

SUPREME COURT OF NIGERIA
10TH DECEMBER, 1993. SC 62/1989.
CORAM:- O. OLATAWURA, I. L. KUTIGI, M. E. OGUNDARE,
E. G. OGWUEGBU, U. MOHAMMED, S. U. ONU,
Y. O. ADIO, JJSC

POTTER DABUP PELLANT AND HARUNA BAKO KOLO SPONDENT	DEFENDANT/AP- PLAINTIFF/RE-
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APPEALS - No ground attacking lower court's finding in respect of an issue
- Whether appellant can question that finding

EVIDENCE - Land dispute - Reliance of each party on a valid certificate of
occupancy - Duty of each party to prove area of land covered by his certificate

LAND LAW - Holder of certificate of occupancy - Where area of land is
uncertain whether trespass can be proved - To warrant granting of injunction

PRACTICE & PROCEDURE - Pleadings - Failure of Plaintiff to file a
defence to the counter

PRACTICE & PROCEDURE - Claim - Defendant's entitlement to summary
judgment - But where issues raised in the counter-claim are met in the plaintiff's
pleading - Whether a different conclusion will be reached

FACTS

The Plaintiff/Respondent (a permanent Secretary) and the Defendant/
Appellant (a Deputy Commissioner of Police) made competing claims to the
land in dispute situate at Jos, before the High Court. Whilst the Plaintiff is
the holder of a statutory Right of Occupancy, the Defendant had a prior Cer-
tificate of occupancy issued by the Local Government. The Plaintiff did not
file any defence to the Defendant's counter-claim although the issues raised
in the counter-claim were met in the Plaintiff's pleading. The trial court gave
judgment in favour of the Plaintiff but excised a portion of the land claimed
by the Defendant from that claimed by Plaintiff. The court dismissed the
claim for perpetual injunction by each party since it found that their claims

overlapped.

Both parties appealed to the Court of Appeal Jos Division, which set aside the declaratory judgments in favour of each party, sent the claims and counter-claims back for retrial with liberty to each party to amend his pleadings. It also granted leave to the Plaintiff to file a defence to the counter-claim. The Defendant has now appealed to the Supreme Court challenging the lower court's interpretation of s.5 (2) of the Land Use Act, an issue the Supreme Court treated as not being relevant to the appeal. The Apex Court was also asked to determine whether the Defendant/Appellant is entitled to judgment in terms of his counter-claim since the Respondent filed no defence thereto.

HELD (Unanimously dismissing the appeal)

1. There is no ground of appeal attacking the Court of Appeal's finding in respect of the uncertainty of the land claimed by either side. And where a party has not appealed against a finding of court, he cannot be heard to question that finding on appeal. (p. 106 L37)

2. Since it is implied that any Certificate of Occupancy granted must be in respect of a definite parcel of land, where an area of land is uncertain, it will be difficult to prove trespass and thereafter grant injunction. It is for each party to prove conclusively the area of land covered by the Certificate of Occupancy as each party relied on a valid certificate, (p. 107 L19)

3. Where a Plaintiff fails to file a defence to a counter-claim the defendant file a motion for summary judgment and since no issue has been joined the court is duty bound to enter judgment for the claim in the counter-claim. But the position is different in the present case in the sense that all the issues raised with regard to the issue of title to the land in dispute were met in the Plaintiffs pleading. (p. 108 L16)

4. It is clear that no judgment could have been given for the Defendant on the counter-claim without considering the evidence led in respect of the facts pleaded by the Plaintiff. Thus, although no defence as such was filed to the counter-claim, there was evidence led which could have been considered when considering the counter-claim. (p.10 L38)

PER OGUNDARE JSC

"There is no doubt that the facts from the pleadings of both parties are intertwined and interwoven as regards Plaintiff's action and defendant's count-

er-claim. Had the Plaintiff succeeded in his claim for damages the counterclaim would have failed since both parties could not at the same time be in exclusive possession of the land in dispute. In my respectful view, this case would be an exception to that general rule that where a Plaintiff fails to file a defence to a counterclaim the defendant is entitled to judgment on his counterclaim". (p.121 L37)

REPRESENTATION:

B.R. Fashola for G. Brown-Peterside SAN, for the Defendant/Appellant
Kayode Sofola for the Plaintiff/Respondent

CASES REFERRED TO

1. Saude v. Abdullahi (1989) N.W1.R. (part 116) 387/416
2. Ogunteye v. Oni (1990) 2 N.W.L.R. 745
3. Romaine v. Romaine (1992) 4 N.W.L.R. 650/662
4. Titiloye v. Olupo (1991) 7 N.W.L.R. 519/530
5. Ogbonna v. Attorney-General of Imo State (1992) 1 N.W.L.R. 647/675
6. Odunayo v. The State (1972) 8-9 S.C 290 15
7. Ijale v. Leventis & Co. Ltd (1959) 4 F.S.C. 108
8. Epi v. Aigbedon (1972) 10 S.C. 53
9. Baruwa v. Ogunsola (1938) 4 W.A.C.A. 159
10. Ayodde v. Olumide (1969) N.S.C.C. 202
11. Oragbade v. Onitiju (1962) N.S.C.C. 16 20
12. Nigerian Housing Development Society Ltd v. Mumuni (1977) 2 S.C. 57
13. Dantumbu v. Adene (1987) 4 NWLR 314 at 326
14. Abioye v. Yakubu (1991) 5 N.W.L.R. (pt 190) 30
15. Aya v. Henshaw (1972) 5 S.C. 87 at p. 95 25

STATUTES REFERRED TO

1. Land Use Act 1978 ss 5 (2), 28(1)
2. Constitution 1979 213 (1)

LEAD JUDGMENT BY OLATAWURA JSC

The competing claims by the appellant and respondent were in respect of a piece or parcel of land in Jos, Plateau State. Both claimed to have the Certificate of Occupancy. It was when the appellant visited this piece of land that he found the respondent and his workers on the land. There was a challenge. The respondent claimed damages for assault and battery, false imprisonment and damages for trespass. The appellant denied the claims and

set up a counter-claim. In view of the issues raised about the counter-claim and the findings of the learned trial judge and the conclusions reached by the Court of Appeal. I consider it necessary to set out the claims and counter-claim verbatim. The appellant and respondent will be referred to as the defendant and plaintiff respectively.

5 The plaintiffs claims are as follows:

"(a) A declaration that the plaintiffs the owner of the landed property and the structures thereon along Jos-Bukuru Road (Now Yakubu Gowon Way) Jos measuring 3.31 Hectares covered by Statutory Certificate of Occupancy No. PL5399.

10 (b) A perpetual injunction restraining the defendant his servants and/or agents from entering upon the said property or doing any other acts thereon incompatible and inconsistent with the plaintiff's title and ownership of the said property.

(c) The sum of N550,000.00 whereof:

15 (i) the sum of N250,000.00 being damages for assault and battery wrongfully committed on the plaintiff by the defendant and his agents by beating him all over his body and manhandling him on the 27th October, 1982.

(ii) the sum of N250,000.00 being damages for falsely imprisoning the plaintiff for several hours before taking him to the police station at Bukuru on the 27th October, 1982.

20 (iii) N50,000.00 being damages for trespassing on the aforementioned property on the footing of aggravated damages."

The defendant's counter-claim reads as follows:

COUNTER-CLAIM

25 "1. By way (sic) counter-claim, the defendant claims for the plaintiff the sum N50,000.00 being aggravated damages for trespass to the defendant's land by the plaintiff upon the following grounds:-

30 (a) The defendant is (with Alhaji Musa Gombe) and was at all material times the owner and entitled to the possession of land and premises situate at and known as Plot AC47, Bukuru Road, Jos in the Gyel District of Jos, Plateau State.

