

SUPREME COURT OF NIGERIA
22ND JULY, 1994 SC. 127/1989
CORAM:- S. M. A. BELGORE, A. B. WALL,
M. E. OGUNDARE, Y. O. ADIO, A. I. IGUH, JJSC

ALHAJA SABALEMOTU AYINKE PLAINTIFF/CORSS-
APPELLANT

AND

ALHAJI MUNIRU LAWAL & ORS DEFENDANT/CROSS-
RESPONDENT

EVIDENCE - Landlord & tenant - Mesne profits - State of evidence coupled with admission - When found to justify mesne profit claimed as reasonable.

LANDLORD & TENANT - Mesne profits - Tenant holding over after termination of his tenancy - Whether landlord is entitled to mesne profits

LANDLORD & TENANT - Mesne Profits - Landlord's Claim described as a claim in compensation - When held to actually be a claim for mesne profits.

LANDLORD & TENANT - Mesne Profits - Basis of calculation - Whether rent payable is the yardstick.

LANDLORD & TENANT - Mesne profits - Tenant holding over - Is bound to pay the fair or actual value adjudged by court

LANDLORD & TENANT - Mesne profits - When the amount claimed by landlord is held to be reasonable.

FACTS

The plaintiff filed an action before the Chief Magistrate's Court Lagos against the Defendants claiming possession of premises and N1,000 per annum as mesne profits until possession is given up. The six years lease agreement (Exh. A) between the Plaintiff and the 1st Defendant which specified the rent to be N2.00 (Two Naira) per annum had expired for about 4 years at the time the action was filed. The trial judge entered judgment for the Plaintiff as per her claim.

The Defendants' appeal to the High Court was upheld. Plaintiff appealed to the Court of Appeal which allowed the appeal, restored the trial Chief Magistrate's Court judgment but reduced the Mesne profits to N2.00

per annum on the basis of the rent payable under the lease between the parties. The Defendants appealed while the Plaintiff Cross-appealed to the Supreme Court. The Defendants appeal was abandoned and struck out. The apex court now has to determine whether the Plaintiff was entitled to mesne profits and whether such mesne profits can be awarded at a rate higher than the rent stated in the parties tenancy agreement.

HELD (Unanimously allowing the Plaintiffs Cross-appeal) ***Whether Landlord is entitled to claim mesne profits***

1. The proposition of law is beyond dispute that a landlord is entitled to claim mesne profits from a tenant from the moment such a tenant ceases to hold the premises as tenant to the time he gives up possession thereof. (P.213L.19)

Claim in compensation held to be one for mesne profits

2. Although the claim before the trial court was rightly described as a claim in compensation for the use and occupation of the premises in issue, it is none-the-less a claim for mesne profits on the particular facts of the case covering the period of four years, during which the 1st appellant ceased to hold the premises as a tenant or lessee of the cross-appellant but wrongfully remained thereon and held the same over. (P.213 L.30)

Yardstick for Determination of mesne profits

3. While rent is liquidated and operative during the subsistence of a tenancy, mesne profits are unliquidated and only start to run when the tenancy expires and the tenant holds over. Mesne profits are generally calculated on the yearly value of the premises and a Landlord is certainly not bound to use the rent payable during the tenancy as a yardstick in his determination of mesne profits. (P.215 L.I)

Mesne Profits - Payment of fair or actual value adjudged by court

4. Being unliquidated and based on the fair open market annual value of the premises, the rate of mesne profits are at large; their assessment is not necessarily based on the reserved rent and the tenant who holds over is liable to pay to the landlord the fair or actual value adjudged by the court to be due for use and occupation of the premises. (P.215 L.20)

Whether the amount of mesne profits claimed is reasonable

5. It seems to me beyond dispute that on the state of the evidence laid before the court, particularly on the admission of the 1st defendant, the learned trial

Chief Magistrate was clearly right in holding that N1000.00 claimed by the plaintiff as mesne profits in respect of the premises “is reasonable having regard to the rent collected by the first defendant from 15/7/72 to date.” (P.216L.12)

NOTABLE POINTS OF INTEREST

IGUHJSC

1. Mesne Profits Defined

“*Mesne profits*” has been described as the rents and profits which a tenant who holds over after the lawful termination or expiration of his tenancy or a trespasser has or might have received during his occupation of the land or premises in issue and which he is liable to pay as compensation to the person entitled to possession of such land or premises. As was explained by Goddard, L. J., the expression is “*another term for damages for trespass arising from the particular relationship of landlord and tenant*” (P.212 L.28)

2. Method of assessing mesne profits

Where the rent represents the fair value of the premises, mesne profits shall be assessed at the amount thereof; but where the real or actual value of the premises exceeds the reserved rent, then of course, mesne profits are assessed at such higher rate or figure. Mesne profits may therefore be equated with fair, real or actual value of the use and occupation of a premises during the period the premises is held over by a person in wrongful possession thereof. They are not necessarily commensurate with the rent reserved in the expired lease since the value of the premises might either have increased or, indeed, fallen during the tenancy. (P.215L. 10)

3. Unchallenged evidence

Where evidence given by a party to any proceedings was not challenged by the opposite party who, like in the instant case, had the opportunity to do so, it is always open to the court seised of the matter to act on such unchallenged evidence before it. (P.215 L.37)

