

SUPREME COURT OF NIGERIA

7TH APRIL 1995. SC.243/1992

**CORAM:- M. BELLO CJN, I.L. KUTIGI, M.E. OGUNDARE,
E.O. OGWUEGBU, S.U. ONU, Y.O. ADIO, A.I. IGUH, JJSC.**

AWOJUGBAGBE LIGHT INDUSTRIES LTD APPELLANT
AND

1. PN. CHINUKWE
2. N.I.D.B. LIMITED

.....RESPONDENTS

LAND USE ACT - Governor's consent - Mortgages - s.22 of the Act - Whether consent must be obtained before the execution of the mortgage deed

MORTGAGES - Agreement of the parties - To date their long executed mortgage deed - After securing the governor's consent - Whether appellant can appropate and reprobate.

MORTGAGES - Validity - Where parties agreed not to date the mortgage - Until the governor's consent is secured - Whether s. 22 of the Land Use Act is violated - So as to render the mortgage invalid.

SUPREME COURT - Conflicting decisions of the Supreme Court - Where the cases are not relevant to the present case - Resolution of the conflict having become merely academic - Is not necessary.

TRESPASS - Forcible entry of premises - In exercise of mortgagee's right under the mortgage agreement - Whether tantamount to trespass.

FACTS

The 2nd Respondent granted a loan of N215,000.00 to the Appellant. The loan was secured vide a legal mortgage between the parties in respect of the Appellant's property situate at Ibadan. The mortgage deed was long executed the parties before the governor's consent was secured. The parties from the record agreed that the date of commencement of the mortgage should not predate that of the governor's consent. Appellant's indebtedness (principal and interest) accumulated to the sum of N364,142.08. It failed to pay after demand. 2nd Respondent in exercise of its power under the mortgage appointed the 1st Respondent as the receiver to the Appellant. The receiver with the aid of security dog's took over possession of the mortgaged premises pursuant to Appellant's failure to

hand over the keys on request.

The Appellant filed this action before the High Court Ibadan claiming various reliefs including a declaration that the parties mortgage deed is invalid for contravening s.22 of the Land Use Act and damages for trespass. Appellant contended that executing the mortgage before obtaining the governor's consent was a breach of s. 22 of the Land Use Act. The trial court found for the Respondents and dismissed the Appellant's case. Appellant's appeal to the Court of Appeal was also dismissed. Appellant has further appealed to the Supreme Court to determine *inter alia*, whether the mortgage deed, Exhibit E is valid and lawful.

HELD (Unanimously dismissing the appeal per lead judgment of **BELLO CJN**)

Mortgages - Agreement of the parties

1. It is crystal clear that although the parties had executed the Mortgage Deed and the Appellant had enjoyed the benefits and facilities of the agreement long before seeking the Governor's consent, they had agreed to defer dating the commencement of the Mortgage Deed until after the consent had been obtained. Surely, the Appellant cannot approbate and reprobate. (p. 720F)

Mortgages - Validity - Land Use Act s.22

2. Now, reverting to the Mortgage Deed in issue, it is transparently clear that the parties did not intend it to be effective at the date of its execution and the letter, Exhibit E1, conveying the Governor's consent reflected that intention by its directive which reads: In compliance with their intention the Deed was not dated at its execution but was dated 8th October, 1985 after the Governor's consent. Since the date of delivery of the Mortgage Deed was not made an issue and in the circumstances of the case, having regard to the evidence and the findings of the trial court, it is to be presumed that the Deed was delivered on the date it was dated, to wit, the 8th of October, 1985. Accordingly, on the authority of *Vincent v. Premo enterprises Ltd.* (supra) and *Denning v. Edwardes* (supra), the Mortgage Deed, a conditional deed, was a mere escrow at its execution and it only became binding and effective after the condition, which was the Governor's consent, had been fulfilled. It follows that the Mortgage Deed did not breach or contravene section 22 of the Act. The Deed is valid. (p. 721F)

Forcible entry of premises

3. The issue relating to forcible entry of the mortgaged premises which

according to the submission of the Appellant amounted to a trespass, even if the Mortgage Deed was valid, may be summarily dismissed. A mortgagee, like a landlord exercising his right to possess after the expiry of his tenant's lease, or his agent who entered and took possession of the mortgaged property in exercise of his right under the mortgage agreement is not liable for damages for forcible entry because the right to possess the property had become vested in the mortgagee and his agent, the receiver, and the forcible entry was done in furtherance of their rights to possess. The submission is therefore untenable. (p. 728 B)

Conflicting decisions of the Supreme Court

4. In the instant case, there is the consent of the Governor and for this reason the decisions in the two previous cases are not relevant for its determination. The resolution of the apparent conflict is therefore not necessary and it has become an academic question. This Court has in numerous cases established that it would not indulge itself in the luxury of academic exercise. (p. 728 F)

NOTABLE POINTS OF INTEREST

OGWUEGBU JSC

1. When a deed will become effective

A deed takes effect from the time of its delivery and not from the day on which it is therein stated to have been made or executed. And other written instrument takes effect from the date of execution. Extrinsic evidence is, however, admissible to prove the date of delivery of a deed, or the execution of any other written instrument. The final and absolute transfer of a deed properly executed, to the grantee or to some person for his use in such a manner that it cannot be recalled by the grantor constitutes delivery. It is also not necessary that the person executing should part with physical possession of the instrument. (p. 736 A)

ONU JSC

2. Whether appellant can contend that loan agreement is void

In conclusion, I need only remark in passing that it is inequitable and morally despicable for the Appellant, after obtaining a loan and after utilizing the same to now turn round and allege that the agreement (Exhibit E) between it and the grantor of the loan i.e. the 2nd Respondent, is null and void. (p. 748 A)

IGUHJSC

Land Use Acts, 22(1) - Governor's consent

3. I think it ought to be stressed that the holder of a statutory right of occupancy is certainly not prohibited by section 22(1) of the Act from entering into some form of negotiations which may end with a written agreement for presentation to the Governor for his necessary consent or approval. This is because the Land Use Act does not prohibit a written agreement to transfer or alienate land. So long as such a written agreement is understood and entered into subject to the consent of the Governor there will be no contravention of section 22(1) of the Land Use Act by the mere fact that such a written agreement is executed before it is forwarded to the Governor for his consent. (p. 760 D)

Executing land conveyance before seeking Governor's consent

4. A close study of section 22(2) of the Land Use Act clearly confirms that it does recognize cases where some form of written agreement or instrument executed in evidence of the relevant transaction is submitted to the Governor in order that the necessary consent under section 22(1) may be signified by endorsement thereon. This being so, I do not conceive that it can be argued with any degree of seriousness that there is anything unlawful in the entering into or execution of Exhibit E before the Governor's consent was obtained as this procedure is expressly covered by section 22(2) of the Land Use Act. The legal consequence that arises in such a situation is that no interest in land passes under the agreement until the necessary consent is obtained. (p. 763 D)

REPRESENTATION

M.E. Adejoro, Managing Director of the Appellant for the Appellant.

Dr. H.O. Kusamotu with D. Salami Esq. for the Respondents.

Amici Curiae

Chief F.R.A. Williams SAN, with O.K. Johnson (Miss) and U.B. Anekwe.

Professor A.B Kasumu SAN, with O.A. Subair Esq.

Professor J. A. Omotola

CASES REFERRED TO

Savannah Bank Nigeria Ltd v. Ajilo (1989)1 NWLR 305

Solanke v. Abed (1962) NRNLR 92

Mellstrom v. Garner (1970)2 All E.R. 9, 10

Guaranty Trust Company of New York v. Hannery Co. 1914-15 All E.R. 24

Bello v. Eweka (1981)1 S.C. 101 at 121

Denning v. Edwardes (1961) A.C. 245

Doyle v. Continental AL INS Co. 4 Otto (94 U.S.) 535 at 538

Merry v. Nickalls (1872) L.R.7 ch. Ap. Cas. 750

Obikoya v. Wema Bank (1989)1 S.C. 127

Obayemi v. Obayemi (1967)1 All N.L.R. 161

B

Babalola v. State (1989)4 NWLR (pt. 115) 264 at 295

Hemmings v. Gold Club (1920)1 KB 720

Vincent v. Premo Enterprises Ltd. (1969)2 OB 609

Macfoy v. U.A.C. (1963)3 All E.R. 1169 at 1193

Eurodiam Ltd. v. Bathurst (1990) 1 Q.B. 1

C

Makanjuola v. Balogun (1989)3 NWLR (Part 108)192 at 206

Mowatt v. Castle Street and Iron Works Co. (1887) 43 Ch. D. 58 at 62

STATUTES REFERRED TO

Land Use Act 1978 ss. 22,26

D

Property and Conveyancing Law of Oyo State ss. 123, 125, 131

Companies Act 1968 ss. 334, 335

Evidence Act ss. 125, 124, 127

Kenyan Land Ordinance 1948 s. 88

E

BOOKS REFERRED TO

Halsbury's Laws of England 4th Ed. vol. 12 para 1486, para 1329

Norton Upon Deeds 1st Ed. p. 15

F

LEAD JUDMENT BY BELLO CJN

This appeal raises very important question of law, particularly to bankers, on the validity of a loan and mortgage agreement when the mortgagee performed his obligation under the agreement by lending to the mortgagor the sum of N215,000.00 and the mortgagor charged by way of first legal mortgage his property, No. 60-64 Ijebu Road, Ibadan, as security for the loan before the Governor of Oyo State gave his consent for the mortgage under Section 22 of the Land Use Act. The section provides:

"22(i) It shall not be lawful for the holder of a statutory right of occupancy granted by the Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise howsoever without the consent of the Governor first had and obtained:

H

Provided that the consent of the Governor:-

(a) shall not be required to the creation of a legal mortgage over a statutory right of occupancy in favour of a person in whose favour an equitable mortgage over the right of occupancy has already been created with the consent of the Governor;

B *(b) shall not be required to the reconveyance or release by a mortgagee to a holder or occupier of a statutory right of occupancy which that holder or occupier has mortgaged to that mortgagee with the consent of the Governor;*

(c) to the renewal of a sub-lease shall not be presumed reason only of his

C *having consented to the grant of a sublease containing an option to renew the same.*

(2) The Governor when giving his consent to an assignment, mortgage or sub-lease may require the holder of a statutory right of occupancy to submit an instrument executed in evidence of the assignment, mortgage or

D *sub-lease and the holder shall when so required deliver the said instrument to the Governor in order that the consent given by the Governor under subsection (1) of this section may be signified by endorsement thereon. "*

The fact of the case as found by the trial Judge are not in dispute.

Between October 1979 and 1987, the 2nd respondent granted a loan of
E N215,000.00 to the appellant. The terms and condition of the loan were contained in a Loan and Mortgage Agreement, hereinafter referred to as the Mortgage Deed. It appeared from the documentary evidence that negotiation and granting of the loan were transacted long before the execution of the Mortgage Deed. Exhibit B, a letter from the 2nd respondent to the
F appellant, showed that the loan was approved on 11th October, 1979 and immediately thereafter the appellant started to use the facility.