(b) On or about November, 1982, the plaintiff wrongfully with his servants and agents entered the said land and premises and wrongfully took possession of the same and has thereby trespassed and is still trespassing thereon, and has removed the defendant's goods from the land.

(c) The plaintiff did the acts aforesaid maliciously and out of spite towards the defendant and with the intention of humiliating the defendant and injuring his proper feelings of dignity and pride and causing him to be held up to ridicule and contempt before passersby and the plaintiff's workers.

2. By reason of the matters aforesaid, the defendant has been subjected 5 to humiliation and suffered anguish and distress and has suffered loss and damage.

PARTICULARS OF DAMAGE

Cost of planting tress and erecting the fence on 10
the land assessed at - N4,400.00

Aggravated damages for trespass
to land - N45,600.00

And the defendant claims N50,000.00." 15

The lower court remarked that the pleadings are prolix. I agree. I will therefore summarise them but I will ensure that the case of each party is reflected in the summary. Be that as it may, it may be necessary to reproduce some of the averments so as to bring out clearly the matter in dispute.

The parties called evidence in support of their pleadings. The matter came before Momoh, J. who, after a review of the evidence and the submissions, 20 gave judgment in favour of the plaintiff but excised a portion of the land claimed by the defendant from the land claimed by the plaintiff. The learned trial judge concluded thus: .

"It is hereby declared and ordered that the plaintiff being the holder of a statutory right of occupancy PL5399 (Exhibit A4) granted on the 30th 25 day of September, 1982 over that piece of land described in the sketch plan (Exhibit A6) shall be entitled to the use and occupation of the said land only to the extent that the land shall not include that portion of land described in the survey plan (Exh. J1) subject to a prior right of occupancy evidenced by the Local Govt. certificate of occupancy (Exh.J) dated 21/8/78."

The learned trial judge dismissed the claims for injunction in view of her finding that their claims overlapped. There was an award of N1,000.00 dam- 30 ages for false imprisonment against the defendant. She dismissed the claims for trespass by both parties as she awarded "title to the use and occupation granted each party over the land." The claims for perpetual injunction by each party were also dismissed.

Both parties appealed to the Court of Appeal Jos Division. In a unanimous decision of that court coram: Agbaje, Jacks and Macaulay, JJ.C.A., Agbaje, J.C.A. in the lead judgment set aside the declaratory judgment in favour of each party, and sent the claims and counter-claims back for retrial with liberty for each party to amend his pleading; granted leave to the plaintiff to file, a defence to the counterclaim. Aggrieved by this decision, the defendant has now appealed to this Court, filed Notice of Appeal with one ground of appeal but subsequently obtained leave of this Court to file additional grounds of appeal. Briefs were filed by both parties.

The defendant raised three issues for determination. Since issue No.1 has been abandoned at the hearing of the appeal, I will now set hereunder the remaining two issues namely:

"(1) Abandoned.

'(2) *Whether the learned justices of the Court of Appeal were right in their interpretation of Section 5(2) of the Land Use Act which postulates that upon the grant of a statutory right of Occupancy under the provisions of subsection (1) of this section all existing rights to the use and occupation of the land which is the subject of the statutory right of occupancy shall be extinguished, even in this instance when it is common ground that the appellant, with one Alhaji Musa Gombe' already were entitled to the use and occupation of part of the land covered by the statutory right of occupancy aforesaid, the same not having been revoked or otherwise extinguished.*

(3) *Were their Lordships of the Court of Appeal right in failing to enter judgment for the appellant when the respondent did not file a defence to the counter-claim in the circumstances of his case?"*

The plaintiff agrees with the defendant on the issues raised as being the issues which call for determination.

In his oral submission, Mr. Fasola, the learned counsel for the defendant in amplification of the brief submitted in respect of issue No.2 - that since the defendant has prior right of occupancy to the land in dispute and that right of occupancy has not been revoked, any subsequent grant to the plaintiff is ineffective *Alhaji Dahiru Saude v. Alhaji Halliru Abdullahi* (1989) NWLR (Pt. 116) 387/416. Learned counsel pointed out that the plaintiff relied on this case but that this case of SAUDE (supra) is distinguishable from the facts. He drew the Court's attention to certain portions of the report and cited *Joshua Ogunleye v. B. Oni* (1990) 2NWLR. (Pt.135) 745. Counsel further submitted that the plaintiff must prove that the grant to him was proper and in accordance with the spirit of the Land Use Act and cannot therefore rely on S.5(2) of the Land Use Act. The earlier grant (i.e. the defendant's grant)

must be revoked. Learned counsel again cited *Romaine v. Romaine* (1992) 4 NWLR (Pt.238) 650/662 and submitted that mere production of the Certificate of Occupancy is not enough, the holder must prove it was actually granted. On specific reference to S.5(2) of the Land Use Act, counsel submitted that where there had been a grant under the Land Tenure Law, as was the case of the defendant, any subsequent grant to another person without revoking the earlier grant is ineffective; *Chief G. A. Titiloye & Ors. v. Chief J. O. Olupo & Ors.* (1991) 7 NWLR (Pt.205) 519/530.

On issue No.3 i.e. non-filing of a defence to the counter-claim, learned counsel submitted that non-filing of the defence amounts to admission of the averments in the counter-claim: *Ogbonna v. Attorney-General of Imo State* (1992) NWLR (pt.220) 647/675. Learned counsel referred to the evidence of the defendant on pages 50-56 of the record of appeal.. He finally urged that the appeal be allowed.

In his own oral submission after adopting the plaintiff's brief, Mr. Kayode Sofola, learned counsel for the plaintiff pointed out that the appeal before us is against the judgment of the Court of Appeal. Learned Counsel referred to the findings of the lower Court on page 157 line 5 to page 158 line 25 and that there has been no ground of appeal against those findings. Counsel pointed out further that there is no nexus between the documents tendered by the defendant and the claims filed by the plaintiff; that the Court of Appeal side-stepped s.5(2) of the Land Use Act as it was no longer relevant to its determination and that those submissions on s.5(2) of the Land Use Act and issue No. 2 do not come within the parameters of the appeal.

However, learned counsel referred to s.5(2) of the Land Use Act and submitted that the express provisions are clear and unambiguous and the court should give effect to those provisions. Counsel pointed out that there has been no relief by the defendant that the Certificate of Occupancy issued to the plaintiff be set aside and that the interpretation placed on that section is not within the provision of the section.

On issue No.3, counsel referred to what he correctly termed "One paragraph counter-claim" which did not allege new facts. All the materials in the counterclaim having been controverted in the plaintiffs pleading and that both parties led evidence in respect of the counter-claim and it is therefore too late to contend the presumption of admission. He also relied on SAUDE'S Case (supra). He finally urged that the appeal be dismissed.

In coming to a decision, I must bear in mind the order of the Court of Appeal

for a retrial of both the claim and counter-claim. Where an appellate Court is faced with an appeal against an order of retrial, it must ensure that, if the appeal is dismissed, its judgment will not prejudice such a retrial in view of the doctrine of stare decisis which binds the courts below the appellate court.

- 5 Issue No.2 relates to the interpretation of section 5(2) of the Land Use Act. This relevant section provides:

"S.5(2) Upon the grant of a statutory right of occupancy under the provision of subsection(1) of this section, all existing rights to the use and occupation of the land which is the subject of the statutory right of occupancy shall be

10 *extinguished."*

The defendant in his brief of argument pointed out that his own certificate of occupancy which is valid and subsisting was granted to him and one Alhaji Musa Gombe as evidenced by Certificate of Occupancy No. 251 dated 21/8/78 by the Jos Local Government *"in respect of the land the subject matter of these proceedings"* and submitted that the subsequent grant

15 by the Governor of a right of occupancy in respect of the same piece of land or a piece of land already granted to the defendant cannot be said to have extinguished the right of the defendant and cited *Dantumbu v. Adene & Ors.* (1987) 4 NWLR (Pt.65) 314/326; and *Saude v. Abdullahi* (1989) 4 NWLR (Pt.116) 387/416 more so in that the certificate of occupancy No.25 granted by the Jos Local Government has not been revoked.