4. Judicial precedent erroneously applied by the court below

It ought to be mentioned that the court below relied on the decision of this court in Oduye v. Nigeria Airways (1987) 2 N.W.L.R. (Part 56) 126 in holding that since Exhibit A stipulated N2.00 per annum as the reserved rent, that rate must be the measure of the mesne profits the plaintiff was entitled to. I must,

with the greatest respect to the court below, emphasize that the principle of law enunciated in the Oduye case is clearly inapplicable to the present case. The Oduye Case dealt with premises to which the provisions of the Lagos State Rent Control and Recovery of Residential Premises Law No. 9 of 1976 applied which is not the position in the present case. “(P.216 L. 17)

OGUNDARE JSC

5. Entitlement to higher amount of Damages - Hindered by a lesser claim

Going by the evidence of the original defendant the damages that the plaintiff would be entitled to would have been well over N4,000.00 per annum but the plaintiff claimed the lesser sum of N1,000.00 per annum and she would only be entitled to that lesser sum; the court would not grant her more than she claimed. Certainly to award her N2.00 per annum as decided by the court below on the premise that the sum represented the rent reserved in the lease agreement between the parties would be to allow the defendant to profit from his wrong doing. That, the law will not allow. (P. 223 L.6)

REPRESENTATION

M.I. Igboke with Oduke for the Cross-Appellant.
Cross-Respondent absent and unrepresented.

CASES REFERRED TO

Bramwell v. Bramwell (1942)1 KB. 370

Ahmed Debs and others v. Cenico Nigeria Ltd (1986)3 NWLR (Part 32) 846

Pan Asian African Ltd. v. Nikon (1982)9 S.C. 48

Oduye v. Nigeria Airways Ltd (1987)2 NWLR (Pt 55)126

Osarawu v. Ezeinika (1978)6 - 7 SC. 135 (Pt 56)

Marine and General Assurance Company Ltd v. Rossek and Another (1986)2 NWLR (Part 25)750 at 763.

Clifton Securities Ltd. v. Huntley (1948)2 All E.R. 283

Bullen and Leake and Jacobs “Precedents of Pleadings” 12th edition Page

Adebanjo v. Tennessee Nigeria Inc. (1974)2 SC 1

Bello v. Eweka (1981)1 SC. 101 at 124

Isaac Omoregbee v. Daniel Lawani (1980) 3- 4 SC. 108 at 117

Odulaja v. Haddad (1973)11 SC. 35

Nigerian Maritime Services Ltd v. Alhaji Bello Afolabi (1978)2 SC 79 at 81

Boshali v. Allied Commercial Exporters Ltd (1961) All MLR 917

Debs v. CENICO Nigeria Ltd (1986)3 NWLR 846

African Petroleum Ltd v. Owodunni (1991)8 NWLR 391

Rochester (Dean and Chapter v. Pierce) (1808) 1 Cap 466

Camas Property Co. Ltd. v. K.L. Television Services Ltd. (1970)2 Q.B. 433

Nigeria Construction and Holdings Co. Ltd. v. Owoyele (1988) 4 NWLR (Pt. 90)588

5 Omotesho v. Oloriegbe (1988) 4 NWLR (Pt. 87) 225.

LEAD JUDGMENT BY IGUH JSC

In the Chief Magistrates court of the Lagos Magisterial District, holden
10 at Yaba, Lagos State, the plaintiff, by a writ of summons filed on the 4th May,
1982 claimed against the defendants as follows:-

(i) Possession of one storey building consisting of 10 shops and 5
office apartments situate at No. 1, Aro Street, otherwise also known as No. 88B
15 Docemo Street, Lagos; and

(ii) N1,000.00(One thousand Naira) per annum for the use and occu-
pation of the said building and premises from the 15th July, 1978 until posses-
sion is given up.

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The case duly proceeded to trial and evidence was led on behalf of
the parties. At the conclusion of hearing, the learned trial Chief Magistrate
after a review of the evidence entered judgment for the plaintiff against the
defendants jointly and severally in the following terms-

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It is hereby adjudged that the plaintiff do recover from the defen-
dants possession of the premises; that is to say, that one storey building
consisting of 10 shops and 5 rooms/offices at No. 1 Aro Street, also known as
88B Docemo Street, Lagos. It is further adjudged that the plaintiff do recover
30 from the defendants jointly and severally the sum of N4,000.00 for use and
occupation of the said premises from period 15/7/78 to date. It is ordered that
the defendants having over stayed for four years should give up to the plain-
tiff immediate possession of the said premises.