By a letter dated the 20th of November, 1979, the 2nd respondent sent a draft of the Mortgage Deed to the appellant for his comments and approval. In his reply of 22nd November, 1979, the appellant approved the
G draft and returned it to the 2nd respondent. Again the 2nd respondent forwarded, by their letter of 13th February, 1980, the draft Mortgage Deed to the appellant for execution which he returned to the 2nd respondent duly executed under cover of his letter of 11th march, 1980. On 26th July, 1982, the 2nd respondent wrote to the appellant as follows:

H ***"LOAN AND MORTGAGE AGREEMENT***

The above-mentioned document is yet to be registered because Oyo State Government has not given the necessary consent to the Mortgage transactions.

You will agree with us that this matter has dragged on for so long. In view of our anxiety to complete the transactions as soon as possible, we now call on you to take all necessary steps to obtain and forward to us soonest consent of the State Government to the Mortgage transactions."

It is evident from Exhibit B1, a letter from the Permanent Secretary, Ministry of Works that the appellant had submitted the application for consent on 30th January, 1984 and the Governor's consent was given on 12th September, 1985. The Mortgage Deed was admitted in evidence as Exhibit E and it showed ex facie that it was made on 8th October, 1985. Accordingly, the trial Judge specifically found that the Deed was duly executed on the 8th of October, 1985 which was after the Governor had given his consent.

Furthermore, Exhibits F and G2, letters from the 2nd respondent to the appellant dated 3rd February, 1987 and 29th May, 1987, showed by that time the appellant's indebtedness, principal and interest, had accumulated N364,142.08 and when the appellant failed to pay the said sum after demand for its payment, the 2nd respondent exercised its power under the Mortgaged Deed and appointed the 1st respondent as the receiver to the appellant. After he had served notice of his appointment on the appellant and the appellant had failed to comply with his request for the keys of the Mortgaged premises, the receiver with the aid of security dogs and their handlers to take over the possession of the said premises.

In consequence of the foregoing, the appellant instituted this suit in the High Court of Oyo State claiming from the respondents:-

"1. Declaration that the Property, and Conveyancing Law of Oyo State and the Mortgage Deed registered as No. 2(2)/2632 and dated 8/10/85 to the extent that they provide for, confer or vest the 2nd defendant mortgagee with power to sell the mortgaged premises and/or without subjecting such sale to prior Governor's consent are inconsistent with the provisions of the Land Use Act and therefore unconstitutional, illegal, unenforceable, invalid and null and void and of no effect.

2. Declaration that the transaction including loan and the Mortgage Deed dated 8/10/85 between the plaintiff and the 2nd defendant is, for non-compliance with the terms of the consent annexed to the Deed, invalid, unenforceable, illegal, null and void.

3. And/or alternatively, declaration that under and by virtue of the provisions of the Land Use Act 1978, the 2nd defendant cannot exercise its statutory right to above without power of same under the mortgage referred to above without complying with the said Act.

4. Declaration that any sale by the defendants of the property

comprised in the mortgage without complying with the Auctioneers Law of Oyo State, and the Land Use Act during the pendency of this action is illegal, ineffectual, null and void and of no effect.

5. Declaration that the said mortgage is not in law a security for the loan advanced to the plaintiff by the 2nd defendant between 1980 and B 1981.

6. Declaration that the entry by the 1st defendant into the premises of the plaintiff situated at 60-64 Akobielemu Layout, Ijebu Road, Ibadan in June, 1987 is illegal, wrongful and unlawful.

7. Declaration that the appointment of the 1st defendant as receiver pursuant to Clause 37 of the mortgage is invalid, illegal and unlawful. . C

8. Injunction restraining the defendants by themselves their agents, servants and or privies or otherwise howsoever from selling the mortgaged premises or from taking any action or steps whatsoever in pursuance of the mortgage referred to above.

D 9. N1,800,000.00 representing total damages for the trespass committed by the defendants by the forcible entry of the 1st defendant on the plaintiff's premises and loss of business caused to the plaintiff by the said trespass.

E 10. N500,000.00 representing damage caused to the plaintiff's machineries. "

In their Statement of Defence and counter-claim, the respondents pleaded the indebtedness of the appellant, the appointment of the receiver in accordance with the terms of the Mortgage Deed after the appellant had failed to liquidate the debt when it had become due for payment and the F 2nd respondent counter-claimed N364,142.08, being the appellant's indebtedness, principal and interest.

After he had carefully considered the case of each party, the trial Judge concluded in respect of the issue of the validity of the Mortgage Deed as follows:

G "On the evidence in this case after various letters in evidence of intentions to borrow and lend money by the plaintiff and second defendant respectively there was a culmination in Exhibit E setting out the terms of the loan agreement. The exhibit is the Mortgage Deed put in evidence for the plaintiff. The agreement is dated 8th October, 1985 but the Governor H of the State had given his consent thereto on 12th September, 1985 before it was duly executed according to the date on it, (which was 8th October, 1985).

The Governor's consent having been given before the Mortgage Deed is dated the deed is in my judgment valid and lawful by virtue of

section 22 of the Land Use Act, 1978.

Exhibit E -the Mortgage Deed thus confirmed the intentions of the parties to the Mortgage Deed agreement giving retrospective effect to all the terms and conditions that have been primarily agreed on by all the parties. The property, indeed mortgaged in the deed, as well as all the terms in the deed can thus be enforced by either party. The 2nd defendant can thus fall B on the security mortgage enforcement clause in paragraph 30 of the deed or appoint the receiver as in clause 37 of the deed."

He thereafter proceeded to make the following findings *"In the totality it appears the case of the defendants is more probable to me in view of their credible witnesses. I accept their evidence and find that they can C enforce their rights under clause 37 of the mortgaged deed, sections 123, 125 and 131 of the Property and Conveyancing Law of Oyo State. I find that the 2nd defendant has been duly appointed a receiver accordingly, under clause 37 of the deed. He is not a corporate body or a bankrupt that cannot be appointed by virtue of sections 334 and 335 of the Companies D Act 1968. He need not give notice of his appointment having not being appointed by a debenture holder of a company's debenture secured by a floating charge. See Section 340 of the Companies Act. To prevent the receiver from performing his duties, the plaintiff should have paid all the money due under the mortgage. See Hickson v. Darlow (1883) 23 Ch.D E 690 at 694.*

Having accepted the case of the defendants, the plaintiffs case therefore fails on merits."

He entered judgment for the 2nd respondent in the sum of F N364,142.08 as counter-claimed.

Dissatisfied with the decision of the trial court, the appellant appealed to the Court of Appeal which dismissed his appeal. He has further appealed to this Court upon four issues formulated by Mr. Adekun of counsel for the appellant who settled the appellant's brief but did not appear before the Court to prosecute the appeal. Mr. Adejoro, appellant's G Managing Director represented the appellant at the hearing of the appeal. In his brief, learned counsel for the respondents described the four issues as "clumsy and the submission on them muddled up and should have entitled the respondents to move this Honourable Court to have been struck out." H Nevertheless, he adopted them in order to allow justice to take its course by hearing the appeal on the merit. I endorse the observation of learned counsel. The four issues for determination are:-

"1. Whether the learned appeal Judges were right in law in holding

that the Mortgage Deed, Exhibit E is valid and lawful.

2. *Whether the learned appeal Judges were right in law in holding that evidence other than evidence before the Court including Exhibits L, D & M need to be adduced by the appellant to prove the collusion as to the date on Exhibit E when such collusion would defeat the object of any law.*

B 3. *Whether the learned appeal Judges were right in law in not restricting themselves to the issues brought before them for adjudication.*

4. *Whether the learned appeal Judges were right in law in failing to take into consideration the forcible take-over of the appellant's assets and trespass by the 1st respondent and the evidence that the respondents have*
C *been mortgagees in possession since 1987 and on the basis of which consideration to assess the damages that should be due to the appellant, even if the judgment debt is upheld."*

When the appeal came for hearing on the 4th of November, 1994 before the ordinary panel, it was adjourned for hearing by a full Court because an
D issue of apparent inconsistency in the decision of this Court in Savannah Bank Nig. Ltd. v. Ajilo (1989) 1 NWLR (pt.97) 305. On the one hand and the decision of the Federal Supreme Court in Solanke v. Abed (1962) NRNL 92 on the other hand had been raised. The Court invited Chief Williams, SAN, Professor Kasumu, SAN and Professor Omotola to assist the Court
E as amici curiae in the determination of the said inconsistency.

The thrust of the appeal on all the issues were predicated on the validity or invalidity of the Mortgage Deed under the Land Use Act. The appellant submitted that the Justices of the Court of Appeal having found that the Mortgage Deed had been executed by the parties before the Gov-
F ernor consented to the mortgage, the Court of Appeal erred in law by its failure to hold the Mortgage Deed void by virtue of Section 22 of the Act. He referred to the lead Judgment of Ogundere, J.C.A., where the learned Justice stated:-

G *"As can be seen from the issues formulated, the main issue was whether the deed of mortgage was in fact executed in 1980 before the Governor's consent in 1985. In which case the Mortgage Deed will be caught by the provisions of the section 22 of the Land Use Act which stipulates that the prior consent of the Governor must be sought and obtained before the deed of mortgage is executed. Savannah Bank v. Ajilo (1989) 1 NWLR (Pt. 97)*
H *305.*

The crux of this appeal is that the consent of the Governor was obtained after the execution of the mortgage contrary to section 22(1) of the Land Use Act 1978. Looking closely at the exhibits, Exhibit E the deed of mortgage was dated by handwriting the 8th of October, 1985. The

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Governor's consent Exhibit E1 was dated 17th September, 1985. By Exhibit L, a letter of 13th Feb., 1980 the 2nd respondent sent ten copies of the Loan and Mortgage Agreement to the Managing Director of the appellant company for execution. It specifically asked that the Company Seal be affixed and that all the ten copies be returned after execution. Again by letter dated 26th July, 1982, the 2nd respondent complained that the loan and mortgage agreement was yet to be registered because the Oyo State Government had not given the necessary consent to the Mortgage transactions. The appellant was then urged to take all necessary steps to obtain and forward the consent to the 2nd respondent soonest. It is therefore safe to conclude that the deed of mortgage was executed by both parties between 1980 and 1982."

The appellant further submitted that contrary to the foregoing finding by the learned Justice, Ogundere, J.C.A. proceeded in his judgment to find as follows:

"The Governor's consent was dated 17th September, 1985 prior to 8th October, 1985 when the deed of mortgage was executed. It was therefore in order and in compliance with section 22(1) of the Land Use Act 1978."

The appellant also referred to the concurring judgment of Muhammad, J.C.A. where he wrote:-

"The Deed of Mortgage was executed sometime between 1980 and 1982. The Governor's consent was obtained on 17th September, 1985. The deed was therefore executed three to five years before the Governor's consent was obtained."

The appellant further contended that in spite of this clear and unequivocal finding that the deed was executed before the Governor's consent, nevertheless, the learned justice proceeded to examine some earlier authorities on which the instant judgment of the High Court had not been based and which were not relevant to the instant case and concluded his judgment as follows:-

"The mere fact that the Deed of Mortgage was executed in 1980 or 1982 and the Governor's consent was obtained in 1985 does not affect the validity of the Deed. Before the Governor's consent it was a lawful agreement to mortgage which could be enforced."