20 In the brief filed on behalf of the plaintiff, learned counsel pointed out a misconception of the conclusion of the lower court by the defendant in that neither party was able to satisfy the court that the land claimed by each party falls within the land claimed by either of them. I will now turn to the conclusion reached by the Court of Appeal, but before doing so, I will point out that there is no right of appeal by a litigant from the decision of the

25 High Court of any State to the Supreme Court. By virtue of the provision of s.213(1) of the 1979 Constitution, appeal lies from the Court of Appeal either as of right or with leave to this Court. Consequently it is the decision of the lower court that can be attacked by a ground of appeal; *Odunayo v. The State* (1972) 8-9 S.C. 290. In the course of argument, reference will be made to the findings of the trial court if only to point out the error of the Court of Appeal.

30 The Court of Appeal when dealing with the uncertainty of the land claimed by either side said:

"In my judgment, the order of the learned trial judge excising the land claimed by the defendant can only be right if:-

(1) The said land has been sufficiently related to the land claimed by the plaintiff, and

(2) The defendant's right or title in the land as claiming (sic) is on the same pedestal as the plaintiff's right or title in the land to be eased. In other words the defendant's right or title or interest in the land claimed by him must not be less than that of a holder of a statutory right of Occupancy in the said land.

Ground one of the plaintiff's grounds of appeal specifically complaints about the uncertainty of the portion of land excised from the land claimed by the plaintiff and given to the defendant.

It is to be noted that there is no composite plan in this case showing the relationship between the land claimed by the plaintiff and the portion claimed by the defendant."

As correctly pointed out by Mr. Kayode Sofola during his oral submission, 10 there is no ground of appeal attacking this finding of the Court of Appeal. Where a party has not appealed against a finding of the trial court or the Court of Appeal he cannot be heard to question that finding on appeal: *Ijale v. Leventis & Co. Ltd.* (1959) SCNLR 255, (1959) 4 F.S.C. 108. It is implied that any Certificate of Occupancy granted must be in respect of a definite, specific or ascertainable piece or parcel of land. Where an area of land is uncertain, it will be difficult to prove trespass and thereafter grant injunction. Where an action is for declaration of title, the onus is on the person claiming the declaration to identify the area of land with certainty and prove the boundaries of the land in dispute: *Epi & Anor. v. Aigbedion* (1972) 10 S.C. 53; *Baruwa v. Ogunsola* (1938) 4 WACA 159; *Algbedion v. Dr. Olumide* (1969) N.S.C.C.202. The failure of either party to prove land claimed led to the order for retrial made 15 by the court when it will lead to a miscarriage of justice not to order a retrial. If there is a ground of appeal that the Justices of the Court of Appeal erred in law in their conclusion that the portions of land covered by the Certificate of Occupancy or Statutory right of occupancy of the defendant is uncertain, then if this Court finds in favour of the defendant on that ground then the construction of s. 5(2) of the Land Use Act will be relevant to this appeal. 25

All the cases relied on by both parties on issue of s.5(2) of the Land Use Act are predicated on a definite and specific area of land covered by the Certificate of Occupancy. It is for each party to prove conclusively the area of land covered by the Certificate of Occupancy more so when each party relied on a valid Certificate. As at the moment, suffice it to say that the decision of this 30 Court in *Titiloye v. Olupo* (supra) has stated the correct position of the law with regard to section 5(2) of the Land Use Act. See also *Saude v. Abdullahi* (supra). The presumption that a holder of a Certificate of Occupancy is prima facie evidence to title and its exclusive possession is reputable, hence the pertinent observation of the lower court per Agbaje, J.C.A:

"It appears from the averments in the defence and the counter-claim that the land the subject-matter of the counter-claim is a portion' of the land claimed by the plaintiff.

So a decision on the plaintiff's claim could not really be divorced a decision having regard to the averments in the defence and counter-claim as
5 *I have just stated."*

Consequently to consider the construction placed on s.5(2) of the Land Use Act by either party at this stage will, in my view, tie the hands of the judge that will hear the case de novo.

I now come to the third issue i.e. failure of the Court of Appeal to enter judgment in favour of the defendant for the plaintiff's failure to file a defence
10 to counter-claim. It is true a counter-claim is a cross-action; Oragbade & Ors. v. Onitiju (1962) 1 SNLR 70; (1962) N.S.C.C. 16. It is equally affected by the rules of pleadings. If one looks at the counter-claim which has been earlier on reproduced in this judgment, it is defective in form as it is bound by the same rules of pleadings. There is no doubt that where a plaintiff fails to file a defence to a counter-claim that the defendant can file a motion for a
15 summary judgment. In the absence of a defence to a counter-claim no issue has been joined, the court is duty bound in such a situation to enter judgment for the claim in the counter-claim; Nigerian Housing Development Society Ltd. v. Mumuni (1977) 2 S.C. 57; Ogbonna v. The Attorney General of Imo State (1992) 1 NWLR (Pt.220) 647/675. The position in this appeal is different in the sense that all the issues raised with regard to the issue of title to the
20 land in dispute were met in the plaintiff's pleading. The main issue is who, in view of the reliance placed on the Certificate of title, is entitled to the land? The findings of the lower court are that the claim and the counter-claim "are intertwined and interwoven". The Court of Appeal Agbaje, J.C.A. said:

"It is to be noted that the facts relied upon by the defendant in his state-
25 *ment of defence in answer to the plaintiff's claim are the same as the facts the defendant is relying upon as giving rise to his counter-claim against the plaintiff on the issue of title to the land the plaintiff was claiming."*

It is therefore clear that no judgment could have been given for the defendant on the counter-claim without considering the evidence led in respect of the
30 facts pleaded by the plaintiff. It is my view that although no defence as such was filed to the counter-claim there was evidence led which could have been considered when considering the counter-claim.

On the whole, I will dismiss the appeal with cost of N1,000.00 in favour of the plaintiff. I hardly need to remind the parties in this case to bear in mind the

orders made by the lower court in so far as the issue of retrial is concerned.

KUTIGI JSC

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I read in advance the judgment just delivered by my learned brother Olatawura, J.S.C. I agree with his reasoning and conclusions. In view of the proposed final order. I do not think it will be wise to advance any opinion on the provision of section 5 sub-section 2 of the Land Use Act 1978 at this stage. The appeal is dismissed with N1,000 costs against the appellant. The judgment of the Court of Appeal, Jos, delivered on the 1st day of June, 1987 10 is accordingly confirmed. For the avoidance of doubt the claim and counter-claim are sent back for a retrial in their entirety before another judge of the High Court, The parties shall be at liberty to amend their pleadings and in particular the plaintiff/respondent is granted leave to file a defence to the counter-claim out of time.

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OGUNDARE JSC

This case originated in the High Court of Plateau State (Jos Judicial Division) where in suit No, HJ/140/1982 the plaintiff Alhaji Haruna Bako Kolo had sued the defendant Potter Dabuk claiming declaration of ownership
20 to a piece or parcel of land situate along Jos-Bukuru Road (that is, Yakubu Gowon Way) measuring about 3.31 hectares and covered by a Statutory Right of Occupancy No. PL 5399 granted by the Governor of Plateau State to the plaintiff; injunction restraining the defendant etc, from entering upon the said land; damages for trespass allegedly committed by the defendant on the land; 25 damages for assault and battery allegedly committed by the defendant on the plaintiff and lastly damages for false imprisonment. Pleadings were ordered and duly filed. In his Statement of Defence, the defendant after meeting the case set out by the plaintiff in his statement of claim raised a counter-claim and pleaded in respect thereof as hereunder:-

30

"COUNTER-CLAIM

1. By way of counterclaim, the defendant claims from the plaintiff the sum of N50,000.00 being aggravated damages for trespass to the defendant's land by the plaintiff upon the following grounds:-

(a) The defendant is (with Alhaji Musa Gombe) and was at all material times the owner and entitled to the possession of land and premises situate at and known as Plot AC47, Bukuru Road, Jos in the Gyel District of Jos, Plateau State.