The Defendants being dissatisfied with this judgment of the learned
35 Chief Magistrate appealed to the High Court of Lagos which on the 2nd day of
April, 1986 allowed the appeal and set aside the judgment and orders of the

Chief Magistrates Court. Aggrieved with the said judgment of the High Court, the plaintiff with the leave of the High Court, appealed to the Court of Appeal, Lagos Division, which in a unanimous decision allowed the appeal on the 29th June, 1987 and restored the judgment of the Chief Magistrate. The Court below however reduced the amount awarded by the learned Chief Magistrate as mesne profits for the use and occupation of the said premises from N 1,000.00 to N2.00 per annum. The defendants were ordered to give up possession of the premises claimed by the plaintiff forthwith. 5

Dissatisfied with the said judgment of the Court of Appeal, the defendants, now appellants, on the 29th September, 1987 filed their notice and grounds of appeal to this court against this decision. The plaintiff, now cross-appellant, also filed a cross-appeal to this Court against only that part of the decision of the Court of Appeal which reduced the mesne profits awarded to him from N1,000.00 to N2.00 per annum. 10

The main appeal which was filed by the defendants was however not pursued and the same was on the 23rd June, 1993 struck out by this court for want of prosecution. This court is now concerned with the plaintiffs cross-appeal only. I shall hereinafter refer to the plaintiff and the defendants in this judgment as the cross/appellant and cross-respondents respectively. 15

The cross-appellant, in his brief of argument, identified one single issue as calling for determination in this appeal. This issue is framed thus - 20

Whether or not a landlord can compute claim from a tenant holding over, and should be awarded, mesne profits at a rate higher than the annual rent reserved in the tenancy agreement between him and his tenant.

Although served with the cross-appellants brief together with the hearing notice in respect of this appeal, the cross-respondents neither filed their cross-respondents brief nor did they appear in court for the hearing of this appeal. I will now proceed to examine the issue as formulated by the cross-appellant as it seems to me clear that a determination thereof is enough to conclude this appeal. 25 30

It is desirable for a better appreciation of the issue that has arisen for consideration in this appeal to observe that the learned trial Chief Magistrate after a thorough evaluation of the evidence before him made inter alia the following findings of fact, namely -

(i) That there was a lease agreement, Exhibit A dated the 1st July, 1972 between the cross-appellant, as lessor, of the one part and the 1st cross/respondent as lessee, of the other part in respect of the property in issue. 35

(ii) That the lease agreement is for a period of six years certain commencing from the 15th July, 1972 and terminating on the 14th July, 1978.

(iii) That the interest of the 1st cross/respondent as lessee over the said property expired on the 14th July, 1978.

5 (iv) That after the expiration of the cross/respondents lease on the 14th July, 1978, the 1st cross/respondent held over the demised premises but ceased to be the cross-appellants tenant or lessee from the 15th July, 1978,

(v) That the cross-appellants claim for N1,000.00 per annum as mesne profits is entirely reasonable having regard to the rent collected by the 1st
10 cross/respondent in respect of the property from the 15th July, 1978 up to the date of his judgment.

(vi) That the 1st cross/respondent held over the cross-appellants said property for four years.

(vii) That the cross/appellant was entitled to judgment for the imme-
15 diate possession of the premises and mesne profits for the said period of four years.

The above findings are fully supported by abundant evidence before the court. It may also be mentioned that under the lease agreement between the parties, Exhibit A, the reserved annual rent payable by the 1st cross/
20 respondent for the six years term created by the lease was fixed at N2.00. The issue that arises in this appeal is simply whether a landlord can claim mesne profits from a tenant holding over and whether such mesne profits can be awarded at a rate higher than the reserved rent stipulated in the tenancy
25 agreement between the parties.

I dare say that the questions that arise for determination in this appeal seem to me entirely narrow. I should perhaps start with a casual examination of the term mesne profits.

Mesne profits has been described as the rents and profits which a
30 tenant who holds over after the lawful termination or expiration of his tenancy or a trespasser has or might have received during his occupation of the land or premises in issue and which he is liable to pay as compensation to the person entitled to possession of such land or premises. As was explained by Goddard, L.J., the expression is another term for damages for trespass arising from the
35 particular relationship of landlord and tenant. See *Bramwell v. Bramwell* (1942) 1KB. 370. It is the name given for the intermediate profits or value for the use and occupation of land during the time it is held by one who is in wrongful

possession or who has not agreed on any rents with the landlord, even though such an occupier cannot strictly speaking be described as a trespasser. They may therefore only be claimed as from the date when a tenant ceased to hold the demised premises as tenant and has become a trespasser.

Indeed in *Ahmed Debs and other v. Cenico Nigeria Limited.*, (1986) 3 NWLR (part 32) 846 at 851 - 856, Oputa, J.S.C. aptly described the term as follows:-

The expression mesne profits simply means intermediate profits, that is, profits accruing between two points of time - that is between the date when the defendant ceased to hold the premises as a tenant and the date he gives up possession. Rent is different from mesne profits. Rent is liquidated, mesne profits are not. Rent is operative during the subsistence of the tenancy, while mesne profits start to run when the tenancy expires and the tenant holds over. The action for mesne profits does not lie unless either the landlord has recovered possession or the tenants interest in the land has come to an end, or his claim is joined with a claim for possession (as in the case now on appeal).

I agree entirely with the above observations of Oputa, J.S.C. and fully endorse the same. In my view, the proposition of law is beyond dispute that a landlord is entitled to claim mesne profits from a tenant from the moment such a tenant ceases to hold the premises as tenant to the time he gives up possession thereof.

The 1st appellant in the present case was the lessee of the cross-appellant in respect of the premises in issue from the 15th July, 1972 to the 14th July 1978.