The appellant also attacked the judgment of Salami, J.C.A. where in answer to the submission of the appellant in the Court of Appeal that the respondents had colluded and falsified the date of execution of the Mortgage Deed as 8th October, 1985 in order to defeat the provision of section 22 of the Act, the learned Justice observed as follows:-

"In the absence of any iota of evidence proving collusion as to the date nor of injury to any person being caused nor of defeating the purpose

of any law, I think, the need for independent evidence as to the correctness of date is uncalled for or dispensed with.....Nor is there evidence showing that the respondent.....were in collusion with anyone to carry out a scheme that would defeat the purpose of Land Use Act or any other enactment."

B The learned Justice thereafter proceeded to state:

"The presumption created by section 125 of the Evidence Act is not a conclusive but a rebuttable presumption which occurs only where collusion or fraud is suspected. In the absence of evidence of fraud or collusion, notwithstanding non-production of evidence as to when Exhibit 'E' was executed, the learned trial Judge was perfectly entitled to presume 8th October, 1985 written on the Mortgage Deed as the date of execution of the document by virtue of the provisions of section 125 of the Evidence Act (supra) which allows a court to presume a document, such as Exhibit E, was executed on the date it bears."

D It was the contention of the appellant that Salami, J.C.A., erred in law by failing to appreciate that section 124 of the Evidence Act allowed for independent proof of the correctness of falsity of the date on an instrument and that Exhibits L & M clearly established that the date, 8th October, 1985 on the Mortgage Deed was false and had been inserted by the E 2nd respondent or its agents for the purpose of defeating the object of the Land Use Act which requires a consent first had and received.

Again, referring to the judgment of Salami, J.C.A., wherein the learned Justice considered the law relating to the exercise of the discretionary power of the court on declaration, the appellant contended that the F judgment dwelt on the main issue as reformulated by the learned Justice who dismissed the appeal on that consideration. I italicize the sentence particularly complained of in the said judgment, which reads:

"The reliefs being sought in the proceedings that proceeded on appeal to this court are various declarations and the power to make binding declaration is discretionary remedy and the practice relating to declaration must be exercised with very great reserve and caution. It is not the practice to grant the reliefs sought if they are useless for any purpose or embarrassing or inequitable or unlawful for the court to grant. See Mellstrom v. Garner & Ors (1970) 2 All ER 9; Guaranty Trust Company of New York v. Hannay G Co. (1914-15) All E.R. 24 and Vincent I Bello v. Magnus A. Eweka (1981) H 1 SC 101 at 121 where the Supreme Court of Nigeria Per Eso, J.S.C. said:-

"This is more important as this is a declaratory action, and declaratory judgments are limited by the discretion of the court.

"In my opinion, said Lord Sterndale, M.R. the power of the court to make a declaration, where it is a question of defining the rights of two parties, is almost unlimited; I might say only limited by its own discretion. See Hanson v. Radcliffe Urban District Council (1922) 2 Ch. 490 at Page 507."

Infact, whether or not the point is taken by the defendant, the Court is still not bound to make a declaration once it does not consider it a proper case, in its discretion, to make one."

On the peculiar facts of this case, this is not a proper case to exercise the Court's discretion in favour of appellant. It is not only embarrassing but also inequitable to exercise the discretion of this court infavour of the appellant who deliberately set out. on its own case, to cheat the second respondent."

Concluding his submission, the appellant urged this Court, having regard to the findings of Ogundere and Muhammad, Justices of the Court of Appeal and the evidence, to hold the Mortgage Deed null and void by virtue of Section 22 of the Act and to grant the declarations sought and award damages for aggravated trespass. He distinguished the case of Solanke v. Abed (1962) NRNLR 92 from the present case in that Solanke's case was decided in the context of the Land and Native Rights Ordinance, Cap. 105, Laws of Nigeria 1948 which did not prescribe alienation without consent as an illegal act whereas the present case was subject to Section 26 of the Land Use Act which renders null and void any transaction or any instrument which purports to confer on or vest in any person any interest or right over land without the consent of the Governor. He relied on the decision of this Court in Savannah Bank (Nigeria) Ltd. v. Ajilo (supra).

The appellant also did his best to distinguish the decision of the Privy Council in Denning v. Edwardes (1961) A.C. 245 which was based on the Law of Kenya and submitted that that Law was not inpari materia with our Land Use Act.

The contention of the appellant on the fourth issue for determination was rested on the alleged illegality of the Mortgage Deed which, according to the appellant, rendered the entry of the 1st respondent into the mortgaged premises as trespass and secondly, the manner of the forcible entry with the aid of security dogs and their handlers constituted aggravated trespass even if the Mortgage Deed was valid. He urged the Court to allow his appeal and to grant the reliefs sought in his claims which should be set off against the judgment debt, upheld by the Court below in favour of the 2nd respondent.

In response, learned counsel for the respondents stated the finding of Ogundere and Muhammad, Justices of the Court of Appeal, that the

execution of the Mortgage Deed was prior to the Governor's consent notwithstanding the Court of Appeal was perfectly right in holding that the Mortgage Deed was valid by virtue of section 22(2) of the Act. He contended that the decision of the Court of Appeal was consistent with the decision of the Privy Council in *Denning v. Edwardes* (supra) on the interpretation of the provision of the Land Ordinance of Kenya which was in pari materia with section 22 of our Land Use Act and recognised the need for some form of written agreement to be entered into before applying for the Governor's consent. He referred to *Doyle v. Continental Allns Co. & Otto* (94U.S.535at 538; *Evans v. U.S.*153US 584 at 601 and *Plant v. Wood* C 176 Mass 492 and submitted that in view of the provision of Section 22(2) of the Act, the prior execution of the Mortgage Deed was unimpeachable.

Learned counsel further submitted that the Court of Appeal directly applied the principle of the interpretation of statutes laid down in *James Orubu v. National Electoral Commission* (1988) 5 NWLR (Pt.94) D 323; (1988) 12 S.C. 275 and *Pretty v. Solly* (1859) 26 BEA V 606 at 610 to the effect that a statute which made a special provision in relation to a matter prevailed over another statute which made general provision on the same matter and accordingly, in the instant case, section 22(2) prevailed over section 22(1) of the Act. He urged the Court to hold that the decision E of the Court of Appeal was in consonance with the decision of the Federal Supreme Court in *Solanke v. Abed* (supra) and judicial adherence to precedence. He cited *Hand Field's case* (1873) LR 8 Com. Pl. Ca. 313 at 320 and *Merry v. Nickalis* (1872) LR 7 Ch. Ap. Cas. 750.

With respect to the issue on collusion by the second respondent to F defeat the provision of the Act by dating the Mortgage Deed "8th day of October, 1985", learned counsel for the respondent furnished simple answer to the issue that it was the intention of the parties as provided by the Mortgage Deed, to wit, "take note that the date of commencement of the transaction should not predate this consent". It is crystal clear that al- G though the parties had executed the Mortgage Deed and the appellant had enjoyed the benefits and facilities of the agreement long before seeking the Governor's consent, they had agreed to defer dating the commencement of the Mortgage Deed until after the consent had been obtained. Surely, the appellant cannot approbate and reprobate.

H On the third issue, which for ease of reference reads:-
"Whether the learned Judges were right in law in not restricting themselves to the issues brought before them for adjudication"

Learned counsel submitted that none of the three Justices of the Court of Appeal went beyond the issues presented to them for determina-

Awojugbagbe Light Ind. Ltd v. Chinukwe (1995) 4 KLR Bello CJN 721
tion. He conceded, however, Salami, J.C.A. had reformulated the main issue, which was too vague as formulated by the appellant, in order to give it precision and clarity which the learned Justice was entitled to do: Latunde & Anor v. Bello Lajinfin (1989) 3 NWLR (Pt. 108) 177; (1989) 5 S.C. 59; Okoro v. State (1988) 5 NWLR (Pt. 94) 255; (1988) 12 S.C. 191 and Dahiru Sande v. Haliru Abdullahi (1989) 4 NWLR (Pt. 116) 387; (1989) 7 S.C. 216.

Finally, learned counsel for the respondents submitted that the fourth issue should be struck out because it was very clumsy and sought reliefs which had not been claimed and canvassed in the lower courts. A court does not award what had not been claimed: Obikoya v. Wema Bank (1989) 1 NWLR (Pt. 96) 157; (1989) 1 S.C. 127; Awoyegbe v. Ogbeide (1988) 1 NWLR (Pt. 73) 695; (1988) 3 SC 99; Onyia v. Oniah & Anor (1989) 1 NWLR (Pt. 99) 514; (1989) 2 SC 20; Obayemi v. Obayemi (1967) 1 All NLR 161; National Insurance Corporation v. Power & Industrial Engineering Co. Ltd. (1986) 1 NWLR (Pt. 14) 1; Babalola v. State (1989) 4 NWLR (Pt. 115) 264 at 295 and Emmanuel Adedeji v. National Bank (1989) 1 NWLR (Pt. 96) 212 at 266. With respect to the claim for damages for forcible entry, learned counsel submitted that it is trite law that a mortgagee is not liable in civil action for forcible entry but may be liable under the criminal law. He relied on Fisher and Lightwood on Mortgage, 8th Ed. p. 271; Beddall v. Maitland (1881) 17 Ch. D 174; Hemmings v. The Stoke Poges Golf Club Limited (1920) 1 KB 720; Aglionby v. Cohen (1955) 1 QB 558.

For the purpose of proper comprehension of the major question for consideration in his brief and oral argument as amicus curiae, Chief Williams, SAN posed two questions:

“(i) Precisely what constitutes a contravention of the requirement of section 22 of the Land Use Decree.

(ii) What is the effect of a contravention of the requirement of section 22 of the Land Use Decree on the transaction to which it relates.”

He submitted that neither Solanke’s case nor Ajilo’s case provided any answer to question (i) but the correct answer to question (ii) was supported by the reasoning of this Court in Ajilo’s case. He, however, prefaced his submission by stating that it was only when a contravention was identified or found to exist under question (i) that question (ii) would arise.

Referring to section 22 of the Act, the learned amicus curiae submitted that the section clearly prohibited transactions or instruments whereby the holder of a statutory right of occupancy alienated his right of occupancy “by assignment, mortgage, transfer of possession, sublease or otherwise howsoever” but, wide as the words appeared to be, they were not wide enough to include purported alienation which the parties did not intend to be effective. In his observation the section did not prohibit the holder from entering into a contract to participate in any of the transactions specified in

the section or to a contract to be a party to any deed or instrument giving effect to such transaction. However, he indicated that it would be unlawful for the party to complete such transaction or deed or instrument without the consent of the Governor first had and obtained. He argued that in the case of an instrument which was a mortgage deed as in the present case, B the section struck at the moment the deed became effective as such but not before. It followed, he concluded, that a person could not be said to have committed a contravention of section 22 until he brought into existence in the case of a Mortgage Deed an instrument which effectively enabled the mortgagee to exercise rights thereunder. Upon these premises, the learned C Senior Advocate of Nigeria formulated the following question:

"At what point in the transaction relating to the Mortgage Deed (Exhibit E) did the plaintiff here in effectively put the 2nd defendant (mortgagee) in a position where, but for the want of the Governor's Consent, he would have been able to exercise the rights of a mortgagee? Was it at the time of the D execution and sealing of Exhibit E as the Court of Appeal appears to think, or was it at the time of the delivery thereof as the Supreme Court is now urged to hold."