5 (b) On or about November, 1982, the plaintiff wrongfully with his servants and agents entered the said land and premises and wrongfully took possession of the same and has thereby trespassed and is still trespassing thereon, and has removed the defendant's goods from the land.

10 (c) The plaintiff did the acts aforesaid maliciously and out of spite towards the defendant and with the intention of humiliating the defendant and injuring his proper feelings of dignity and pride and causing him to be held up to ridicule and contempt before passers by and the plaintiff's workers:

2. By reason of the matters aforesaid, the defendant has been subjected to humiliation and suffered anguish and stress and has suffered loss and damage

15 **PARTICULARS OF DAMAGE**

Cost of planting trees and erecting the fence
on the land assessed N4,400.00

Aggravated damages for trespass to land N45,600.00

And the defendant claims N50,000.00,"

20 The action proceeded to trial at which evidence was led on both sides. The learned trial Judge (Momoh J.) in a considered judgment found:-

(1) that the land granted to the plaintiff by the Governor overlapped the parcel of land earlier granted to the defendant by the Jos Local Government Council; and

25 (2) that the defendant's right over the portion of land in which he and another person were granted Customary Right of Occupancy subsisted and remained unaffected by the Statutory Right of Occupancy subsequently granted to the plaintiff by the Governor.

She made the following declarations and directive;

"DECLARATIONS

30 *On the plaintiff's claim:*

It is hereby declared and ordered that the plaintiff being the holder of a statutory right of occupancy PL 5399 (Exhibit A4) granted on the 30th day of September, 1982 over that piece of land described in the sketch plan (Exhibit A6) shall be entitled to the use and occupation of the said land only

to the extent that the land shall not include that portion of land described in the survey plan (Exhibit J1) subject to a prior right of occupancy evidenced by the Local Govt. certificate of occupancy (Exh. J) dated 21/8/78.

On the defendant's Counterclaim:

The defendant and Alhaji Musa Gombe are hereby declared joint holders of a right of occupancy and entitled to the use and occupation of the piece of 5 land described in the plan exh. J1 covered by Local Government Certificate of Occupancy Exhibit J dated 21st August, 1978.

Court Directives:

The Commissioner in charge of land matters in Plateau State is hereby directed to take all necessary steps through the department of Land and Survey for the purpose of conforming with the above declarations of court 10 including adjusting the plaintiff's plan Exhibit A6 to exclude the plot to which the defendant and Gombe are declared entitled. The Commissioner may thereafter conclude the processing of the plaintiffs application for a certificate of occupancy PL 5399 and the claimants joint application for a statutory right of occupancy PL 6443."

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In respect of the plaintiff's claims for damages for trespass, assault and false imprisonment and the defendant's counterclaim the learned trial Judge dismissed both parties' claims for damages for trespass; she awarded N1,000.00 damages in favour of the plaintiff for false imprisonment.

Being dissatisfied with the judgment of the learned trial Judge the defendant 20 appealed to the Court of Appeal; the plaintiff also cross-appealed. The latter court after a consideration of the arguments advanced in favour of the appeal and cross appeal allowed both appeals, set aside the judgment of the learned trial Judge and ordered a retrial of the action. Being again dissatisfied with the judgment of the Court of Appeal the defendant further appealed to this Court upon one original and two additional grounds of appeal. The plaintiff 25 did not cross-appeal.

Pursuant to the rules of this Court both parties filed and exchanged their respective Briefs of Arguments. Learned leading counsel for the defendant/appellant set out 3 issues as calling for determination in the appeal. These 3 issues are also adopted in the plaintiff/respondent's Brief. At the hearing of 30 the appeal however, learned counsel for the defendant/appellant abandoned issue (1) which is covered by the 2nd ground of appeal. That ground is hereby accordingly struck out by me. The two remaining issues for consideration in this appeal are:

1. Whether the learned Justices of the Court of Appeal were right in their interpretation of section 5(2) of the Land Use Act which postulates that upon the grant of a statutory right of occupancy under the provisions of sub-section (1) of this section all existing rights to the use and occupation of the land which is the subject of the statutory right of occupancy shall be extinguished, even in this instance when it is common ground that the appellant, with one Alhaji Musa Gombe already were entitled to the use and occuputory right of occupancy aforesaid, the same not having been revoked or otherwise extinguished.

2. Were their Lordships of the Court of Appeal right in failing to enter judgment for the appellant when the respondent did not file a defence to the counterclaim in the circumstances of this case?

Before I proceed further to a consideration of this appeal, I need to set out at this stage how-be-it briefly the facts. Sometime in February 1982 the plaintiff applied to the Governor for an industrial plot to be used for the purpose of a food processing industry. After preliminary steps had been taken the plaintiff was granted a statutory right of occupancy dated 30th September, 1982 and number PL 5399 to a piece or parcel of land measuring about 3.31 hectares and stated to be situated along Jos-Bukuru road in Jos Local Government area. Following the grant to this right of occupancy the plaintiff went into possession and employed workers to erect a fence around the land. The plaintiff was on the site on the 27th of October, 1982 inspecting the progress of work being done to the fence when the defendant, a Deputy Commissioner of Police (Kaduna State Command) came on the land and claimed ownership to it. There was an incident leading to the arrest, detention and prosecution of the plaintiff. Consequently the plaintiff who was at the relevant time a Permanent Secretary in the Plateau State Civil Service instituted the action leading to this appeal and claiming as herein before set out.

The defendant and one Alhaji Musa Gombe had on 21st August 1978 been granted a customary right of occupancy as evidenced by Local Government Certificate of Occupancy No. 25 I issued by the Jos Local Government and in respect of a piece of land in the vicinity of the area granted to the plaintiff. It would appear from the evidence led at the trial that the 2 pieces of land overlapped. Hence the contradictory claims made by each party to the land in dispute. Both documents relied upon by the parties do not have attached to them a plan of the land granted by each document to each party but a sketch plan (Exhibit N) drawn not as a result of accurate survey, was tendered in evidence to illustrate the overlap. Other sketch plans were also admitted in evidence.

I now proceed to the appeal.

Issue (1):-

The plaintiff appealed against the interpretation given by the learned trial Judge to s.5(2) of the Land Use Act 1978. The issue on it before the Court of Appeal was formulated as follows:

"(a) Having regard to the fact that the Governor of Plateau State granted the Statutory Right of Occupancy No. PL 5399 to appellant under s.6(1) of the Land Use Act.

Whether respondent's right to occupation and use of any part or the land covered by the Governor's grant still subsisted or was extinguished

The court below per Agbaje. J.C.A. (as he then was) in deciding this issue observed as follows:-

"Section 5 subsection 2 of the Land Use Act provides as follows:-

Upon the grant of a statutory right of occupancy under the provisions of subsection (1) of this section. All existing rights to the use and occupation of the land which is the subject of the statutory right to occupancy shall be extinguished.'

Added to this is section 15 of the same Act which says;

During the term of a statutory right of occupancy the holder:-

(a) shall have the sole right to and absolute possession of all the improvement on the land;

(b) may, subject to the prior consent of the Military Governor, transfer, assign or mortgage any improvements on the land which have been effected pursuant to the terms and conditions of the certificate of occupancy relating to the land.