His leasehold interest over the property expired by effluxion of time and was accordingly determined. Thereafter, the 1st appellant with his agents, servants and/or subtenants became trespassers on the premises, unlawfully remained thereon and held the same over for the period of four years covered by the second arm of the cross-appellants claims. It is plain to me that although the claim before the trial court was rightly described as a claim in compensation for the use and occupation of the premises in issue, it is non-the-less a claim for mesne profits on the particular facts of the case covering the period of four years, during which the 1st appellant ceased to hold the premises as a tenant or lessee of the cross-appellant but wrongfully remained thereon and held the same over. I will now examine the second aspect of the sole issue for consideration in this appeal. This is whether a landlord should be awarded mesne profits at a rate higher than the annual rent reserved in the tenancy agreement between him and his tenant before the expiration or termination thereof.

Before the court below, learned counsel for the defendants/cross-respondents argued that the award of N1,000.00 (One thousand Naira) per annum to the plaintiff/cross-appellant as mesne profits by the learned trial Chief Magistrate for the 4 years the cross-respondents held over the premises after the expiration of the lease was ill conceived and unjustifiable. He advanced as his reason for this submission that Agreement, Exhibit A, between the parties stipulated N2.00 per annum as rent and that the claim for mesne profits could not consequently exceed the agreed N2.00 per annum therein stipulated. He contended that the basis of the assessment for the amount of N1,000.00 per annum claimed was not stated or explained and that the amount was therefore arbitrary and excessive.

The Court of Appeal per the lead judgment of Kutigi, J.C.A., as he then was, treated the matter as follows-

I think the learned trial Chief Magistrate did rightly in my view find that there was a lease agreement between the parties herein for a period of six years. He also rightly found that the lease expired on 14/7/78 and that the respondent was holding over for a period of approximately four years when he finally delivered his judgment on 2316/82. After the service of the written notice to quit or at the end of the terms granted, if the tenant holds over without the permission of the landlord, the tenant is liable to pay mesne profit for the use and occupation of the premises till he delivers up possession. See Pall Asian African Limited v. N.I.C.O.N. (1982) 9 S.C1. I agree with Mr. Saru for the respondent that in these circumstances the appellant would not be entitled to mesne profit higher than the N2.00 (two Naira) per annum fixed as rent under the original agreement. (See Oduye v. Nigeria Airways Limited (1987) 2 NWLR. (Pt. 55) 126. If there is need to vary the amount a proper application has to be made to the appropriate authority or tribunal.

The Chief Magistrate was clearly in error when he awarded N4,000 (i.e. N 1,000.00 per annum) to the appellant for use and occupation of the premises. The award will have to be reduced and it is hereby reduced to N18.00 (Eighteen Naira Only) i.e. from July 1978 to date at the rate of N2.00 per annum as fixed by the Agreement, Exhibit A.

With profound respect to the Court of Appeal, I am unable to accept the reasoning that since the lease, Exhibit A, between the parties stipulated N2.00 per annum as rent, that rate must necessarily be the index of the mesne profits payable in respect of the premises and that the plaintiff/cross-appellant cannot claim a higher rate than the said N2.00 per annum. The point must be stressed that the plaintiff in an action for loss of use and occupation of a premise is not bound to use the rent payable during the tenancy as a measure

for the rate of mesne profits. The law as I have observed, is that while rent is liquidated and operative during the subsistence of a tenancy, mesne profits are unliquidated and only start to run when the tenancy expires and the tenant holds over. Mesne profits are generally calculated on the yearly value of the premises and a landlord is certainly not bound to use the rent payable during the tenancy as a yardstick in his determination of mesne profits. See *Osarawu v. Ezeiruka* (1978) 6 - 7 S.C 135, *Ahmed Debs and others v. Cenico Nigeria Ltd.* (1986) 3 NWLR (Part 32) 846 at 852 and *Marine and General Assurance Company Ltd. v. Rossek and Another* (1986) 2 NWLR (Part 25) 750 at 763. Where the rent represents the fair value of the premises, mesne profits shall be assessed at the amount thereof; but where the real or actual value of the premises exceeds the reserved rent, then of course, mesne profits are assessed at such higher rate or figure. See *Clifton Securities Limited v. Huntley* (1948) 2 All E.R. 283. Mesne profits may therefore be equated with fair, real or actual value of the use and occupation of a premises during the period the premises is held over by a person in wrongful possession thereof. They are not necessarily commensurate with the rent reserved in the expired lease since the value of the premises might either have increased or, indeed, fallen during the tenancy. See *Bullell and Leake and Jacobs Precedents of Pleadings* 12th Edition Page 69. Being unliquidated and based on the fair open market annual value of the premises, the rate of mesne profits are at large; their assessment is not necessarily based on the reserved rent and the tenant who holds over is liable to pay to the landlord the fair or actual value adjudged by the court to be due for use and occupation of the premises. See *Adebanjo v. Tenesse Nigeria Inc.* (1974) 2 S.C.1. The onus, of course, is on the plaintiff to establish to the satisfaction of the court what this fair open market annual value of the premises in issue is.

In the present case the plaintiff gave evidence in respect of his claim for the sum of N1,000.00 per annum as mesne profits. He stated:

I know that the 2nd to the 14th defendants are also in my premises as sub-tenants of 1st defendant. I want all the defendants to vacate the premises. I want N1,000.00 per annum for use and occupation from 15/7/78 to date - four years. We once went to court in respect of this case. We both gave evidence. The defendant in that case stated that he was collecting rent.