In answering the question, Chief Williams, SAN., submitted that the law was well settled that a transaction created by a deed did not come E into effect prior to the delivery of the deed; that a deed only became effective upon its delivery and where it was intended by the parties that it would not have effect until a certain time had arrived or till some condition had been performed, then until the specified time had arrived or the condition had been performed, the instrument was not a deed but a mere escrow. He F relied on Halsbury's Law of England 4th Ed. Vol. 12 para. 1329; Goddard's case (1584) 76 ER 396; Vincent v. Premo Enterprises Ltd. (1969) 2 QB 609 and Mowatt v. Castle Steel & Iron Works Company (1887) 34 Ch. D 58 in support of the contention. He pointed out that since the date of the delivery of the Mortgage Deed in the present case was not made an issue, G the presumption in Halsbury's Laws of England, 4th Ed. Vol. 12 para. 1486 and section 127 of the Evidence Act applied and it was presumed delivered on the 8th October, 1985, being the date of the Mortgage Deed.

Finally, Chief Williams SAN, answered question (1) that a contra- H vention of the requirement of section 22 of the Act occurred, in the case of alienation of a right of occupancy carried out by a deed, at the time when the relevant deed was delivered and not at the time when it was executed or sealed and since the Mortgage Deed was delivered after the Governor's consent, there was no contravention of the section.

In the same vein, Professor Kasumu SAN also distinguished the present appeal from the decisions in *Solanke v. Abed and Ajilo*'s case in that the issues raised in those cases were not particularly relevant to the issue raised in the instant case. In the earlier cases there was no consent of the Governor at all to the transaction involved and the Court had to determine the effect of lack of consent to those transactions. In the present case, consent was obtained before the transaction became effective. The effect of section 22 of the Act, he contended, was that it did not matter when a deed was executed and alienation could only be said to have taken place after the Governor had given his consent and before the consent the deed was inchoate.

Learned counsel further submitted that the undue emphasis placed on the judgment of the Court of Appeal was as a result of the wrong formulations of the first issue for determination by that Court. He referred to the formulation in the lead judgment which reads:

"As can be seen from the issues formulated, the main issue was whether the deed of mortgage was in fact executed in 1980 before, the governor's consent in 1985. In which case the Mortgage Deed will be caught by the provisions of Section 22 of the Land Use Act which stipulates that the prior consent of the governor must be sought and obtained before the deed of mortgage is executed"

and contended that this of course was not what the Act stated. Nowhere did the Act state that consent must be given before execution of any document. On the contrary, sections 22(2) and 26 presupposed the existence of an agreement of a sort before the Governor's consent.

As *amicus curiae*, Professor Omotola also made useful contribution for the determination of the issues. He pointed out that the fact that the consent of the Governor had been obtained was not in dispute but the controversy was whether the consent was obtained prior to the execution of the Mortgage Deed or after it had been executed and, if the consent was obtained after the execution, whether the Mortgage Deed was void. He referred the Court to the judgments of Ogundere and Salami, Justices of the Court of Appeal, who decided that the consent was given before the execution of the Mortgage Deed and therefore the provisions of section 22 of the Act relating to consent had been complied with.

The learned Professor submitted that for the appreciation of the proper interpretation of section 26 of the Act, the court ought to pay due attention to the provision of section 22(2). Citing the provision of the subsection, he contended that the provision was in line with the view of Viscount Simond in *Denning v. Edwards* (*supra*) wherein their Lordships ex-

pressed the opinion that, there was nothing contrary to law in entering into a written agreement before the Governor's consent was obtained. He surmised that the draftsman of the Act had anticipated the problem which might arise were it to be insisted upon that no document should be prepared in furtherance of a transaction or no agreement, should be reached B in furtherance of a transaction on which the Governor's consent would be endorsed. The issue therefore for decision by the court was, at which stage the consent of the Governor must be obtained. He contended that the words "*first had and obtained*" within the context of section 22 must mean no more than an emphasis on the need to obtain consent. Practical reality C must dictate the stage at which such consent should be obtained. He concluded that it could not seriously be suggested that section 22 be given a literal interpretation such as to require parties to a transaction to ask the Governor to approve their intention to enter into a transaction.

It is note worthy that learned counsel for the respondents and D amici curiae are in unanimous agreement in their submissions that upon the proper interpretation of sections 22 and 26 of the Land Use Act there was no breach or contravention of the provisions of the Act in this case on appeal. The relevant sections of the Act may be reproduced for ease of reference. They are:

E "*22. It shall not be lawfull for the holder of a statutory right of occupancy granted by the Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise howsoever without the consent of the Governor first had and obtained:*

F *(2) The Governor when giving his consent to an assignment, mortgage or sublease may require the holder of a statutory right of occupancy to submit an instrument executed in evidence of the assignment, mortgage or sublease and the holder shall when so required deliver the said insstrument to the Governor in order thaat the consent given by the Governor under*
G *Subsection (1) of this section may be signified by endorsement thereon.*

"26. Any transaction or any instrument which purpots to confer on or vest in any person any interest or right over land other than in accordance with the provisions of this Act shall be null and void."

In Ajilo' s case which dealt with alienation of a mortgaged prop- H erty by the mortgagee under a Mortgage Deed when there was no consent of the Governor to the mortgage, this Court declared the mortgage to be null and void by virtue of lack of the Governor's consent.

There is no doubt that the Governor gave consent to the mortgage in the instant case, but he did so after the Mortgage Deed had been ex-

ecuted. Accordingly, unlike Ajilo's case, the controversy does not revolve on lack of consent but on consent given after the execution of the Mortgage' Deed. It was the contention of the appellant that the Governor's consent must be obtained before the mortgage and since the consent was obtained after the execution of the Mortgage Deed, the deed was null and void by virtue of section 26. On the contrary, the respondents' counsel and amici curiae contended that since the parties had intended the Mortgage Deed to be effective after the Governor's consent, its prior execution and physical delivery did not make it effective but rendered it inchoate and a mere escrow. The Mortgage Deed did not therefore come into effect between 1980 and 1982 when it was executed but it became effective on 8th October, 1985 when it was dated after the Governor's consent in accordance with the intention of the parties.

The foregoing contention of the learned amici curiae is supported by relevant authorities they cited. The importance of the intention of the parties to be bound by its terms for the purpose of rendering a deed effective in law is clearly set out in Halsbury's Laws of England 4th Ed. Vol. 12 para. 1329 which reads:

"1329. Delivery of deed: In order to be effective a deed must be delivered as the act and deed of the party expressed to be bound by it, as well as sealed. No special form or observance is necessary for the delivery of a deed, and it may be made in words or by conduct. The usual form of delivering a deed by words is for the executing party to say, while pulling his finger on the seal, "I deliver this as my act and deed".

It is not necessary, however, to follow this form of execution; nor is it necessary that the deed should actually be delivered over into the possession or custody either of the person intended to take the benefit of the deed, or to a third person to the use of the party taking the benefit of the deed; though if the party to be bound so hands over the deed that is sufficient delivery without any words.

What is essential to delivery of the document as a deed is that the party whose deed the document is expressed to be (having first sealed it) shall by words or conduct expressly or impliedly acknowledge his intention to be immediately and unconditionally bound by the provisions contained in it." (Italics is mine)

In *Vincent v. Premo Enterprises Ltd.* (supra) at p. 619 Lord Denning, M.R. aptly Stated the effect in law of a deed which a party did not acknowledge his intention to be immediately and unconditionally bound by the provisions contained therein. It is pertinent to set it out extensively.

"The law as to "delivery" of a deed is of ancient date. But it is

reasonably clear. A deed is very different from a contract. On a contract for the sale of land, the contract is not binding on the parties until they have exchanged their parts. But with a deed it is different. A deed is binding on the maker of it, even though the parts have not been exchanged, as long as it has been signed, sealed and delivered. "Delivery" in this connection does not mean "handed over" to the other side. It means delivered in the old legal sense, namely an act done so as to evince an intention to be bound. Even though the deed remains in the possession of the maker, or of his solicitor, he is bound by it if he has done some act evincing an intention to be bound, as by saying "I deliver this my act and deed." He may, however, make the "delivery" conditional: in which case the deed is called an "escrow" which becomes binding when the condition is fulfilled.

The law was much considered by the House of Lords in the leading case of *Xenos v. Wickham* (1866) LR2 HL 296. After the judges had been brought together to advise the House, Lord Cranworth said at p. 323:-

"In the first place, the efficacy of a deed depends on its being sealed and delivered by the maker of it; not on his ceasing to retain possession of it. This, as a general proposition of law, cannot be controverted. It is not affected by the circumstance that the maker may so deliver it as to suspend or qualify its binding effect. He may declare that it shall have no effect until a certain time has arrived, or till some condition has been performed, but when the time has arrived or the condition has been performed, the delivery becomes absolute and the maker of the deed is absolutely bound by it, whether he has parted with the possession or not. Until the specified time has arrived, or the condition has been performed, the instrument is not a deed. It is a mere escrow."

That was applied recently by this court in *Beesly v. Hallwood Estates Ltd.* (1961) Ch. 105, where a company was held to be bound by a lease which had been signed, sealed and delivered by the company, even though it had not been sent to the other side at all. It was delivered as an escrow, subject to a condition that the tenant should hand over the counterpart. He did hand it over and the company was held bound accordingly because the condition had been fulfilled." (italics mine)

The observation of Viscount Simond in *Denning v. Edwardes* (supra) on the efficacy of a conditional agreement is also relevant. In interpreting section 88 of the Kenyan Land Ordinance 1948, which is in pari materia with section 22 of our Land Use Act he stated:

"It has been argued that the consent of the Governor must be obtained before the agreement is entered into and that subsequent consent

is insufficient. Some form of agreement is inescapably necessary before the Governor is approached for his consent. Otherwise negotiation would be impossible. Successful negotiation ends with an agreement to which the consent of the Governor cannot be obtained before it is reached. Their Lordships are of opinion that there was nothing contrary to law in entering into a written agreement before the Governor's consent was obtained. The legal consequences that ensued was that the agreement was inchoate till that consent was obtained. After it was obtained the agreement was complete and completely effective."

The law relating to the effective date of a deed is stated by Halsbury's Law of England, 4th Ed. para. 1486 as follows:

"Extrinsic evidence to prove date. Extrinsic evidence is admissible to prove the date of delivery of a deed, or of the execution of any other written instrument A deed takes effect from delivery, and any other written instrument from the date of execution, and though the date expressed in the instrument is prima facie to be taken as the date of delivery or execution, this does not exclude extrinsic evidence of the actual date; and the actual date when proved, prevails in case of variance, over the apparent date."

Also section 127 of our Evidence Act provides:

"127 When any document purporting to be, and stamped as, a deed, appears or is proved to be or to have been signed and duly attested, it is presumed to have been sealed and delivered although no impression of a seal appears thereon."