Having regard to the above statutory provisions, the irresistible conclusion I reach is that counsel for the plaintiff is right in his submission to us in his brief and in his oral argument to us to the following effect:-

'The effect of grant of a statutory title under section 6(1) of the Land Tenure Law which is identical in terms with section 5(1)(a) of the Land Use Act is that all other rights to the use and possession of the land, the subject of the grant extinguished. Where there are two conflicting titles granted under the same section, the first in time may be stronger in law.'

It is the conclusion reached in the above passage that is on attack in the appeal before us.

Learned leading counsel for the appellant Gaily Brown-Peterside S.A.N. had argued in the appellant's brief thus:-

".....it is Appellant's respectful submission that the learned Justices of the

Court of Appeal were clearly in error when they held as they did, that section 5(2) of the Land Use Act postulates a situation where existing right over land which has not been revoked or otherwise lawfully divested from the owner is extinguished upon the grant of a statutory right of occupancy by the Military Governor; the fact notwithstanding that the previous owner had a subsisting right of occupancy thereon granted by a competent authority. As already stated, (page 6 supra), there is uncontroverted evidence that the appellant at all material times with one Alhaji Musa Gombe, had a valid subsisting C of O granted to them by Jos Local Government, namely C of O No. 251 dated 21st August, 1978 in respect of the land the subject-matter of these proceedings. That being so, it is further respectfully submitted that the subsequent grant by the Plateau State Government of a Right of Occupancy over the same piece of land or a piece of land incorporating the land already the subject-matter of the C of O granted to the appellant and his ally under the Land Tenure Law, cannot be said to have extinguished the right of the appellant in this instance to the use and occupation of the land of their subsisting C of O as aforesaid. See Dantumbu v. Adene & Ors. (1987) 4 NWLR (Pt.65) 314 at 326. In a more recent decision, this honourable court, considering a situation in pari materia with this case, in terms of section 5(2) of the Land Use Act, said:-

'Upon a proper interpretation of subsection (2) of section 5 of the Land Use Act, a later statutory right of occupancy extinguishes all rights created by an earlier grant. To save an earlier grant of a statutory right of occupancy, that later right of occupancy must be expressly set aside.'

See Saude v. Abdullahi 1989 (4) NWLR (Pt. 116) 387 at 416

Suffice it to add here that appellant's Certificate of Occupancy No.251 as granted by the Jos Local Government has not been revoked."

He contended that the interpretation placed on section 5(2) was erroneous. Learned Senior Advocate submitted that the defendant and Musa Gombe having personally been granted customary right of occupancy to the land in dispute, the subsequent grant of a statutory right of occupancy to the plaintiff by the Governor of Plateau State over the same piece of land or piece of land incorporating the land already granted to the defendant and his friend could not be said to have extinguished the defendant/appellant's right without that right being first revoked before the grant of statutory right to the plaintiff. He cited in support Dantumbu v. Adene & Ors. (1987) 4 NWLR (Pt.65) at 326, Saude v. Ahdullahi (1989) 4 NWLR (Pt.116) 384 at 416.

Mr. Fashola who appeared at the oral hearing for the defendant/appellant submitted that as the defendant had prior right of occupancy of the land in dispute and as that right had not been revoked any subsequent grant of a right of occupancy by the Governor over the same piece of land would be ineffective. He submitted that Saude v. Abdullahi (supra) is distinguishable on its own facts. He cited Ogunleye v. Oni (1990) 2 NWLR (Pt.135) at 784 C-E 5 and G-H and submitted that to succeed the plaintiff must not rely on section 5(2) alone but must also show by evidence that there had been a revocation of existing adverse interest. He relied on Romaine v. Romaine (1992) 4 NWLR (Pt.238) 650, 662 E-G. He further submitted that where there had been a grant under the Land Tenure Law to a party (as in the case of the defendant) a subsequent grant of a statutory right of occupancy to another party (as in case of the plaintiff) Section 5(2) of the Land Use Act would not apply until there has been revocation of the prior interest. He relied on Titiloye v. Olupo (1991) 7 NWLR (Pt.205) 519, 530 C-E.

Mr. Kayode Sofola for the plaintiff/respondent submitted that in the light of the findings of the Court of Appeal on page 157 line 5 to page 158 line 25, issue (2) would not come within the parameter of the present appeal and urged us to discountenance all submissions on issue (2). I need point out that issue 2, is issue (1) in this judgment. He however, submitted in the alternative that effect should be given to the clear and unambiguous provisions of section 5(2). Learned counsel further argued that the defendant/appellant having become aware of the statutory right of occupancy granted to the plaintiff should have sued to vacate that statutory right of occupancy and as he did not do this, he could not now complain.

It is true that the court below found that the defendant failed to discharge the onus on him to relate the land he was claiming to the one claimed by the plaintiff and that having failed to discharge this onus his claim to any portion of the land claimed by the plaintiff would not succeed. This finding in my respectful view only goes to the claim of the plaintiff for a declaration and does not affect the earlier finding of the court below that the effect of a grant of a statutory right of occupancy under s.5(1) is to extinguish the existing rights in the land. The question therefore, which I now have to answer is whether the court below was right in its interpretation of s.5(2).

We have been referred by learned counsel for the appellant to a number of authorities. In Datumbu v. Adene & Ors. (supra) a decision of the Court of Appeal, A was granted a customary right of occupancy to a piece of land by the Local Government. Subsequently B was granted a statutory right of occupancy to the same land by the State Governor. A went on the land B sued joining the Military Governor and Attorney-General among others. It was

held by the Court of Appeal that a customary right to occupancy granted by a Local Government places priority of estate so as to render null and void any subsequent right of occupancy granted by the Governor in respect of the same piece or parcel of land unless the customary right of occupancy aforesaid was first revoked by the Local Government before the grant of the statutory right of occupancy by the Governor to another person. Ogundare, J.C.A. delivering the lead judgment of the Court observed at pages 236-237:

"The plaintiff produced a statutory certificate of occupancy, whilst the defendant produced a customary certificate of occupancy in 'respect of the same land, and there was no satisfactory evidence as to whether or not the land was urban land. Each of the two certificates of occupancy is valid, prima facie, respectively under Sections 5 and 6 of the Land Use Act, 1978. Under section 5, it is lawful for the Military Governor, inter alia, to grant statutory rights of occupancy in respect of land whether or not in an urban area. Also, under Section 6 it is lawful for a Local Government to grant customary rights of occupancy in respect of land not in an urban area. The key to the question is if the Local Government Grant of customary right of occupancy was made while the land was rural, and not urban, then the defendant would have acquired a legal estate in the land prior to that of the plaintiff and the grant to the plaintiff by the Governor would only be valid if the prior grant by the Local Government was revoked. See *The Government of Kaduna State v. Dada* (1986) 4 NWLR (Pt.38) p. 687 in which the Supreme Court upheld the decision of this Court and this Division, in particular, that Section 28 of the Land Use Act, 1978 made provisions for the revocation of a right of occupancy and that provisions of the Act prevail over the provisions of Section 34 of the Land Tenure Law which also made provisions for the revocation of a Certificate of Occupancy under which the Governor purported to revoke the certificate of occupancy in question, thus rendering the revocation null and void."

With profound respect to the learned Justices of the Court of Appeal the Governor of Kaduna State and Anor v. Dada (supra) relied on in support of their above proposition of law does not appear to support the view held by them. What was in issue in DADA's case was the extent to which the Land Tenure Law of Northern Nigeria is still applicable in view of the Land Use Act. Section 5(2) of the Act did not come up for interpretation in Dada's case. While I agree that the above dictum of Ogundare J.C.A. correctly states the decision of this Court in Dada's case, that case does not however, support the proposition of law pronounced by him in the said dictum.