This evidence was neither contradicted nor discredited by the defendants by way of cross-examination and, as such that rate remained unchallenged. See *Bello v. Eweka* (1981) 1 S.C. 101 at 124. Where evidence given by a party to any proceedings was not challenged by the opposite party who, like in the instant case, had the opportunity to do so, it is always open to the court

seised of the matter to act on such unchallenged evidence before it. See Isaac Omoregbe v. Daniel Lawani (1980) 3-4 S.C. J08 at 117, Odulaja v. Haddad (1973) 11 S.C. 357; Nigerian Maritime Services Limited v. Alhaji Bello Afolabi (1978) 2 S.C. 79 at 81 and Boshali v. Allied Commercial Exporters Limited (1961) 5 All NLR 917; (1961) 2 SCNLR 322.

It must also be noted that the 1st defendant in his evidence testified that the value of the building on the premises was N44,000.00 that he was collecting between N3,000.00 and N4,000.00 per annum from his tenants on the premises and that even though he paid no rents in respect of the 3 rooms he occupied in the premises, the fair open market value of the apartment was N90.00 per annum. It seems to me beyond dispute that on the state of the evidence laid before the court, particularly on the admission of the 1st defendant, the learned trial Chief Magistrate was clearly right in holding that N1,000.00 claimed by the plaintiff as mesne profits in respect of the premises is reasonable having regard to the rent collected by the first defendant from 15/7/72 to date. It ought to be mentioned that the court below relied on the decision of this court in Oduye v. Nigeria Airways (1987) 2 NWLR (Part 55) 126 in holding that since Exhibit A stipulated N2.00 per annum as the reserved rent, that rate must be the measure or the mesne profits the plaintiff was entitled to. I must, with the greatest respect to the court below, emphasize that the principle of law enunciated in the Oduye case is clearly inapplicable to the present case. The Oduye Case dealt with premises to which the provisions of the Lagos State rent Control and Recovery of Residential Premises Law No.9 of 1976 applied which is not the position in the present case. It seems to me clear that the facts of the present case are distinguishable from the facts of the Oduye case. In my view, it is plain that the Court of Appeal was in grave error by relying on that case to reduce the rate at which the learned trial Chief Magistrate awarded mesne profits to the plaintiff/cross-appellant.

In view of all I have said above, the answer to the question posed in this appeal must be in the affirmative.

In the final result, this appeal accordingly succeeds and it is hereby allowed. I set aside the judgment of the court below dated the 29th June, 1987 in respect of the sum of N4,000.00 awarded to the plaintiff/cross-appellant by the trial court as mesne profits for the use and occupation of the premises in issue. The judgment and orders of the said trial court are hereby restored. The cross-appellant is entitled to the costs of this appeal which I assess at N 1,000.00. I also award to the said cross-appellant N800.00 costs of the proceedings in the Court of Appeal.

BELGORE JSC

I had the privilege of reading in advance the judgment of my learned brother, Iguh, J.S.C. and I am in full agreement with his reasoning and conclusions. I adopt them as mine in restoring the decision of trial Chief Magistrate and setting aside the judgment of Court of Appeal. I make the same consequential orders as to costs. 5

WALI JSC

I had been privileged to read in advanced the lead judgment just delivered by my learned brother, Iguh, J.S.C. and I am in total agreement with his reasoning and conclusions, which reasoning and conclusions I adopt as mine. Accordingly, this appeal succeeds and it is hereby allowed. I also abide by the consequential orders contained in the lead judgment, including those of costs as awarded to the Cross-Appellant both in this Court and in the Court of Appeal. 15

OGUNDARE JSC

I have had the advantage of a preview of the judgment of my learned brother, Iguh, J.S.C. just delivered. I agree with his conclusion that this appeal be allowed. 20

By writ of summons issued in the Magistrate Court of Lagos State in Suit No. 850/82, the Plaintiff who is now the Appellant before us sued Alhaji Bashiru Adetunji Lawal claiming as hereunder:

1. The plaintiff is entitled to the possession of the premises, one storey building (consisting of 10 shops and 5 room-offices) situate at No. 1 Aro Street (otherwise referred to as No. 88B Docemo Street) Lagos which were let by the plaintiff to the Defendant under a Lease Agreement dated the 1st day of July 1972 for a period of six years under the rent of N2.00 per annum, which said agreement was determined by efflux ion of time on the 15th day of July 1978 and on the 25th day of March 1982 the plaintiff by her solicitor did serve on the Defendant a notice in writing of her intention to apply to recover possession of the said storey building (a duplicate of which notice is hereto annexed) by serving him personally, and that notwithstanding the said notice, the Defendant refused or neglected to deliver up posses 35

sion of the said premises and still detains the same. The plaintiff claims possession and N1,000.00 per annum for use and occupation from the 15th July 1978 until possession is given up.

5 The case went on trial before Alhaji J .A. Oshodi Chief Magistrate Grade I who after taking evidence and addresses of learned counsel for the parties found in favour of the plaintiff and entered judgment in her favour in the following terms:

It is hereby adjudged that the plaintiff do recover from the defen-
 10 *dant possession of the premises mentioned in the particulars of claim annexed to the summons in this action, that is to say that one storey building constituting of 10 shops and 5 rooms offices at No. 1 Aro Street; also known as 88B Docemo Street, Lagos. It is further adjudged that the plaintiff recover from the defendant jointly and severally the sum of N4,000 for use and occu-*
 15 *pation of the said premises from period 15/7/78 to date. It is ordered that the defendants having over stayed for four years should give to the plaintiff immediate possession of the said premises.*

The defendant will pay to the plaintiff costs of this action which is assessed at N200.