Now, reverting to the Mortgage Deed in issue, it is transparently clear that the parties did not intend it to be effective at the date of its execution and the letter, Exhibit E1, conveying the Governor's consent reflected that intention by its directive which reads:

"Please take note that the date of commencement of the transaction should not predate that of this consent."

In compliance with their intention the deed was not dated at its execution but was dated 8th October, 1985 after the Governor's consent. Since the date of delivery of the Mortgage Deed was not made an issue and in the circumstances of the case, having regard to the evidence and the findings of the trial court, it is to be presumed that the deed was delivered on the date it was dated, to wit, the 8th of October, 1985. Accordingly, on the authority of *Vincent v. Premo Enterprises Ltd.* (supra) and *Denning v. H Edwardes* (supra), the Mortgage Deed, a conditional deed, was a mere escrow at its execution and it only became binding and effective after the

condition, which was the Governor's consent, had been fulfilled. It follows that the Mortgage Deed did not breach or contravene section 22 of the Act. The deed is valid.

Since the appeal in respect of all the appellant's claims other than B the claim for trespass for forcible entry was based on the purported invalidity of the Mortgage Deed, the appeal failed. The issue relating to forcible entry of the mortgaged premises which according to the submission of the appellant amounted to a trespass, even if the Mortgage Deed was valid, may be summarily dismissed. A mortgagee, like a landlord exercising his C right to possess after the expiry of his tenant's lease, or his agent who entered and took possession of the mortgaged property in exercise of his right under the mortgage agreement is not liable for damages for forcible entry because the right to possess the property had become vested in the mortgage and his agent, the receiver, and the forcible entry was done in D furtherance of their rights to possess: See *Beddall v. Maitland* (1881) 17 Ch.D.174; *Hemmings v. Stoke Poges Gold Club* (1920) 1 KB 720 CCA and *Aglionby v. Cohen* (1955) 1 QB 558. The submission is therefore untenable.

I should like to reiterate our appreciation for the commendable E assistance given to the Court by the learned amici curiae which enabled us to reach decisions on the issues. They have put up a lot of learning and research for the purpose of the resolution of the apparent conflict in the decisions of the Federal Supreme Court and of this court in *Solanke v. Abed* (supra) and *Savannah Bank v. Ajilo* (supra) which were founded on F the absence of the Governor's consent under section 11 of the Land and Native Rights Ordinance and section 22 of the Land Use Act respectively. In the instant case, there is the consent of the Governor and for this reason the decisions in the two previous cases are not relevant for its determination. The resolution of the apparent conflict is therefore not necessary and G it has become an academic question. This court has in numerous cases established that it would not indulge itself in the luxury of academic exercise.

The appeal is accordingly dismissed. The decision of the Court of Appeal is affirmed. N1,000.00 costs to the respondents.

H

KUTIGI JSC

I have had the privilege of reading in advance the judgment just delivered by my learned brother Bello, Chief Justice of Nigeria. He has ably

and fully set out the facts, the issues and the law. I am in complete agreement with the reasons comprehensively and lucidly stated therein for dismissing the appeal. I have nothing to add. I will also dismiss the appeal and hereby confirm the judgment of the two lower courts. I abide by the order for costs made in the lead judgment.

B

OGUNDARE JSC

I have had the advantage of reading in draft the judgment of the Honourable the Chief Justice just delivered. For the reasons given by him in the said judgment which I hereby adopt as mine, I too dismiss this appeal with cost as assessed in the lead judgment of my learned brother the Chief Justice.

C

OGWUEGBU JSC

I have had the advantage of reading in advance the draft Judgment just delivered by my learned brother Bello, C.J .N. and I agree with his reasoning and conclusion. I would also dismiss the appeal.

D

The facts of the case have been fully set down in the lead judgment and I do not find it necessary to repeat them.

The plaintiff/appellant's contention in this appeal as it relates to the provisions of the Land Use Act, 1978 is that the deed of mortgage (Exhibit "E") relied upon by the 2nd defendant/respondent to appoint the receiver (1st defendant/respondent), is null and void having been executed long before the Governor's consent was given and in contravention of section 22 of the said Act.

E

Both parties filed briefs of argument and five issues for determination are identified in the appellant's brief. The Court of Appeal in determining the appeal before it, held the view that there is inconsistency in the decisions of this court in *Savannah Bank (Nig) Ltd. v. Ajilo* (1989) 1 NWLR (Pt.97) 305 and the Federal Supreme Court in *Solanke v. Abed* (1962) 1 NRNLR 92. The court below opted for the latter case in dismissing the appeal of the plaintiff herein.

F

As a result of the perceived conflict in the two decisions by the court below, Chief Williams, S.A.N. and Professor Kasunmu, S.A.N. who took part as counsel in *Ajilo's* case *supra* were invited to assist the court as *amici curiae*. Both Senior Counsel responded to the invitation and filed briefs of argument together with Professor J .A. Omotola who was also invited. The learned *amici curiae* made oral submissions in addition to the briefs filed. Dr. H.O. Kusamotu who is counsel for the respondents herein

H

was also counsel for the respondents in Ajilo' s case supra.

The conclusions of the learned justices of the Court of Appeal who heard the appeal are summarised as follows:

Ogundere, J.C.A. who presided, held as follows:-

"As can be seen from the issues formulated, the main issue was whether the deed of mortgage was infact executed in 1980 before the Governor's consent in 1985. In which case the mortgage deed will be caught by the provisions of section 22 of the Land Use Act which stipulates that the prior consent of the Governor must be sought and obtained before the deed of mortgage is executed. Savannah Bank v. Ajillo (1989) 1 NWLR (Pt.97)

C 305

.....

It is therefore safe to conclude that the Deed of Mortgage was executed by both parties between 1980 and 1982 but the space for the date was left open, until Governor's consent was obtained, and that was why the date inserted after the consent was hand written Looking closely at the exhibits, Exhibit "E" the decd of mortgage was dated by handwriting the 8th of October, 1985. The Governor's consent Exhibit "E1" was dated 17th September, 1985 prior to 8th October, 1985 when the Deed of Mortgage was executed. It was therefore in order, and in compliance with section 22(1) of the Land Use Act, 1978."

E

Salami, J.C.A. , concluded that the execution of the decd of mortgage before submitting it to the Governor for his consent did not contravene section 22 of the Land Use Act. He went further to hold that:

"There is nothing in the Act preventing prior execution of an instrument before an approach is made to the Governor for his consent. So that the provisions that the consent of the Governor must first be had and obtained before a mortgage can be made, means no more than that the agreement entered into will remain inchoate until the Governor's consent thereon is sought and obtained. Governor would be handicapped in his duty to protect public policy If he gives his consent blind folded. Public policy is better protected by his having foreknowledge of what he is called upon to consent to. Consenting to a sub-lease, mortgage, transfer of possession prior to the parties drawing up an agreement is analogous to buying a pig in the poke."

G

H Muhammad, J.C.A. in his own contribution asked the question:-
"Would a deed be rendered "null and void" if it was first executed without the Governor's consent and then the consent is subsequently obtained?"

He answered the question thus:

"In view of the above, it is my considered opinion that the mere fact that the Deed of Mortgage was executed in 1980 or 1982 and the Governor's consent was obtained in 1985 does not affect the validity of the Deed. Before the Governor's consent it."

The learned appellant's counsel Mr. Adekun who was absent at the hearing, submitted in his brief of argument that the basis of the findings of Ogundere and Muhammad, JJ .C.A. with regard to the date of execution of Exhibit "E" in relation to the date of the consent (Exhibit "E1"), should have led the Justices of the court to hold that the execution of Exhibit "E" before the consent of the Governor rendered it null and void.

It was further contended by learned counsel that the three Justices of the Court of Appeal had each independently dismissed the appeal for a variety of reasons not based on a full and proper application of the relevant laws. He further argued that there is no distinction between the appellant's case and that of Ajilo supra and that section 22(1) of the Land Use Act requires prior consent before interest in land is alienated. He submitted that failure to obtain prior consent rendered the deed of mortgage null and void ab initio and the loan and mortgage transaction, illegal.

The learned counsel for the respondents in agreeing with the conclusions of Ogundere and Muhammad, JJ.C.A. that Exhibit "E" was executed before the relevant consent of the Governor was obtained, submitted that the three Justices of the court below were correct in holding that the execution of Exhibit "E" before the Governor's consent was legally valid and that the court anchored its decision on the provision of section 22(2) of the Act.

He referred the court to the case of Denning v. Edwards (1961) A.C. 245 on the interpretation of a similar provision of Kenya Crown Lands Ordinance which is in pari materia with section 22(2) of the Land Use Act. He submitted that section 22(2) of the Act recognises the need for some form of written agreement to be entered into before an approach is made to the Governor.

He further submitted that the provisions of section 22(1) and (2) of the Land Use Act are repugnant to one another and in a situation like this, the court should follow the rule stated by Romilly, M.R. in *Pretty v. Solly* (1859) 26 Beav. 606 at 610.

In his submission, Chief Williams, S.A.N., stated that what section 22 of the Land Use Act prohibits the holder of a statutory right of occupancy from doing (without the Governor's consent), is:

"to alienate his right of occupancy or any part thereof by assignment, mort-

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gage, transfer of possession, sublease or otherwise howsoever without the
consent of the Governor first had been obtained."

It was his contention that no one can be said to have committed a contravention of section 22 until he brings into existence an instrument which effectively enables an assignee, or mortgagee or sub-lessee of the right of occupancy to exercise rights thereunder.

B The learned Senior Counsel posed the question:

"At what point in the transaction relating to the mortgage deed (Exhibit E) did the plaintiffs herein effectively put the 2nd defendant (mortgagee) in a position where, but for the want of Governor's consent, he would have been able to exercise the rights of a mortgagee? Was it at the time of execution and sealing of Exhibit (as the Court of Appeal appears to think) or was it at the time of delivery thereof (as the Supreme Court is now urged to hold)."

C He submitted that in the case of any transaction by deed, the law is that such transaction does not come into effect prior to delivery. He referred the court to Halsbury's Laws of England 4th edition Vol. 12 paragraph 132 the cases of Goddard (1584), 2Co. Rep. 4b, 76 E.R. 392 at 398. Vincent v. Premo Enterprises Ltd. (1969) 2 Q.B. 609 at 619-620 and Mowatt v. Castle Steel Iron Works Co. (1887) 34 Ch.D. 58.

E He again submitted that the date of execution of Exhibit "E" is not material to the operation of section 22 of the Land Use Act, that the deed had not become effective at the date of its execution and that it only became effective after its delivery to the 2nd defendant following the Governor's consent.

F He finally submitted that the Land Use Act contains clear and unambiguous provisions regarding the effect of a contravention of the consent requirement of section 22 thereof by not only prescribing what shall be done but spells out the consequence of non-compliance. We were urged to hold that a contravention of or non-compliance with the requirement of section 22 of the Act occurs (in the case of alienation of a right of occupancy), at the time when the relevant deed was delivered and not at the time when it was executed or scaled.

