaction between the Ashipa family and the Hausa
Community. There was an agreement between Bello 30
Oyekola Ashipa by which land was let on behalf of
the Ashipa family to the defendant for storage of his
cattle. I produce my own copy of the agreement.'

(d) there was the said agreement between the parties.

5 5.07 It is most humbly submitted that the said transaction
or arrangement is the subject-matter of the said
agreement which to all intents and purposes, it is
further submitted with due respect, is merely a record
10 of the said transaction or arrangement. By the said
agreement it does not mean that the parties who are
subject to Native Law and Custom of a kind (Yoruba
Native Law and Custom) which requires their trans
actions to be carried out orally, intend that their
15 dealings or transaction should be regulated by any
law other than their Native Law and Custom. I most
respectfully refer Your Lordships once again to the
case of Okeke Okpata & or. v. Chief Ekem Obo &
ors. F.S.C 201/1959 unreported but delivered on 18/
20 3/60 and the relevant portion of the judgment quoted
in the present case at pages 48 - 49 of the Records.
See also: Chief S.N Okonkwo & or. v. Dr. PI Okolo
(1988) 2 NWLR (Pt.79) 632 at 634 - 635 (Ratios 9,
25 10 and 11) and 653 (Paras E - H).

5.08 It is submitted with due respect that paragraphs 6 of
the statement of claim should not be read in
30 isolation but should be read together with paragraph
5 and 7 of the same statement of claim pages 3-4 of
records as admitted by paragraphs 3,5,6,7 and 11
of the Amended statement of Defence at pages 22-
23 of the Records. In view of all the above, it cannot
35 be said and argued that there was no evidence

before the learned trial Judge to arrive at the conclusion he reached and that a miscarriage of justice occurred when the Justices of Appeal affirmed that conclusion."

5

I have taken pains to set out the penultimate passages of the judgments of both the trial High Court and the Court of Appeal on which both courts based their rationale for finding in favour of the plaintiff. I have also set out the arguments of learned counsel in their respective briefs in favour of or against the rationale used by the courts below in coming to their respective decisions. The question that arises is: are the courts below justified in finding that the transaction between the defendant and the predecessor -in-office of the late Chief Amuda Olorunkosebi was one under customary law? Both lower courts based their finding on the grounds (a) that the parties to the agreement were illiterates; (b) that the transaction was in the nature of native law and custom transaction: (c) that the defendant admitted the agreement pleaded in paragraph 6 of the plaintiff's statement of claim and, therefore, relying on *Owosho v. Dada* (1984) 7 S.C. 149, there was no need to tender the agreement and (d) that the terms and conditions or the agreement were before the trial court. I shall now proceed to consider these grounds.

As regards (a), that is, illiteracy of the parties. I cannot find anything on the record to lead the courts below to the finding that the parties were illiterates. Illiteracy was not pleaded by either party nor any evidence led on it. It is just the conjecture of the learned trial Judge adopted by the learned Justices of the court below. A party who wishes to rely on illiteracy must plead that fact -

see: Awosile v. Sotunbo (1992) 5 NWLR 514, 528.

On (b), I cannot on the record also find anything to lead one
5 to the conclusion that the agreement between the defendant and
late Chief Oyekola was one in the nature of a customary law transac-
tion. By paragraph 6 of the statement of claim the action was based
on an Agreement dated 11th day of January 1970. There is nothing
10 in that paragraph or any other paragraph of the statement of claim
to inform one that the transaction therein was based on customary
law. True enough that paragraph shows that a tenancy was created
by the pleaded Agreement but there is no indication that the tenancy
was one under customary law or under statute to wit, Property and
15 Conveyancing Law, Cap. 100, Laws of West Region of Nigeria, 1959
(hereinafter is referred to as the Law). The fact that the land was held
by the Ashipa under customary law would not, per se be sufficient to
lead one to the conclusion that all transactions relating thereto must
be under customary law. It would appear from the judgments of the
20 courts below that they were led to the conclusion they reached be-
cause the land was held by the Ashipa under customary law. This
reasoning ignored the provisions of Section 1(2) & (3) of the Law.
Subsections (2) and (3) of Section 1 of the Law read:

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*"(2) This law shall apply to land within the State which is not
held under customary law and property not held in
30 accordance with customary law.*

*(3) As respects land held under customary tenure or
property held in accordance with customary law, this law shall
35 apply in any transaction if the parties agreed, or must from*

the nature of the transaction be presumed to have agreed, that the transaction should be exclusively regulated other wise than by customary law"