20 Being dissatisfied with this judgment the defendant appealed to the high Court. During the pendency of the appeal in the High Court, the defendant died and was substituted by Alhaji Muniru Lawal, Alhaja Aderonke Lawal, Alhaja Monsurat Lawal and Alhaji Rasheed Lawal, the legal personal representatives of the deceased Bashiru Adetunji Lawal and the caption of the case
 25 was accordingly amended. The appeal was heard by Hon. C.A. Johnson CJ who in a judgment delivered on the 2nd of April 1986 allowed the appeal, set aside the judgment of the trial Chief Magistrate and dismissed plaintiffs case. The plaintiff being dissatisfied with the judgment of the High Court appealed, with leave, to the Court of Appeal. That Court (Ademola, Kolawale JJ.C.A.;
 30 Kutigi J.C.A. (as he then was)) allowed the appeal of the plaintiff and adjudged as follows:

The Appeal therefore Succeeds and it is hereby allowed. The judgment of the Chief Magistrate Grade I delivered on 23/6/82 is hereby confirmed except as to the amount of N4,000.00 awarded as mesne profit for use
 35 *and occupation of the premises. The respondent should give up possession of the premises claimed to the appellant forthwith. The award of mesne profit is reduced as stated above.*

I award costs of two hundred (N200) Naira in favour of the appellant.

In the lead judgment of the court with which the other Justices agreed,

Kutigi J.C.A. (as he then was) observed as follows:

I think the learned trial Chief Magistrate did rightly in my view find that there was a lease agreement between the parties herein for a period of six years. He also rightly found that the lease expired on 14/7/78 and that, that respondent was holding over for a period of approximately four years when he finally delivered his judgment on 23/6/82. After the service of the written notice to quit or at the end of the term granted, if the tenant holds over without the permission of the landlord, the tenant is liable to pay mesne profit for the use and occupation of the premises till he delivers up possession (See Pan Asian African Limited v. N.I.C.O.N (1982) 9 S.C. 48. I agree with Mr. Saru for the respondent that in these circumstances the appellant would not be entitled to mesne profit higher than the N2.00 (two Naira) per annum fixed as rent under the original agreement. (See Oduye v. Nigeria Airways Limited (1987) 2 NWLR (Pt.55) 126. If there is need to vary the amount a proper application has to be made to appropriate authority or tribunal. The Chief Magistrate was clearly in error when he awarded N4,000.00(i.e. N1,000.00 per annum) to the appellant for use and occupation of the premises. The award will have to be reduced and it is hereby reduced to N18.00 (Eighteen Naira) i.e. from July 1918 to date at the rate of N2.00 per annum as fixed by the Agreement (Exh. A) (Italics mine)

The plaintiff has again with leave of Court appealed to this Court against that part of the judgment of the Court of Appeal reducing the award of damages given by the trial Chief Magistrate in her favour from N4,000.00 to N18.00. The defendants also appealed against the whole judgment. They however, did not pursue their own appeal in this Court and this was subsequently struck out. This judgment is concerned with the plaintiffs appeal.

The plaintiff relies on two grounds of appeal to wit:

1. The learned Justices of the Court of appeal erred and misdirected themselves in law when they held that the cross-appellant would not be entitled to mesne profits at a rate higher than the N2.00 per annum fixed as rent under the tenancy agreement and in reducing the rate of mesne profits found and awarded by the Chief Magistrates Court against the cross-respondents from N1,000.00 per annum to N2.00 per annum.

Particulars of Errors

(a) Mesne profits are calculated on the fair or annual value of the premises and mayor may not be the same as the annual rent payable during the tenancy and as such its claim and award may go higher or lower than the rent stated in the tenancy agreement.

(b) *Since mesne profit is unliquidated and it is based on the open market or current annual value of the premises it is at large and its assessment differs from the rate of the rent in the tenancy agreement.*

(c) *It is enough basis for the award of mesne profits if the claimant addresses satisfactory credible evidence in proof of its rate even if the evidence is the claimants mere ipse dixit.*

(d) *The cross-appellants ipse dixit that the mesne profit was N1,000.00 per annum was not challenged or contradicted in any way by the cross-respondents and the cross respondents did not prove that the annual value of the premises was N2.00.*

2. *The learned Justices of the Court of Appeal erred in law and misdirected themselves on the facts in relying on Oduye v. Nigeria Airways Limited (supra) to hold and in holding that if there is need to vary the amount of N2.00 stated in the tenancy agreement, a proper application has to be made to the appropriate authority or tribunal.*

Particulars of Errors

(a) *The case of Oduye v. Nigeria Airways Limited (1987) 2 NWLR (Pt. 55) 126 relied on by the Court of Appeal is distinguishable from the present case.*

(b) *At the time of the institution of this case in the trial court, only Magistrates and High Courts had jurisdiction to entertain possession cases.*

(c) *The issue of variation of the amount of N2.00 stated in the tenancy agreement was neither raised nor canvassed by any of the parties before the Court of Appeal.*

(d) *The cross-appellant claimed N1,000.00 per annum as mesne profits and not as arrears of rents.*

In this court she filed a brief wherein she set out the following issue as arising for determination to wit:

Whether or not a landlord can compute, claim from a tenant holding over, and should be awarded, mesne profits at a rate higher than the annual rent reserved in the tenancy agreement between him and his tenant?