G Dealing with the instant case, Professor Kasunmu submitted that section 22 of the Act provides that no alienation can take place without the consent of the Governor being in place; that the effect of this is that no matter what documents are executed or when so executed, the alienation can only be said to have taken place after consent and that the Act does not say that consent must be in place before execution of any document. In his view, section 22(2) and section 26 presuppose the existence of an agreement of some sort.

H

Professor Omotola submitted in his brief that if due attention is paid to section 22(2) of the Act, it will assist in the appreciation of the proper interpretation to be given to section 26. He referred the court to the case of *Denning v. Edwards* supra. As to the stage at which the consent of the Governor must be obtained, he submitted that the words “first had and obtained” must mean no more than an emphasis on the need to obtain consent and that practical reality must dictate the stage at which such consent must be obtained. It was his further submission that it could not seriously be suggested that section 22 should be given a literal interpretation such as to require parties to a transaction to ask the Governor to approve their intention to enter into a transaction.

On the effect of non-compliance, he referred to section 26 which provides that the transaction shall be void. He submitted that a void transaction is a nullity: *Macfoy v. U.A.C.* (1963) 3 All E.R. 1169 at 1193.

In conclusion, he urged the court to pronounce in favour of strict compliance with section 22(2) of the Act as this will best serve the cause and objectives of the Act and to lean in favour of what he called “Public Conscience Principle” or the “Justice of the case Principle” which requires the court to grant relief unless that would be an affront to public conscience. He referred to the cases of *Saunders v. Edwards* (1987) 1 W.L.R 1116, *EuroDiam Ltd. v. Bathurst* (1990) 1 Q.B. 1 and *Haward v. Sislar Container Passport Ltd.* (1990) 1 WLR 1292.

The submissions of the learned amici curiae support the contention of the learned appellant’s counsel that there is no breach of section 22 of the Land Use Act.

It is my view that a resolution of any inconsistency or conflict between the decisions of *Ajilo* supra and *Solanke* supra, assuming such conflict exist, does not arise in this appeal. I have therefore left out all the submissions in that regard made by learned counsel since I will not consider them in the determination of this appeal. For the moment, I will give consideration of this appeal to one point alone, that is whether Exhibit “E” is in contravention of section 22 of Land Use Act based on the pleadings, oral and documentary evidence tendered by the parties.

Be that as it may, the decisions of the Federal Supreme Court and this court in *Solanke v. Abed* supra and *Savannah Bank (Nig) Ltd. v. Ajilo* supra were based on total absence of the Governor’s consent under section 11 of the Land and Native Rights Ordinance Cap. 105 Laws of Nigeria, 1948 and section 22 of the Land Use Act whereas in the present case, the consent of the Governor was obtained. This made a difference.

Section 22 of the Land Use Act, 1978 prohibits the alienation of

statutory right of occupancy without the consent of the Governor. Sub-sections (1) and (2) thereof provide:

“(1) It shall not be lawful for the holder of a statutory right of occupancy granted by the Military Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise howsoever without the consent of the Military Governor first had and obtained;

Provided that the consent of the Military Governor.....

(2) The Military Governor when giving his consent to an assignment, mortgage or sub-lease may require the holder of a statutory right of occupancy to submit an instrument executed in evidence of the assignment, mortgage or sub-lease and the holder shall when so required deliver the said instrument to the Military Governor in order that the consent given by the Military Governor under subsection (1) may be signified by endorsement thereon.”

Section 26 of the said Act stipulates that:

“Any transaction or any instrument which purports to confer on or vest in any person any interest over land other than in accordance with the provisions of this Decree shall be null and void.”

It is the contention of the plaintiff that the deed of mortgage (Exhibit “E”) was executed in or about 1980 when he returned the duly executed loan and mortgage agreement to the 2nd defendant with a covering letter Exhibit “D” which is dated 11:3:80. This assertion is also contained in paragraphs 7 and 8 of its amended statement of claim. The 2nd defendant’s contention is that it was on 8:10:85 that the plaintiff formally mortgaged its property to it (2nd defendant). That is the date inserted in Exhibit “E” after the Governor’s consent Exhibit “E” dated 17:9:85.

The court of trial held that the consent having been given before the mortgage deed was dated, therefore, the deed is valid and lawful under section 22 of the Act (Italics is for emphasis only)

The court below laid emphasis on the date of execution of Exhibit “E”. As far as that court is concerned, it is the date of execution of the mortgage deed that is material to the creation of a valid instrument of mortgage. The three learned Justices of that court came to the conclusion that Exhibit “E” was in compliance with section 22 of the Act but for different reasons which are wrong. The wrong reasons emanated from the failure, with respect, to ask themselves the question as to when a deed of mortgage becomes effective and legally binding.

Exhibit “E” is an instrument under seal issuing from a corporate body. The appellant cannot claim that it delivered it through Exhibit “D” to

the 2nd respondent after signing and sealing it. When the appellant applied to the Governor on 30: 1:84, it was clear to both parties that the consent of the Governor was required to make the transaction effective.

Before the appellant applied to the Governor for his consent, the 2nd respondent was pressurising it to obtain the necessary consent Exhibit “M” dated 26:7:82 was a letter written to the appellant by the 2nd respondent reminding the appellant that he had not obtained the consent and expressed its anxiety to complete the transactions as soon as possible.

Exhibit “M” reads:

“Loan And Mortgage Agreement

The above-mentioned document is yet to be registered because Oyo State Government has not given the necessary consent to the Mortgage transactions. You will agree with us that this matter has dragged on for so long. In view of our anxiety, to complete the transactions as soon as possible, we now call on you to take all necessary steps to obtain and forward to us soonest CONSENT of the State Government to the Mortgage transactions.” D

Again, clause 30 of Exhibit “E” makes it abundantly clear that the consent of the Governor is a prerequisite to the validity of the mortgage instrument. Clause 30 reads:

“For the consideration afore-said the Borrower as Beneficial Owner (with the consent of the Governor of Oyo State) hereby charges by way of first E legal mortgage all the properties “

The fact that the appellant applied for consent on 30:1:84, that by Exhibit “M”, the 2nd respondent reminded the appellant of the need to obtain the consent “soonest” and the provision of clause 30 of Exhibit “E”, it is quite clear to the parties that Exhibit “E” required the consent of the F Governor to make the transaction effective.

Section 22 of the Act prohibits transactions or instruments whereby a holder of a statutory right of occupancy alienates his right of occupancy by assignment, mortgage, transfer of possession, sublease or otherwise whatsoever without the prior consent of the Governor. G

It is therefore essential to determine, as rightly submitted by Chief Williams, S.A.N., the point in the transaction relating to the mortgage (Exhibit “E”) when the plaintiff effectively put the 2nd defendant (the mortgagee) in a position where but for the want of Governor’s consent, it would have been able to exercise the rights of a mortgagee. In other words, what was the nature of Exhibit “E” before the Governor gave his consent? When then did Exhibit “E” take effect? These are crucial questions. The correct H

answers to them will determine whether there was contravention of section 22 of the Land Use Act or not.

A deed takes effect from the time of its delivery and not from the day on which it is therein stated to have been made or executed. Any other written instrument takes effect from the date of execution. Extrinsic evidence is, however, admissible to prove the date of delivery of a deed, or the execution of any other written instrument. The final and absolute transfer of a deed properly executed, to the grantee or to some person for his use in such a manner that it cannot be recalled by the grant or constitutes delivery. It is also not necessary that the person executing should part with physical possession of the instrument See Words and Phrases Legally Defined Vol. 2 p.38 (Reprinted in 1978) and Halsbury's Law of England 4th edition Vol. 12 paras. 1329 and 1356.

The delivery may be conditional as an escrow. An escrow is described in Norton Upon Deeds 1st edition p.15 as:

D “..... an instrument delivered to take effect on the happening of a specified event, or upon the condition that it is not operative until some condition is performed, then pending the happening of the event or the performance of the condition, the instrument is called an escrow Until the specified time has arrived or the condition has been performed, the instrument is not a deed. It is a mere escrow. See *Xenos v. Wickham* (1866) L.R. 2 H.L. 296 at 323, *Beesly v. Hallwood Estates Ltd.* (1961) 1 Ch. 105 at 116 and *Vincent v. Premo Enterprises Ltd.* (1969) 2 Q.B. 609..... “

Exhibit “E” was an escrow. When the Governor gave his consent on 8:10:85, it became absolute and the appellant was absolutely bound by it. In *Goddard v. Denton* (1584) 76 E.R. 396, a date was held not to be of the substance of a deed; for though it may lack a date, or have a false date, yet the deed is good for it takes effect from the delivery and not from the date.

Mention must also be made of the case of *Denning v. Edwards* supra cited and relied upon in the respondents' brief. It was a decision of the Privy Council on appeal from the then Court of Appeal for Eastern Africa. One of the issues in the appeal was the interpretation of section 88 of the Crown Lands Ordinance (Laws of Kenya, 1948) namely whether consent given subsequent to sale of Crown Land was valid. The said section 88 is in pari materia with section 22 of the Land Use Act. It provides:-
 H “88(1) No person shall, except with the written consent of the Governor, sell, lease, sub-lease, assign, mortgage or otherwise by any means whatsoever, whether of the like kind to the foregoing or not, alienate, encumber, charge or part with possession of land which is situate in the high lands, nor

except with the written consent of the Governor shall any person acquire any right, title or interest in any such land for or on behalf of any person without the consent of the Governor.

(2)

(3) *Any instrument, in so far as it purports to effect any of the transactions referred to in subsection (1) shall be void unless the terms and conditions of such transaction have received the consent of the Governor which shall be endorsed on the “instrument.”*

In that case the respondents as plaintiffs instituted an action in the Supreme Court of Kenya against the appellant claiming specific performance of an agreement dated 17:4:54 whereby the appellant agreed to sell to the respondents a certain parcel of land.

It was common ground that the agreement did not bear any endorsement of the consent of the Governor. It was the submission of the appellant that under subsection (3) of section 88 of the Crown Lands Ordinance, the agreement was void.

The Privy Council, in dismissing the appeal, advised Her Majesty that the agreement to sell was not void under section 88 of the Ordinance; that an agreement to sell did not effect any transaction within the meaning of subsection (3) of section 88 which was not applicable to the agreement in question and the consent of the Governor need not be endorsed on it.

It was further held that subsection (3) was not applicable to agreements for the transactions mentioned in subsection (1) and that there was nothing contrary to law in entering into written agreement for sale before the Governor’s consent was obtained. (Italics is for emphasis)

Contrary to the submission of Mr. Adekun in his brief of argument, the case of Denning v. Edwards supra is very relevant in the interpretation of section 22 of the Land Use Act. It buttresses the point that the signing and scaling (execution) of Exhibit “E” is within the contemplation of subsection (2) of section 22 of the Land Use Act. The Governor when giving his consent may require the holder of ‘the statutory right of occupancy to submit an instrument executed in evidence of the assignment, mortgage (etc) in order that his consent under subsection (1) may be signified by endorsement thereto.

Paragraphs 2 and 3, of Exhibit “E1” confirm the fact that section 22(2) H contemplates the existence of Exhibit “E”.