In Saude v. Abdullahi (supra) A applied for 2 plots of land in the industrial

area of Katsina town. His application was approved and certificates of occupancy over plots 9 and 10 were issued to him in March and July 1979. Later A commenced development of one of the plots (Plot 9). In respect of the same plot No.9 however, B was, in November 1980, issued with a certificate of occupancy. When he was to commence development of the plot he discovered that A had been in possession of it and had commenced development on it. The matter was brought to the Notice of the Ministry of Lands and Survey which Ministry asked A to stop the development on the land in dispute. A's right of occupancy in respect of plot No.9 was subsequently revoked by the Government pursuant to s.34(2) (c) of the Land Tenure Law. In the course of the appeal in this Court the effect of the grant of statutory right of occupancy on existing rights came up for consideration, Obaseki, J.S.C. held on page 4167 of the report:

"The express power to revocation a Military Governor has under the Land Use Act, 1978 is confined to revocation for overriding public interest as spelt out in section 28(2) and (3) of the Act and for requirement by the Federal Government for public purposes. There is no provision for revocation for any other grounds in the Act. However, section 5(2) of the Land Use Act creates a statutory revocation of all existing right on the grant of a statutory right of occupancy. It states:

"Upon the grant of a statutory right of occupancy under the provisions of subsection (1) of this section, all existing rights to the use and occupation of the land which is the subject of the statutory right of occupancy shall be extinguished."

It cannot, therefore, be a correct statement of the law that the statutory right of occupancy granted to the appellant falls to the ground and became void as held by Ogundare J.C.A., because the revocation of the statutory right of occupancy granted to the respondent was set aside. Upon a proper interpretation of subsection (2) of section 5 of the Land Use Act, a later statutory right of occupancy extinguishes all rights created by an earlier grant. To save an earlier grant of a statutory right of occupancy, the later right of occupancy must be expressly set aside."

(Italics are mine)

This decision has clearly overruled Dantubu v. Adene. I must observe that the other six Justices that sat on the appeal in this Court did not say anything on the point in their respective judgments. That notwithstanding I am of the firm view that the decision of Obaseki, J.S.C. is binding. In any event, I agree in-to-to with the views expressed by him.

Mr. Fashola has argued before us that the facts in Saude v. Abdullahi are distinguishable from the facts in this case. I do not agree with that view. For the purpose of the application of Section 5(2), I think the facts are the same. I

agree with learned counsel for plaintiff/respondent. Mr. Sofola, that what the defendant in this case should have done would have been to sue to set aside the right of occupancy granted in favour of the plaintiff by the Governor. The Governor cannot correct whatsoever error had been made by a recourse to his power of revocation under section 28(1) of the Act which reads:

5 *"It shall be lawful for the Governor to revoke a right of occupancy for over-riding public interest"*

and the phrase 'overriding public interest' is defined in subsections (2) and (3) of section 28. Other grounds on which the Governor may revoke the right of occupancy are provided in subsections (4) and (5) and do not apply to the facts here. The meaning ascribed to the phrase 'overriding public interest' will
10 not cover the facts of this case either.

We have also been referred by Mr. Fasola to *Romaine v. Romaine* (supra). I do not see how this case is relevant to the interpretation of section 5(2). I would say no more on it. We have equally been referred to *Titiloye v. Olupo*. In that case, was granted a customary right of occupancy in respect of a piece
15 of land. He was subsequently granted a statutory right of occupancy to the same piece of land by the Governor. The question arose as to whether it was necessary to first revoke the customary right of occupancy before the grant of statutory right of occupancy. *Kawu, J.S.C.* delivering the lead judgment of the full Court observed at page 530 of the report:

20 *"As to whether a Governor can grant a Certificate of Occupancy to another party when the Local Government had granted customary right of occupancy on the same land without first revoking the latter, raised in issue No.6, I think the answer can be found in S.9(1) of the Land Use Act which says:*

'(1) It shall be lawful for the Military Governor- (a) When granting a statutory right of occupancy to any person.

25 *(b) When any person is in occupation of land under a customary right of occupancy and applies in the prescribed manner; or*

(c) When any person is entitled to a statutory right of occupancy to issue a Certificate under his hand in evidence of such right of occupancy.

*It is clear that paragraph (b) of S.9(1) empowers a Military Governor to issue a statutory right of occupancy to a person who is already in occupation
30 of land under a customary right of occupancy.*

In my view it is not the law that the customary right of occupancy being enjoyed by such a person must be first revoked before he can be granted a statutory right of occupancy, and this is because upon such a grant, all existing rights on the parcel of land are automatically extinguished. This is the provision of S.5(2) of the Act which says:

'(2) Upon the grant of a statutory right of occupancy under the provision of subsection (1) of this section, all existing rights to the use and occupation of the land which is the subject of the statutory right of occupancy shall be extinguished.

(Italic are mine)

In view of the authorities with which I am in full agreement, it is my view 5 that the court below is right in approving the submission in the plaintiff/appellant's brief as regard the interpretation of S.5(2) and that is that a grant of a statutory right of occupancy extinguishes all rights existing on the land at the time of the grant. The subsection is clear and unambiguous. In my respectful view, that is the only reasonable interpretation that can be given to it.

As *Obaseki J.S.C.* observed in *Saude v. Abdullahi* (supra) at p.415, the 10 power of revocation contained in section 28(1) or the Land Use Act is not meant to be used in the case of a grant induced by mistake of fact as would seem to be the defendant's case in the matter on hand. If the Governor had made a mistake in the grant of a statutory right of occupancy over the land in dispute to the plaintiff, he could correct that mistake not by his resorting to the power of revocation given him by section 28(1) of the Act but by exercising 15 his inherent power to rectify the grant. The Governor has an inherent power to correct errors made by him arising from a misunderstanding of the facts. I do not therefore accept the submission of learned counsel for the defendant that it was necessary for the Governor to first revoke the customary right of occupancy earlier granted by Jos Local Government to the defendant and his friend before granting a statutory right of occupancy over the land in dispute 20 to the plaintiff.

Issue (2):

This issue was raised in the court below. It was contended before that court that the plaintiff having failed to file a defence to the defendant's counterclaim, 25 the trial High Court Judge was wrong not to have entered judgment in the defendant's favour on the said counterclaim. The court below found that the defendant's counterclaim was properly before the trial court and that contrary to the rules of the trial court the plaintiff had failed to file a defence to the counterclaim. *Agbaje J.C.A.* (as he then was) in his lead judgment observed further as follows:

*"Ordinarily, the defendant would have been entitled to move for judgment on his counter-claim in the absence of defence to it. See Oguleye v. Arewa (1959) SCNLR 603; (1960) W.R.N.L.R. 9. But the defendant did not do this. The defendant allowed the claim and counterclaim to proceed as if a defence
30*

had been filed to the counterclaim.

It appears to me that the trial of the counter claim had not been in order for no issue had been joined on the counter claim strictly so to say. It has been said that where a trial conducted by pleadings, the judgment of the court must be based on issues which the parties have raised and joined in the pleadings.

5 It has also been stated that the object of pleadings is to compel the parties to define that issues upon which the case is to be decided. *Oke-Bala v. Malake* (1975) 12 SC 61. and *Total v. Nwaka* (1978) 5 SC 1.

So strictly speaking, the plaintiff having not filed the defence to the counter-claim could not be heard to give evidence against the evidence of the defendant in support of his counterclaim.

10 This, however, does not conclude the defendant's appeal on the counter-claim. At this juncture, I must go on to consider the plaintiff's appeal of his claim before the court."