5

Thus, where the parties agree, a transaction relating to land held under customary law may be subject to the law. Without the production in evidence of the Agreement pleaded in paragraph 6 of the statement of claim it would be mere speculation to conclude that the transaction covered by the Agreement was one under customary law. It is trite law that where trial is by pleadings, the judgment of the court must be based on the pleadings and not on speculations -Incar (Nig.) Ltd. v. Benson Trans Ltd. (1975) 3 S.C. 117; Solana v. Olusanya (1975) 6 S.C. 55; Metal Construction (W.A) Ltd. V. Migliore (1979) 6 - 9 S.C 163. It is the duty of a plaintiff to prove his case and in so doing he must rely on the strength of that case rather than on the weakness of the defence. He is, however, entitled to take advantage of any admission by the defence favourable to his case. In the instant case, if it was the case of the plaintiff that the defendant was his customary law tenant then he must plead this and prove it. This, the plaintiff has not done and it is wrong, in my respectful view, to suggest, without production of the Agreement pleaded in paragraph 6, that the transaction between the parties to it was in the nature of a customary law transaction.

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Reliance was placed by the trial court on the judgment of this Court in FSC 201/1959: Ekeke Okpata & anor. v. Chief Ekem Obo & anor. (unreported) a judgment delivered on 18th March, 1960 (now reported in (1960) SCNLR 103) wherein Brett. FJ (as he then
5 was) delivering the judgment of the Court said:

10 *"We were invited to disregard the oral evidence of the leases to the people of Amachi and Edda, on the ground that the leases had been reduced to writing, and the written documents held inadmissible for want of registration under the Land Registration Ordinance. For this Mr. Araka replied*
15 *on S.131 (1) of the Evidence Ordinance, which provides for the exclusion of oral by documentary evidence. Formal rules of evidence which are thought appropriate in litigation between towns-people can easily work grave injustice when rigidly applied to suits between illiterates from the remote*
20 *rural areas, and I should have thought it regrettable if this submission had succeeded, but I am satisfied that the oral evidence was rightly admitted under S.131 (3) of the Evidence Ordinance, which provides that oral evidence of the existence of a legal relationship is not excluded by the*
25 *fact that it has been created by a document, when the fact to be proved is the existence of the relationship itself, and not the terms on which it was established.'*

30

If I am correct in holding that the oral evidence of the relationship of landlord and tenant between the Obubra and the Izzi was properly admitted it is immaterial whether the leases were properly excluded, and neither side sought to
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challenge the Chief Justice's ruling that the leases were instruments within the meaning of the Land Registration Ordinance. I think it right, however, to say that it seems to me at least arguable that the ruling was mistaken. An instrument is defined in S.2 of the Ordinance in the following terms -

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"instrument" means a document affecting land in Nigeria, whereby one party (hereinafter called the grantor) confers, transfers, limits, charges or extinguishes in favour of another party (hereinafter called the grantee) any right or title to, or interest in land in Nigeria, and includes a certificate of purchase and a power of attorney under which any instrument may be executed, but does not include a will.'

20

The essential part of this definition is that the document must be one which produces a legal result itself, and not merely one which serves as a memorandum of the legal result produced by some other transaction. It is well known that under native law and custom in all parts of Nigeria dealings in land, of every kind, were traditionally carried out orally, and not by means of a written document. The modern tendency is to have some sort of written memorandum, and as illiteracy disappears and more and more people come to see the advantages of having a written record of any transaction in land it may well become normal practice to enter into a written memorandum. This will not necessarily mean, however, that the parties will intend that their dealings should be regulated by English law, and where a written

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document records a transaction, between persons subject to native law and custom, of a kind which by native law and custom, was required to be carried out orally, it seems to me that the courts may well hold, without excessive refinement, that the oral agreement was the essence of the transaction, and the document merely the record of it. If it should be thought desirable to insist on the registration of such documents as a condition of their admissibility in evidence, that is a matter for the legislature."

15

In the passage above, this Court, per Brett, F. J. after dealing with the correctness of the trial court's admissibility of oral evidence of leases undoubtedly pleaded and raised as an issue at the trial went on to express an opinion on the admissibility of a written agreement or memorandum between the parties, Which memorandum reduced into writing the oral agreement between them whereby one party granted customary law leases to the other. The trial court had ruled that as the written memorandum offended against Section 2 of the Land Registration Ordinance, it was inadmissible. Both parties were content with this decision and did not question it on the appeal to this Court nor addressed the Court on it. Brett, FJ. however expressed an opinion questioning the correctness of the trial court's decision. To that extent, the opinion expressed is obiter and not one of the *rationes decidendi* of the final decision of the court on the appeal before it. I have no reason, however, to doubt the correctness of the opinion expressed.