The said paragraphs of Exhibit “E” read:-

“2. It is not necessary that the deed evidencing the approved transaction be returned for endorsement thereon of the consent. In most cases the deed

may be submitted directly for registration after stamping in the usual way. You should, however enclose this letter of consent.....

3. Please note that the date of commencement of the transaction should not predate that of this consent. “

To hold that a contravention of or non-compliance with section 22 of the Act occurs at the time when the holder of a statutory right of occupancy executes or seals the deed of mortgage will be contrary to the spirit and intendment of section 22 of the Act.

It is not necessary for me to consider the fourth issue formulated by the appellant in its brief which deals with forcible take-over of its asset and damages for trespass. In any case, the 1st respondent was appointed under the powers conferred on the 2nd respondent by Clause 37 of Exhibit “E”. In so far as Exhibit “E” is by deed and the power to appoint a receiver is conferred in clause 37 thereof, the 2nd respondent had no obligation to apply to the court for a receiver to be appointed.

D For the above reasons and the more detailed reasons contained in the lead judgment of my learned brother Bello, C.J.N., I hold that Exhibit “E” is valid and lawful.

The appeal therefore fails and it is hereby dismissed. The decision of the court below is affirmed. I abide by the order as to costs as contained E in the lead judgment.

ONU JSC

F By its amended Statement of Claim dated 10th October, 1988 in paragraph 25 thereof, the plaintiff, appellant herein, following its Writ of summons dated 15th June, 1987, claimed against the defendants, respondent herein, in the High Court of Oyo State holden at Ibadan (coram T.A.A. Ayorinde, J., as he then was) as follows:-

G “ 1. *DECLARATION that the Properly and Conveyancing Law of Oyo State and the Mortgage Deed registered as NO.2/2/2632 and dated 8/10/85 to the extent that they provide for, confer or vest the 2nd defendant mortgage with power to sell the mortgaged premises and/or without subjecting*
H *such sale to prior Governor’s consent are inconsistent with the provisions of the Land Use Act and therefore unconstitutional, illegal, unenforceable, invalid and null and void and of no effect.*

2. DECLARATION that the transaction including loan and the mortgage deed dated 8/10/85 between the plaintiff and the 2nd defendant is, for non-

compliance with the terms of the consent annexed to the Deed, invalid, unenforceable, illegal, null and void.

3. *AND/OR ALTERNATIVELY DECLARATION that under and by virtue of the provisions of the Land Use Act 1978 the 2nd defendant cannot exercise its statutory above without power of sale under the mortgage referred to above without complying with the said act.*

4. *DECLARATION that any sale by the defendants of the property comprised in the mortgage without complying with the Auctioneers Law of Oyo State, the Land Use Act during the pendency of this action is illegal, ineffectual, null and void and of no effect.*

5. *DECLARATION that the said mortgage is not in law a security for the loan advanced to the plaintiff by the 2nd defendant between 1980 and 1981.*

6. *DECLARATION that the entry by the 1st defendant into the premises of the plaintiff situate at 60-64 Akobielemu Layout, Ijebu Road, Ibadan in June, 1987 is illegal, wrongful and unlawful.*

7. *DECLARATION that the appointment of the 1st defendant as Receiver pursuant to Clause 73 of the mortgage is invalid, illegal and null and void.*

8. *INJUNCTION restraining the defendants by themselves their agents, servant and privies or otherwise howsoever from selling the mortgaged premises or from taking any action or steps whatsoever in pursuance of the mortgage referred to above.*

9. *N1,800,000.00 representing total damages for the trespass committed by the defendants by the forcible entry of the 1st defendant on the plaintiff's premises and loss of business caused to the plaintiff by the said trespass.*

10. *N500,000.00 representing damage caused to the plaintiff's machineries. "*

Pleadings were ordered and while the appellant had filed a Statement of Claim which it further amended, the two respondents filed a joint Statement of defence with only 2nd respondent Counter-claiming therein against the appellant. The appellant thereafter delivered a Reply to the Statement of Defence and Counter claim.

Facts giving rise to this case on appeal may be briefly stated thus:

The appellant herein, borrowed N215,000.00 on a long term loan from the second respondent, Nigerian Industrial Development Bank Limited (otherwise called N.I.D.B. for short) which it applied for on the 3rd day of May, 1979. The loan was granted to it on 11th October, 1979, as per 2nd respondent's letter of that date upon terms and conditions contained therein. On November 3, 1979, the appellant Company by its Board's resolution No.2 confirmed the Managing Director's letter of application for

the loan which was to be used to establish a nail factory. By December, 1982, the project had been completed and the entire principal sum of N215,000 had been disbursed.

The appellant's Managing Director had back in 1979 mortgaged his property at No. 60-64, Akobielemu Layout, Ijebu Road, Ibadan, to the B 2nd respondent to secure the loan. The mortgage Deed, registered as No. 13 page 13 Volume 2295 at the Land Registry, Ibadan executed in 1980, was not perfected until the 8th of October, 1985 upon the receipt of the Governor's consent in an approval which although it bore the 12th of September, 1980 was contained in a Legal Mortgage registered as No.2 page 2 C Volume 2632 at the Land Registry, Ibadan of 8th of October 1985 aforesaid.

The appellant's operations at the Nail factory later ran into difficulties but not without the first repayment of principal and/or interest amounting to N1,425.46 having been made in December, 1980. By 3/2/87, when D 2nd respondent demanded the whole payment, the total debt due to it from appellant had risen to N354,610.27. Whereupon, the 2nd respondent foreclosed the mortgage and appointed a receiver in the person of 1st respondent to take over the factory with guards and dogs. The appellant finding the situation unacceptable, filed the action giving rise to the case E herein against both respondents for declarations inter alia that the Deed of mortgage dated the 8th day of October, 1985 between it and the 2nd respondent to the extent that it provides or vests the 2nd respondent as Mortgagee with the power of sale of the mortgaged premises, is inconsistent with the provisions of the Land Use Act and is therefore unconstitutional, F null and void. The case went to trial and after both sides had adduced evidence and counsel had addressed the trial court, the learned trial Judge in a considered judgment delivered on 24th April, 1990, dismissed it. The appellant's appeal to the Court of Appeal, Ibadan was by a unanimous decision dismissed on 21st of September, 1992. The appellant had further G appealed to this court premised on a Notice of Appeal containing four grounds dated 27th November, 1992.

Briefs of argument were exchanged between the parties in accordance with the rules of court. The four issues emanating from the four grounds of appeal submitted at the appellant instance for our determination (which the respondents seem reluctantly to have adopted, if only in the interest of justice) are:-

"1. Whether the learned appeal Judges were right in law in holding that the mortgage deed, Exhibit "E" is valid and lawful.

2. Whether the learned Appeal Judges were right in law in holding

that evidence other than evidence before the court including Exhibits L, & M need to be adduced by the appellant to prove the collusion as to the date on Exhibit E when such collusion would defeat the object of any law.

3. Whether the learned Appeal Judges were right in law in not restricting themselves to the issues brought before them for adjudication.

4. Whether the learned appeal Judges were right in law in failing to B take into consideration the forcible take-over of the appellant's assets and trespass by the 1st respondent 'and the evidence that the respondents 'have been mortgagees in possession since 1987 and on the basis of which consideration to assess the damages that should be due to the appellant, even if the judgment debt is upheld.'" C

The main bone of contention in this case is whether upon a proper interpretation of the Land Use Act 1978, now Cap. 202 Laws of the Federation of Nigeria, 1990 (hereinafter referred to simply as the Act) the Deed of Mortgage (Exhibit E) is void because the Governor's consent (Exhibit E 1) was obtained after the execution of Exhibit E, which bore a date subsequent to the approval of the Governor. Put succinctly, the main focus of the appellant's grouse as grounded in issue 1, is: D

"Whether the learned appeal Judges were right in law in holding that the mortgage deed, Exhibit E is valid and lawful."

In my consideration of this issue (Issue 1) to which my answer is E unequivocally in the affirmative and, which in my view, falls within a narrow compass, only Issue 4, at the end of the day, will later engage my attention, leaving Issues 2 and 3 to fall into line with Issue 1 in that answers thereto will be rendered effete or put at the highest, will be of academic interest only. Be that as it may, in the consideration of the points agitated F in this appeal, not only have we had the benefit of briefs by either side to the contest but excellent and most informative ones from the line up of distinguished Senior Advocates in the persons of Chief F.R.A. Williams and Professor A.B. Kasunmu as well as from Professor J.A. Omotola who appeared as amici curiae. This Court has with sincere appreciation drawn G much from their wealth and depth of knowledge of the Act, the interpretation of the main corpus of which after its dissection through some land mark cases, still needs to be accompanied with suggestions for amendments, where necessary. Such useful suggestions have been made in the instant case but a lot more remains to be done. H

I am of the view that the case of Savannah Bank v. Ajilo (1989) 1 NWLR (Pt. 97) 305 and Solanke v. Abed (1962) NRNLR 92 are not strictly relevant or applicable in the determination of the instant appeal.

The distinguishing features of these two cases inter se on the one

hand, and the instant case on the other hand respectively, are that while in the two no consent of the Governor was sought and obtained under the relevant legislations applicable vide Section 22 of the Act, now Cap. 202, Laws of the Federation of Nigeria, 1990 and section 11 of the Land and Native Rights Ordinance Cap. 105 (1948) Laws of Nigeria - the precursor of the Land Tenure Law, Cap. 59, Laws of Northern Nigeria, which in turn is the precursor of the Act, in the instant case, the Governor's consent was sought and obtained pursuant to Section 22 of the Act. Further, although in Ajilo's Case (supra) the 1st plaintiff/respondent by the tenor of the Act committed the initial wrong by alienating his statutory right of occupancy without prior consent in writing of the Governor, the express provisions of the Act made it undesirable to invoke the maxim 'exturpi causa non oritur actio' (an action does not arise from a base cause) (per Obaseki, J.S.C.) and the equitable principle invoke and applied in Bucknor Maclean v. Inlaks Ltd (1980) 8-11 S.C. 1 (per Idigbe, J.S.C). In Solanke v. Abed (supra), the plaintiff there was not guilty of any wrongful act; it was the Bank, as in the Ajilo Case (supra), that failed to seek and obtain the consent of the Governor, thus leading to the mortgage being declared null and void at the instance of the plaintiff, who was faultless in the sense that the responsibility to seek and obtain leave did not lie with him.

In the case in hand, there is no doubt that the Governor gave his consent (Exhibit E1) to the mortgage deed (Exhibit E) Unlike in Ajilo's Case, the appellant's grouse does not revolve on lack of consent but that consent here given after execution should equally be regarded as void as in Ajilo. All that the appellant herein quarrels with therefore is that consent was not validly obtained because execution of Exhibit E came before and not after the Governor's consent as exemplified in Exhibit E1. For our purposes here, however, it may be pertinent first to set out what I consider to be the crucial and relevant sections of the Act, to wit:

Section 22(1) and (2) and 26 respectively. The sections provide:-
"22(1) It shall not be lawful for the holder of a statutory right of occupancy granted by the Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise howsoever, without the consent of the Governor first had and obtained.