After considering the appeal of the plaintiffs and concluding that that appeal ought to succeed went on to say -

15 "Accordingly, this could have meant the pronouncement by me that the plaintiff's appeal must succeed and that the order of the learned trial judge excising any portion from the land claimed by the applicant in favour of the defendant cannot stand but for the point I have made earlier on in this judgment that the defence and counterclaim in this case are intertwined and interwoven. There is also a point I have made on the counterclaim, namely,

20 since the plaintiff has not filed a defence to the counterclaim, the defendant would be entitled to judgment on it. It appears from the averments in the defence and the counterclaim that the land the subject-matter of the counterclaim is a portion of the land claimed by the plaintiff.

So a decision on the plaintiffs claim could not really be divorced from a decision having regard to the averments in the defence and counterclaim

25 as I have just stated.

The plaintiff by not filing a defence to the counterclaim cannot be heard strictly speaking, on the defendant's counterclaim. The defendant, as I have just held, by not connecting the land he is claiming to the one claimed by the defendant must fail in his defence to the applicant's (sic) claim. If as it appears, the subject matter of the counterclaim relates to a portion of the land claimed

30 by the plaintiff, the odd situation would then arise whereby the averments in the defendant's defence will, in one breath fail, but, in another breath, succeed in the counter-claim in the same case, because of the technicalities I have shown above. This to my mind is a situation which no reasonable tribunal will allow to happen,"

He concluded thus:

"The conclusion I read (sic) therefore is that the point taken by the defendant in his appeal as regards the failure of the plaintiff to file a defence to the counterclaim is well taken. I am equally satisfied that the point taken by the plaintiff as to the uncertainty to the land excised from his land for the 5 defendant is well taken too. These matters upon which in my judgment the learned trial judge had erred. In my judgment therefore the judgment of the learned trial judge on the declaratory judgments sought in the claim and counterclaim cannot stand."

It is against this conclusion, with which the other justices that sat on the appeal agreed, that the defendant has appealed to this Court, contending 10 that in view of the court's finding to the effect that the plaintiff had failed to file a defence to the counterclaim the defendant was entitled to judgment.

The law is very clear on the point. There are numerous authorities that say that a counterclaim is in the same position as an action being itself a cross-action and subject to the same rules of court as regards pleadings. Ordinarily therefore, the plaintiff having failed to file a defence to the counterclaim the 15 defendant on moving the trial court would be entitled to judgment and his claim being one for unliquidated damages the trial court would have had after hearing him on the issue of damages to make an award in this case. However the defendant did not move the court of trial for judgment but rather proceeded to full scale trial by adducing evidence and calling witnesses after the close of the case for the plaintiff. There is no doubt that the facts from the pleadings 20 of both parties are intertwined/interwoven as regards plaintiff's action and defendant's counterclaim. Had the plaintiff succeeded in his claim for damages the counterclaim would have failed since both parties could not at the same time be in exclusive possession of the land in dispute. In my respectful view therefore, this case would be an exception to that general rule that where a plaintiff fails to file a defence to a counterclaim the defendant is entitled to 25 judgment on his counter-claim. Akpata J.S.C. correctly, in my view, stated the law when in *Ogbonna v. Attorney-General Imo State* (1992) 1 NWLR (Pt.220) 647, 698 he observed as follows:

"failure of a plaintiff to file a defence to a counter-claim may not be disastrous if he succeeds in his claim. His success may render useless the 30 counter-claim depending on the nature of the counter-claim. However where he fails in his claim, as in this case, and had filed no defence to the counter-claim, the defendant's claim in his counter-claim remains uncontroverted. If however the claim in the counter-claim is for a declaratory right the defendant will still have to satisfy the court that he is entitled to the declaration sought

regardless of the failure of the plaintiff to file a defence."

In the present action it cannot be said in the light of the findings of the two courts below, particularly that of the Court of Appeal, that the plaintiff had failed in his claims. Consequently, therefore, I do not share the view of learned counsel for the defendant that the court below was wrong in not entering judgment for the defendant on his counterclaim, the plaintiff having failed to file a defence thereto. I therefore, answer the second issue argued in this appeal in the affirmative.

Finally for the reasons I have given above I agree with the conclusion reached by my learned brother Olatawura J.S.C. in his lead judgment just delivered that this appeal be dismissed. I too dismiss it and as there has been no cross appeal by the plaintiff I affirm the judgment of the court below ordering a retrial of the action and counterclaim in the High Court of Plateau State. In view of the age of this action - the writ of summons was issued out in November 1982 - I direct that the High Court should give expeditious hearing to the retrial.

I abide by the order for costs of this appeal made by my learned brother Olatawura J.S.C. in his lead judgment.

OGWUEGBU J.S.C

I have had the advantage of reading in draft the judgment read by my learned brother Olatawura, J.S.C. and I am also of the opinion that the appeal fails and should be dismissed. A

The facts of the case have been set out in the said judgment and it is unnecessary to repeat them.

Two main issues arising for determination in this appeal are:-

1. Whether the learned Justices of the Court of Appeal were right in their interpretation of S.5(2) of the Land Use Act which postulates that upon the grant of a statutory right of occupancy under the provisions of sub-section (1) of this section all existing rights to the use and occupation of the land which is the subject of the statutory right of occupancy shall be extinguished, even in this instance when it is common ground that the appellant, with one Alhaji Musa Gombe already were entitled to the use and occupation of part of the land covered by the statutory right of occupancy aforesaid, the same not having been revoked or otherwise extinguished.

2. Were their Lordships of the Court of Appeal right in failing to enter judgment for the appellant when the respondent did not file a defence to the

counter-claim in the circumstances of this case.

It should be remembered that:-

(1) The appellant is a holder of a customary certificate of occupancy No. 251 dated 21/8/78 granted by the Jos Local Government under the Land Tenure Law.

(2) The respondent is the holder of a statutory right of occupancy No.PL 5399 granted by the Military Governor of Plateau State effective from 30:9:87. The two pieces of land overlap.

(3) The respondent did not file a defence to the counter-claim.

As to the first issue, learned counsel for the appellant submitted that the court below was in error when it held that S.5(2) of the Land Use Act, 1978 postulates a situation where existing right over land which has not been revoked or otherwise lawfully divested from the owner is extinguished upon the grant of a statutory right of occupancy by the Governor notwithstanding that the previous owner had a subsisting statutory right of occupancy granted by a competent authority.

He contended that the right of the appellant to the use and occupation of the same piece of land or a piece of land incorporating the land the subject-matter of the customary certificate of occupancy under the Land Tenure Law, cannot be said to have been extinguished by the statutory right of occupancy granted subsequently by the Plateau State Government. He cited the cases of Dantumbu v. Adene & Ors. (1987) 4 NWLR (Pt 65) 314 at 326; Saude v. Abdullahi (1989) 4 NWLR (Pt.116) 387 at 416; Titiloye v. Olupo (1991) 7 NWLR (Pt.205) 530 and S.5(2) of the Land Use Act, 1978.

It was his further submission that the customary certificate of occupancy granted to the appellant and Alhaji Gombe has not been revoked. We were urged to answer the two issues in the negative.

The learned counsel for the respondent in his reply stated that the appellant failed to advert to the ultimate decision of the Court of Appeal which is that no sufficient evidence connecting the land he was claiming with that claimed by the respondent and that both parties failed to satisfy the court on this ground. On this ground he submitted that neither of them was entitled to judgment hence the order for re-hearing.

He referred us to the following findings of the court below:-

1. *"the onus is on the defendant to relate the land he is claiming to the one claimed by the defendant (sic). Having failed to do that, his claim to any portion of the land claimed by the plaintiff cannot succeed.*

2. *"Having held that he defendant has failed to connect his land with the land claimed by the plaintiff and for that reason his defence must crumble...."*

See page 158 lines 20-22 of the record.

3. "there would be no need to consider the other point as to whether or not his title or interest in the portion of the land claimed by the plaintiff is of the same degree as that of the plaintiff in the land."