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This notwithstanding, the case, in my respectful view, does not apply to the case on hand. I say this because, first, the Agreement pleaded in the statement of claim, unlike the written agreement in the OKPATA case, was not tendered and rejected by the trial court. 5 Learned counsel for the plaintiff sought to tender it but on being faced with an objection by defence counsel on non-registration under the Land Registration Law of Eastern Nigeria (in pari materia with the Land Registration Ordinance in the OKPATA case), withdrew the document and so it has never formed part of the record. 10 Secondly, oral evidence was given showing that there had been prior oral agreement of leases under customary law before the written agreement or memorandum witnessing that oral agreement. It must be assumed that it was pleaded that the leases were customary law leases 15 granted in accordance with customary law rules. There is no such pleading nor evidence in the instant case. Thirdly, as the Agreement relied on by the plaintiff in the present case was not received in evidence nor forms part of the record before us, it is impossible to decide whether it "produces a legal result itself or merely serves as a 20 memorandum of the "legal result produced by some other transaction."

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In my respectful view, the learned trial Judge was in error to rely on OKPATA, without the pleaded Agreement being before him, in holding that the transaction between the defendant and the Ashipa 30 Family, as represented by Chief Oyekola was under customary law.

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I now turn to consider (c) and (d) together. The defendant admitted the Agreement pleaded in paragraph 6 of the statement of claim but Owosho v. Dada (supra) is no authority for holding that it was not necessary to tender the Agreement in order to show its terms and conditions. The facts in Owosho v. Dada are not apposite to the facts in the case on hand. In Owosho v. Dada what was in issue was the failure by the plaintiff to tender in evidence a deed of conveyance he intended to have set aside by the court. The deed was pleaded by him and admitted in the statement of defence of one of the defendants. The existence of the deed thus became an admitted fact which the plaintiff need not prove. In the case on hand, however, the issue was whether on the terms and conditions of the Agreement pleaded in paragraph 6 of the Statement of claim, the plaintiff was entitled to forfeiture. In Owosho v. Dada, Aniagolu, J.S.C in his lead judgment adverted his mind to the difference. He said at pages 165 - 166 of the Report:

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"In the instant case, there was no need, having regard to the state of the pleadings, for the respondent/plaintiff to apply to recall the plaintiff in order to tender the deed of conveyance registered as 69/69/1433 which had been admitted specifically by the 7th defendant and deemed to be admitted by the 1st to 6th defendants in the pleadings.

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With all due respect to Mr. Bashua, counsel for the appellants, he had conceived the matter erroneously when he kept on harping, in his submission before us, that the learned trial Judge could not set aside a deed of conveyance which was not before him. He

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argued as if a setting aside of a deed of conveyance would entail a physical tearing up, or destruction, of the deed before it could be said to have been set aside. The particulars of the deed were before the court and were admitted. All that would have happened would have been for a judgment of a court setting aside the deed in the instant case, deed registered as No. 69 at page 69 in volume 1433 of the Lagos Lands Registry to be affixed to the deed in the Lands

Registry by the Registrar, or for the record of the Court's judgment to be made on the deed and the cancellation would then be effective. Mr. Bashua must have felt that he had reached his El Dorado when the plaintiff did not produce his deed of conveyance, and this must have been responsible for his taking the unwise step not to call any evidence at the close of the plaintiffs case. Clearly, that was a mistaken failure to appreciate the state of the pleadings in this case.

It must be pointed out that the matters in issue were not the terms of the deed of conveyance in which case it would be necessary that the document should be produced in order that the court might determine the precise contents of the document. What the plaintiff pleaded was that the 1st to 6th defendants purported to convey that estate which was already vested in him to the 7th defendant..The 7th defendant had admitted that it was that estate which was conveyed to him by the deed of conveyance registered as 69/69/1433 of the Lagos Land Registry'

(underlinings are mine)

5 The existence of the Agreement is not in dispute. As pleaded
in paragraph 6 of the statement of claim, the Agreement was a ten-
ancy agreement whereby the Ashipa was landlord and the defen-
dant was tenant. The rent payable was N21 per annum. That was all
10 the defendant admitted in his statement of defence. Beyond these,
nothing else is known about the terms and conditions of the Agree-
ment. It is not known, for instance, what the landlord's covenants
were nor those of the tenant and the conditions that would give rise
to forfeiture of the tenant's holding on the land. Without producing
15 in evidence the Agreement, it would be impossible to know whether
the landlord was entitled to forfeiture of the tenant's holding follow-
ing the latter's refusal to pay rents and denying the landlord's title.