The defendants who are now respondents in this Court did not file any brief nor did they appear throughout in the proceedings in this court. The main argument in support of the appeal is that the court below was wrong to use the rent reserved in the lease agreement as a yardstick for determining the damages plaintiff was entitled to. It is the contention of the plaintiff that mesne profits are generally calculated on the yearly value of the premises and that the landlord is not bound to use the rent reserved in the lease agreement

and payable during the tenancy as the index of the rate of mesne profit. Reliance is placed on Debs v. Cenico Nigeria Limited (1986) 3 NWLR (Pt. 32) 846 and Marine and General Assurance Co. Limited v. Rossek and Another (1986) 2 NWLR (Pt. 25) 750 at p. 763. It is further contended that Oduye v. Nigeria Airways Limited (1987) 2 NWLR (Pt. 25) 126 on which the Court based its decision is inapplicable to the facts of the case here. Finally it is contended that on the evidence available at the trial, the trial Chief Magistrate was right in entering judgment for the plaintiff in the sum of N4,000.00

I like to begin by pointing out that the claim of the plaintiff in the trial court was not for mesne profits for use and occupation of the premises but for damages for use and occupation of the premises. The court below obviously confused the issue by taking the claim as one of mesne profits for use and occupation. This Court has in a recent case pointed out that there is no such thing as mesne profits for use and occupation. I refer to African Petroleum Limited v. Owodunni (1991) 8 (Pt. 210) NWLR 391 where this Court pointed out the distinction between mesne profits and damages for use and occupation of land or premises. Nnaemeka-Agu, J.S.C. delivering the lead judgment of this Court in that case had this to say at pages 417 -418 of the report:

In order to be able to decide the second issue, it is necessary to consider the following namely:

(i) Would the plaintiff been titled to mesne profit or to damages for use and occupation of the premises? Or are the two expressions interchangeable?

(ii) When could the claim for mesne profits or for damages for use and occupation properly begin to run?

(iii) What is the right measure?

Now according to Whartons Law Lexicon (14th Edn. at p. 652:-

Mesne profits are the rents and profits which a trespasser has, or might have received or made during his occupation of the premises, and which therefore he must pay over to the true owner as compensation for the tort which he has committed. A claim for rent is therefore liquidated, while a claim for mesne profit is always unliquidated.

XXXXXXX

The jury are not bound by the amount of the rent, but may give extra damages.

It follows therefore that a claim for mesne profits is inappropriate when the occupier is still a tenant. It can only be maintained when his tenancy has been duly determined and he becomes a trespasser. In this respect, a statutory tenant such as the defendant, though merely a protected tenant cannot prop-

erly be adjudged to be liable for mesne profit unless and until his tenancy has been duly determined according to law.

On the other hand, where a tenant who entered upon a premises lawfully occupies the land or premises of another without an agreement with consent by the true owner, what he has to pay is not rent, because as there is
 5 no longer a demise, he no longer has an estate, he will not pay mesne profit because he is not a trespasser. Rather, he will be liable for damages for his use and occupation of the land or premises. The action arises out of an implied agreement to payout of what may be called a quasi - tenancy rather than a relationship between a landlord and tenant (See Woodfall: On Landlord: On
 10 Landlord and Tenant (21st Ed.) p. 666.) See also Rochester (Dean and Chapter v. Pierce) (1808) 1 Cap 466.

So, the defendant would be liable for damages for use and occupation. He could not be liable for mesne profits because the element of wrongful and tortious occupation was absent. In the circumstances, for the Court of
 15 appeal to have made an award as mesne profits for use and occupation was an error. But it did not lead to a miscarriage of justice. Another area of difference between mesne profits and damages for use and occupation is the date of commencement. Mesne profits start to run from the date of service of the process for determining the tenancy (See Canas property Co. Limited v. KL
 20 Television Services Limited (1970) 2 Q.B. 433). But damages for use and occupation start to run from the date of holding over the property, the function of the court being to ascertain an amount which may constitute a reasonable satisfaction for the use and occupation of the premises held over by the tenant. The previous rent may sometimes be a guide, but may not be conclu-
 25 sive.

Karibi-Whyte, J.S.C. in his own contribution observed at page 420:

“Mesne Profits are the rents profits which a trespasser has, or might have received or made during the occupation of the premises and which there-
 30 fore he must pay over to the true owner as compensation for the tort which he has committed. A claim for rent is therefore liquidated, while a claim for mesne profit is always unliquidated. See Whartons Law Lexicon (14th Ed.) 652”

See also Debs v. Cernico Limited (1986) 3 NWLR (Pt. 32) 846 at p.851;
 Nigerian Construction and Holding Co. Limited v. Owoyele (1988) 4 NWLR (Pt. 90) 588.