See page 158 lines 22-25 of the record.

- 5 He submitted that the appellant did not challenge the above findings and therefore not competent to ask this court to make a pronouncement on the effect of a grant under S.6(1)(a) of the Land Tenure Law vis-a-vis under S.5(1) (a) of the Land Use Act.

We were urged to dismiss the appeal based upon this premise.

- Mr. Kayode Sofola's alternative argument is that the appellant's Customary
10 Certificate of Occupancy No. 251 relied upon by him was issued on 21/8/78 under and by virtue of the Land Tenure Law. The Statutory Right of Occupancy was issued to the respondent on 30/9/82 with the knowledge of the existence of the Certificate No. 251 of 21/8/78. He referred us to the case of Saude v. Abdullahi (supra) and that by virtue of S.5(1) of the Land Use Act, a later statutory right of occupancy extinguished any right which the appellant might
15 have derived by the Customary Certificate of Occupancy issued on 21/8/78. We were urged to dismiss the appeal.

It should also be pointed out that the court below at page 156 lines 5-33 stated:-

- 20 "Section 5 sub-section 2 of the Land Use Act provides as follows:-

.....
Having regard to the above statutory provisions the irresistible conclusion I reach is that counsel for the plaintiff is right in his submission to us in his brief and in his oral argument to us to the following effect:-

- 25 "The effect of grant of a statutory title, under S.6(1)(a) of the Land Tenure Law which is identical with S.5(1)(a) of the Land Use Act is that all other rights to the use and possession of the land, the subject of the grant extinguished. Where there are two conflicting titles granted under the same section, the first in time may be stronger in law";

- The court below then proceeded to consider the uncertainty of the land claimed by the appellant and the absence of a composite plan showing the
30 relationship between the land claimed by him and the portion claimed by the respondent.

Section 5(2) of the Land Use Act provides:-

"Upon the grant of a statutory right of occupancy under the provisions of subsection (1) of this section, all existing rights to the use and occupancy

of the land which is the subject of the statutory right of occupancy shall be extinguished."

In my view, the above provision means what it says. The language is clear. See Saude v. Abdullahi (supra) at page 416 where Obaseki, J.S.C. said:-

"Upon a proper interpretation of subsection (2) of section 5 of the Land Use Act, a later statutory right of occupancy extinguishes all rights created 5 by an earlier grant. To save an earlier grant of statutory right of occupancy, the later right of occupancy must be expressly set aside."

The judgment of this court in the case of Titiloye v. Olupo (1991) 7 NWLR (Pt.205) 519 at 530 also supports the view that on a grant of statutory right of occupancy under S.5(1) of the Land Use Act, all existing rights to the use and occupation of the land which is subject to that right shall be extinguished. 10

As to the question of the respondent not filing a reply to the counter-claim, it is well settled that where a defendant counter-claims against the plaintiff the latter is duty bound to file a reply in defence to the counter-claim because the court is entitled to assume that the plaintiff has no defence to the counter-claim and may enter judgment for the defendant accordingly. See Ogbonna v. Attorney-General of Imo State & Ors. (1992) 1 NWLR (Pt. 220) 633 at 675; 15 and Nigerian Housing Development Society Ltd. v. Mumuni (1977) 2 S.C. 57.

The court below in addition to its finding that the land claimed by the appellant is uncertain in relation to that claimed by the respondent, went on to say that the facts relied upon by the appellant in his statement of defence in answer to the respondent's claim are the same facts that the appellant is relying upon as giving rise to his counter-claim against the respondent on the 20 issue of title to the land claimed by the respondent.

The court below also found that the defence of the appellant to the respondent's claim and the appellant's counter-claim are intertwined and interwoven.

The appellant did not challenge the findings of the court below as to his failure to connect the land he is claiming with that claimed by the respondent 25 and the effect of such failure on his claims. The respondent did not also cross appeal against the order for retrial. This court cannot give them what they did not ask for.

I therefore hold that the appeal fails. It is hereby dismissed. The judgment of the court below delivered on 1/6/87 is affirmed. The case is accordingly remitted to the High Court of Plateau State for hearing de novo by another 30 judge of the said High Court. I abide by all the consequential orders including that as to costs contained in the lead judgment.

MOHAMMED JSC

I am in full agreement with the judgments which my Lords have given. The lead judgment of my learned brother, Olatawura, J.S.C., has explained the import of the provisions of section 5(2) of the Land Use Act which agrees with the interpretation made in the lead judgment of the Court of Appeal, per Agbaje, J.C.A. (as he then was). '

Following the opinion of my Lord Obaseki, J.S.C., in the case of Saude v. Abdullahi (1989) 4 NWLR (Pt.116) 387 at 416, it has been made plainly clear that a later grant of right of occupancy shall extinguish all rights, customary or statutory, earlier granted on the same piece of land. Mr. Fashola, learned counsel who made oral submissions for the appellant cannot be correct to say that as the appellant had prior right of occupancy over the land in dispute, the governor could not grant a statutory right over the same land without first revoking the earlier grant. I see no dispute in this issue because in the case of Titiloye v. Olupo (1991) 7 NWLR (Pt.205) 519 Kawu, J.S.C., while interpreting the provision of section 9(1)(b) of the Land Use Act held that the grant of a statutory right of occupancy automatically extinguishes all existing rights in respect of the parcel of land over which it is granted.

For these and fuller reasons given by my Lords in their respective judgments, I hereby dismiss this appeal. I abide by all the orders made including award of costs in the lead judgment.

ONU JSC

Having been privileged before now to have a preview of the lead judgment of my learned brother Olatawura, J.S.C. just delivered, I entirely agree with him that this appeal be and is hereby dismissed. I abide by the consequential orders inclusive of those as to costs made in that judgment.

ADIO JSC

I have had the privilege of reading, in draft, the judgment just read by my learned brother, Olatawura, J.S.C. I agree that the appeal should be dismissed and accordingly I too dismiss it with N1,000.00 costs in favour of the plaintiff. I, however, wish to add a few comments of mine.

One of the issues for determination raised in this appeal was the interpretation of section 5(2) of the Land Use Act. The provision of the section is as follows:-

"5(2) Upon the grant of a statutory right of occupation under the provisions of subsection (1) of this section, all existing rights to the use and occupancy of the land which is the subject of the statutory right of occupancy shall be extinguished."

In my view, the words used in the provision of section 5(2) of the Act are plain and unambiguous. In the circumstance, they should be given their plain meaning. A court interpreting the provision of the section will consequently limit itself to interpreting the said provision and should not concern itself with what the law ought to be. See Abioye v. Yakubu (1991) 5 NWLR (Pt.190) 130. Applying the foregoing principles in the interpretation of section 5(2) of the Land Use Act, the legal position is that a grant of statutory right of occupancy automatically extinguishes all existing rights in respect of the parcel of land over which it is granted. My view is in line with the view expressed by this court in Titiloye v. Olupo (1991) 7 NWLR (Pt.205) 519 at 530, cited in the lead judgment in the same connection.

In other words, the Land Use Act does not contemplate or permit a situation in which one person will hold a valid certificate of occupancy issued by a local government and another person will hold a certificate of occupancy issued by the governor in respect of the same parcel of land at or during the same time or period.

The question whether the statutory provision, as properly interpreted, is rational, good or bad is completely irrelevant. The court has to give effect to it because it is not the court's business to try to avoid the consequence of a statutory provision which is plain and/or unambiguous. See Aya & Anor. v. Henshaw (1972) 5 S.C. 87 at 95.

For the reasons given above and the fuller reasons given in the lead judgment of my learned brother, Olatawura, J.S.C., with which I agree. I dismiss this appeal and make the same consequential orders made by my learned brother, Olatawura, J.S.C.

Appeal dismissed.

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