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 There are incidents attaching to customary tenancy that have
been recognized in numerous cases. In all customary tenancies, for
instance, the customary tenant retains, until forfeiture, the right to
25 the use and enjoyment of the land. A denial by him to his landlord's
title is a misconduct which can be a ground for forfeiture See: *Oloto*
v. Dawodu (1904) 1 NLR 58; *Onisiwo v. Bamigboye* (1947) 7 WACA
69; *Eletu v. Omojewonniya* (1962) 2 All NLR 13; *Anyaduba v. Nig*
Renowned Trading Co. Ltd. (1992) 5 NWLR (Pt.243) 535.

30

 Under the Law however, there are statutory restrictions im-
posed such as, for example, restriction on and relief against forfeiture
35 imposed by Section 161(1) which reads:

"A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice -

- (a) *specifying the particular breach complained of; and* 10
- (b) *if the breach is capable of remedy, requiring the lessee to remedy the breach; and*
- (c) *in any case, requiring the lessee to make compensation in money for the breach;* 15

and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach." 20

(Italics are mine)

Having regard to the use the land was being put to, is it not possible to suggest that all the Agreement gave was a licence? Had the courts below adverted their minds to the various speculations that could arise from the non-production of the Agreement pleaded in paragraph 6 and relied on by the plaintiff, they would not have readily found in his favour as they did. 25 30

From all I have been saying, the failure by the plaintiff to produce in evidence the Agreement pleaded and relied upon by him is fatal to his case. If the tenancy had been under customary law, I would not have hesitated to dismiss this appeal for, by denying his landlord's title, the defendant would be guilty, on the authorities, of such misconduct that would entitle the landlord to forfeit his holding. 35

But there is nothing in the statement of claim to suggest that there was an oral agreement of such a tenancy which was reduced into the written memorandum dated 11th January 1970. I think both the trial High Court and the Court of Appeal are in error to come to the conclusion they reached that there was such oral agreement of a customary law tenancy which the parties reduced into writing.

10

In view of the importance to the case for the plaintiff of the Agreement pleaded in paragraph 6 of his statement of claim- which document formed the basis of his action - it is rather startling, to say the least, that learned counsel for the plaintiff could not regularise before the close of his case the defect that led to his withdrawing the document from evidence. Neither did he consider it prudent to amend his pleadings to include facts from which it could be inferred that the transaction leading to the Agreement was a customary law transaction. Rather than focus on the kernel of his case, he allowed himself to be carried away by the plea of *jus tertii* raised by the defendant and focused his attention more on disproving that plea than proving the case he had set up.

25

In conclusion, this appeal succeeds and it is allowed by me. I set aside the judgments of the courts below and in their stead I make an order dismissing plaintiff's claims. I award N1,000.00 costs of this appeal to the defendant/ appellant. I also award to the defendant/ appellant N350.00 and N450.00 costs in the High Court and Court of Appeal respectively.

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UWAIS JSC

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I have had the opportunity of reading in draft the judgment read by my learned brother Ogundare. J.S.C. I agree with the judgment and do not wish to add anything.

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Accordingly, the appeal is hereby allowed with N1,000.00 costs to the appellant against the respondent.

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KAWU JSC

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I have had the advantage of reading, in draft, the lead judgment of my learned brother, Ogundare. J.S.C. which has just been delivered. I am in complete agreement with him that this appeal ought to be allowed. The foundation of the plaintiff's claim in the trial court was the contract agreement pleaded in paragraph 6 of his statement of claim. That document was, however, not before the trial court, and in the circumstances. It would be mere speculation to determine the nature of the transaction between the parties. I too will allow the appeal, set aside the judgment of the two lower courts and dismiss the plaintiff's claims with N1,000.00 awarded to the defendant.

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WALI JSC

5 I have been privileged to read in advance a copy of the lead judgment of my learned brother. Ogundare, J.S.C. I agree with his reasoning and conclusion and I adopt the same as mine.

10 For those same reasons I shall also allow and hereby allow the appeal. The judgments of both the trial court and the Court of Appeal are set aside and in place thereof an order dismissing the plaintiffs/respondent's case is substituted. I endorse the order as to costs made in the lead judgment. Appeal allowed.
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UWAIS JSC

25 (PRONOUNCEMENT)

My learned brother, the late Mohammed, J.S.C. who took part in the hearing of this appeal and the conference which we held immediately thereafter died in a motor accident on Tuesday, the 9th
30 day of February, 1993.

In accordance with the provisions of Section 258 subsection
35 (2) of the Constitution of the Federal Republic of Nigeria 1979 thereby pronounce that he was of the opinion that the appeal should succeed and that it should be allowed with N1,000.00 costs to the appellant.