35 Because a claim for mesne profits is based on trespass and is inappropriate in respect of lawful occupation as a tenant, it can only be maintained when the tenancy has been duly determined and the tenant becomes a trespasser. In the circumstances of this case where a tenancy is created by operation of law, the status of trespasser will not arise, until the tenancy is duly

determined according to law - See Omotesho v. Oloriegbe (1988) 4 NWLR (Pt. 87) 225.

However, the lawful use and occupation of the land and premises, implies an agreement to pay damages for such use and occupation of the land and premises. It is a quasi-tenancy which the law recognises. It is not based on the accepted landlord and tenant relationship.

In the instant case, absent the element of wrongful and tortuous occupation, defendant is clearly not liable for mesne profits. He undoubtedly will be and is liable for use and occupation; The use of the expression mesne profits to describe the damages for use and occupation is a misnomer; and an error, which did not lead to a miscarriage of justice.

On the facts as disclosed on the evidence the plaintiff was right to have claimed for damages for use and occupation and the court below, with due respect, was wrong to have referred to her claim as one for mesne profits for use and occupation. This error however, does not occasion any miscarriage of justice.

With this conclusion I come to the main issue raised in this appeal and that is, whether rent reserved in a lease agreement is to be a determinant factor in computing the damages for use and occupation and indeed for mesne profits. In the case of African Petroleum Limited v. Owodunni (supra), Karibi-Whyte J.S.C. set out the criteria for determining mesne profits and damages for use and occupation. He said-

In calculating the damages for use and occupation, the period is reckoned from the date of the holding over of the property. The duty of the Court is to ascertain an amount which may constitute a reasonable satisfaction for the use and occupation of the premises held over by the tenant. The previous rent is merely a guide but is not necessarily conclusive. Where standard rent has been fixed, for a period, for two years, as in the instant case, such rent will be conclusive. After such period rent commensurate with similar premises in the same location will be a guide.

This is also the yardstick applied by Nnaemeka-Agu J.S.C in his judgment in the case. It follows therefore, that the Court of Appeal was clearly in error in using the rent as the index for determining the award to be made to the Plaintiff. There is abundant evidence on record to justify the award made by the learned trial Chief Magistrate. Plaintiff gave evidence in support of her claim for N1,000.00 per annum. The original defendant in his own evidence, 35 testified thus:

Alhaji Adegbesan pays N40.00 per month.

Giba pays, I do not remember how much

I collect wrongly (sic) between N3,000.00

to N4,000.00 per annum.

To questions by the court, he answer thus:

I occupy three rooms in the premises

I do not pay rents for the rooms I occupy.

If I have pay (sic) rents

5 *I will pay at least N90.00 per month.*

Going by the evidence of the original defendant the damages that the plaintiff would be entitled to would have been well over N4,000.00 per annum but the plaintiff claimed the lesser sum of N 1,000.00 per annum and she would only be entitled to that lesser sum; the court would not grant her more
10 than she claimed. Certainly to award her N2.00 per annum as decided by the court below on the premise that, that sum represented the rent reserved in the lease agreement between the parties would be to allow the defendant to profit from his wrong doing. That, the law will not allow.

It would appear from the lead judgment of the court below that it was
15 swayed into this error by its reliance on the decision of this Court in Oduye v. Nigeria Airways Limited (supra). I have read in full all the judgments of the Justices of this Court that sat in the Oduye case (supra). That case is clearly not authority for the proposition in the lead judgment of the court below that
.....the appellant would not be entitled to mesne profit higher than the
20 N2.00 (two Naira) per annum fixed as rent under the original agreement.

It is not the case here that the Rent Control and Recovery of Residential Premises Edict 1976 of Lagos State applied. The Edict had in fact been repealed by Lagos State Law No.5 1981 and the jurisdiction of the tribunal created under the Edict had reverted to the conventional courts when the
25 action in the present matter was filed in May 1982. Indeed what constitutes mesne profit was never decided in Oduye. Had there been a proper appraisal of the facts, and the basis of the decision of this Court in the Oduye case, the court below would have discovered that its facts were different to the facts in the case before it and that the decision therein would not apply to decide the
30 issue of mesne profit here. And there lies the danger in relying on a case without advertng to its facts and the basis for the courts decision in it. As explained in the lead judgment of my learned brother, the Oduye case concerned residential premises to which the Lagos State Rent Edict No.9 of 1976 applied. The case concerned a landlord (an employer) under the Edict suing in
35 the High Court for mesne profit by way of commercial rent, from his statutory tenant (a former employee). Under the Edict, it was the Rent Tribunal that had power to determine Commercial rent. This Court held that the determination by the High Court was made without jurisdiction and, therefore, a nullity. The

landlords claim was struck out as having been brought in a wrong forum.

For the reasons I have given above, my conclusion is that the learned trial Chief Magistrate was right in awarding to the plaintiff against the defendants a sum of N4,000.00 for the four years the defendants held over until judgment of the trial Chief Magistrate. The court below was wrong in interfering with that award and I have no hesitation whatsoever in allowing this appeal and setting aside the judgment of the court below. I restore the judgment of the learned trial Chief Magistrate and abide by the award of costs made in the lead judgment of my learned brother Iguh, J.S.C.

ADIO JSC

I have had the privilege of reading, in draft, the judgment just read by my learned brother, Iguh, J.S.C. and I agree that the appeal succeeds. Accordingly, I allow the appeal and abide by the consequential orders made in the lead judgment, including the order for costs.