(2) The Governor when giving his consent to an assignment, mortgage or sublease may require the holder of a statutory right of occupancy to submit an instrument executed in evidence of the assignment, mortgage or sub-lease and the holder shall when so required deliver the said instrument

to the Governor in order that the consent given by the Governor under subsection (1) of this section may be signified by endorsement thereon.

26. Any transaction or any instrument which purports to confer or vest any person any interest or right over land other than in accordance with the provisions of this Act shall be null and void."

The words 'null and void' used in this, as in other sections of the Act being, in my view, precise and unambiguous should be construed to bear their natural and ordinary meanings and no more. See *Atuyeye v. Ashamu* (1987) 1 NWLR (Pt. 49) 267 at 278 and *Ojokolobo v. Alamu* (1987) 3 NWLR (Pt. 61) 377 at 402. Thus, the provisions in Sections 22 and 26 when applicable to any case involving their interpretation should, in my view, be construed to be mandatory and not directory. This is why the suggestion by the amici curiae that the decision in *Solanke v. Abed* (supra) where Unsworth, F.J. emphasised the dichotomy between what is 'illegal' and what is 'unlawful' where there ought to be none, is a case which at the appropriate time ought to be reviewed.

Now, with the exception of the appellant, there seems to be a consensus by all concerned in this appeal, that the court below was right in holding that the prior execution of Exhibit 'E' before obtaining the Governor's consent, was legally valid.

In the light of this finding, the conclusion arrived at by the court below in the lead judgment per Ogundere, J.C.A. and concurred in by his learned brothers, Salami and Muhammad, JJ.C.A. to the effect that-

"The main bone of contention by the plaintiff was that the mortgage was void because the Governor's consent was obtained after the execution of the mortgage even though the mortgage deed bore a date subsequent to the approval of the governor"

cannot be anything but right. When, however, in continuation of the judgment the learned Justice held that:

"As can be seen from the issues formulated the main issue was whether the deed of mortgage was in fact executed in 1980 before the governor's consent in 1985. In which case the mortgage deed will be caught by the provisions of section 22 of the Land Use Act which stipulates that the prior consent of the governor must be sought and obtained before the deed of mortgage is executed. Savannah Bank v. Ajilo (1989) 1 NWLR (Pt. 97) 305," (Italics is mine)

he would thereby appear to have run into difficulty which ought not to have occurred had the learned Justice adverted his attention to the full purport of section 22 of the Act. The above excerpt, which in my view, is referable to subsection (1) of section 22 of the Act only, if literally interpreted, may

mean that the parties to the transactions stipulated therein must first seek and obtain the governor's consent, to wit: that such a consent is a sine qua non before the commencement of negotiations. The difficulty need not be, firstly, if the purport of sub-section (2) of Section 22 is read conjunctively with sub-section (1) thereof. The Respondent's contention therefore, that B both sub-sections are repugnant to each other cannot, in my view, be sustained and ought to be jettisoned. Secondly, that it is impracticable and indeed not what the Act provides (although its wordings in both subsections in this regard could be better put by reframing or even an amendment) to state expressly that the governor's consent has to await the negotiations C although execution could be earlier. This is because, Section 22(2) of the Act, on pain of repetition (and with which Salami and Muhammed, JJ .C.A. in their concurring judgment" would seem to be agreed) stipulates that -

"The Military Governor when giving his consent to an assignment, D Mortgage or sublease may require the holder of a statutory right of occupancy to submit an instrument, executed in evidence of the assignment, mortgage or sub-lease and the holder shall when so required deliver the said instrument to the Military Governor under sub-section (1) may be signified by endorsement thereon." (Italic is mine for emphasis).

E The sum total of the submissions of the respondent and the amici curiae would seem to be unanimous that upon a proper interpretation of sections 22 and 26 of the Act, there was no breach or contravention of the Act and is broadly in line with the view expressed by Viscount Simonds in Denning v. Edwards (1961) A.C. 245, a Privy Council decision based on F the interpretation of Section 88 of the Lands Ordinance of Kenya (in pari materia with the Act). At page 258 of the Report it is observed thus:

"It has been argued that the consent of the Governor must be obtained before the agreement is entered into and that subsequent consent is insufficient. Some form of agreement is inescapably necessary before the G Governor is approached for his consent. Otherwise negotiation ends with an agreement to which the consent of the Governor cannot be obtained before it is reached. Their lordships are of opinion that there was nothing contrary to law in entering into a written agreement before the Governor's consent was obtained. The legal consequences that ensued was that the H agreement was inchoate till that consent was obtained. After it was obtained the agreement was complete and completely effective." (Italic is also mine).

As to when a deed is rendered a complete and effective document, I am satisfied that although the learned trial Judge and each of the

Justices of the Court below in construing when Exhibit E (the mortgage deed) was executed assigned different reasons thereto, they were all agreed in their conclusions that a valid and lawful consent (Exhibit E1) by virtue of Section 22 of the Act was given by the Governor. But for it to be said that there is an effective execution of the deed, there must be an act of delivery, On this vital point Halsbury's Laws of England 4th edition Volume 12 B paragraph 1329 relevantly provides that:-

"1329 Delivery of deed. In order to be effective a deed must be delivered as the act and deed of the party expressed to be bound by it, as well as scaled. No special form or observance is necessary for the delivery of a deed, and it may be made in words or by conduct. The usual form of C delivering a deed by words is for the executing party to say while pulling his finger on the seal, "I deliver this as my act and deed." It is not necessary, however, to follow this form of execution; nor is it necessary that title deed should actually be delivered over into the possession or custody either of D the person intended to take the benefit of the deed, or to a third person to the use of the party taking the benefit of tile deed; though if the party to be bound so hands over the deed, that is sufficient delivery without any words.

What is essential to delivery of the document as a deed is that the party whose deed the document is expressed to be (having first scaled it) shall by words or conduct expressly or impliedly acknowledge his intention E to be immediately and unconditionally bound by the provisions contained in it."

The above exposition is supported by decided cases with a history dating into antiquity. One of the oldest of such cases is Goddard's Case (1584), 2 Co. Rep 46; 76 E.R 396. The latter Report decides at pages 398 et F seq as follows:

"There are but three things of the essence and substance of a deed, that is to say, writing in paper or parchment, sealing and delivery, and if it hath these three, although it wanted in cujus rei testimonium sigillum suum apposuit, yet the deed is sufficient, for the delivery is as G necessary to the essence of a deed, as the putting of the seal to it, and yet it need not be contained in the deed that it was delivered. And note, the order of making a deed is, first to write it, then to seal it, and after to deliver it; and therefore it is not necessary that the sealing or delivery be mentioned in the writing for as much as they are to be done after. And so, it was said, H it was resolved in, Henry the Eighth's time."

A more modern case of Vincent .v Premo Enterprises Limited (1969) 2 QB 609 was then adverted to. In it, Lord Denning M.R. said at p. 619 as follows:

"The law as to "delivery" of a deed is of ancient date. But it is reasonably clear. A deed is very different from a contract. On a contract for the sale of land, the contract is not binding on the parties until they have exchanged their parts. But with a deed it is different. A deed is binding on the maker of it, even though the parts have not been exchanged, as long as
 B *it has been signed, sealed and delivered. "Delivery" in this connection does not mean "handed over" to the other side. It means delivered in the old legal sense, namely, an act done so as to evince an intention to be bound. Even though the deed remains in the possession of the maker, or of his solicitor, he is bound by it if he has done some act evincing an intention to*
 C *be bound, as by saying: "I deliver this my act and deed." He may, however, make the "delivery" conditional in which case the deed is called an "escrow" which becomes binding when the condition is fulfilled."*

The law was much considered by the House of Lords in the leading case of *Xenos - v - Wickham* (1866) LR 2 H.L. 296 where Lord Cranworth
 D said at p. 323:-

"In the first place, the efficacy of a deed depends on its being sealed and delivered by the maker of it; not on his ceasing to retain possession of it. This, as a general proposition of law, cannot be controverted. It is not affected by the circumstance that the maker may so deliver it as to
 E *suspend or qualify its binding effect. He may declare that it shall have no effect until a certain time has arrived, or till some condition has been performed, but when the time has arrived, or the condition has been performed, the delivery becomes absolute, and the maker of the deed is absolutely bound by it, whether he has parted with the possession or not. Until*
 F *the specified time arrived, or the condition has been performed, the instrument is not a deed. It is a mere escrow."*

That was applied recently by this Court in *Beesly - v- Hallwood Estate Ltd* (1961) Ch. 105, where a company was held to be bound by a lease which had been signed, sealed and delivered by the company, even
 G though it had not been sent to the other side at all. It was delivered as an escrow, subject to a condition that the tenant should hand over the counterpart. He did hand it over and the company was held bound accordingly because the Constitution had been fulfilled."

In *Mowatt-v-Castle Steel and Iron Works Co.* (1887) 34 Ch. D 58,
 H a case which dealt with the ineffectiveness of deed of debenture and where the deeds in question were dated, signed and scaled, Cotton L. J. said at page 62 of the Report:

"It is argued that as they bore date the 10th of May, 1882, that must be" treated as the day on which they were issued. But the debentures

must be delivered before they can be binding on the company. The fact of their being dated and sealed does not show that they were delivered. There was a resolution that debentures to the amount of Ten Thousand pounds should be sealed, but not that they should be delivered."

Strouds Judicial Dictionary of Words and Phrases, Fourth Edition page 732 says in relation to delivery of a deed as an escrow as follows:- B

"Delivery of a deed as an escrow is where a deed is delivered on a CONDITION; if the CONDITION is performed, the deed becomes absolute; but until then it is an escrow i.e. in suspense (Watkins v. Nash. L.R. 20 Eq. 262 and case there cited)." See also Vincent v. Premo Enterprises (supra). C

The effect of the foregoing, I perceive, is that in the instant case, Exhibit 'E' was in the form of an escrow until the Governor's consent in Exhibit E1 was obtained, since the Governor does not give his consent in vacuo. This is because, while 'inchoate would appear to symbolise a dead document until brought to life, escrow signifies a document that is alive all the way (i.e. in suspense) until crystalised. The law relating to the effective date of delivery of a deed is stated by Halsbury's Laws of England, 4th Ed. paragraph 1486 as follows: . D

"Extrinsic evidence to prove date. Extrinsic evidence is admissible to prove the date of delivery of a deed, or of the execution of any other written instrument. A deed takes effect from delivery, and any other written instrument from the date of execution, and though the date expressed in the instrument is prima facie to be taken as the date of delivery or execution, this does not exclude extrinsic evidence of the actual date; and the actual date when proved, prevails, in case of variance, over the apparent date." E F

See also section 127 of the Evidence Act Cap. 112 Laws of the Federation, 1990 which provides:

"When any document purporting to be, and stamped as, a deed appears or is proved to be or to have been signed and duly attested, it is presumed to have been sealed and delivered although no impression of a seal appears thereon" G

From the foregoing, it is clear that the date of execution is not material to the operation of Section 22 of the Act. The deed (Exhibit E) consequently had not become effective at the date of execution between H 1980 and 1982; it became effective upon its delivery on 8th October, 1985 to the 2nd respondent following the Governor's consent on Exhibit E1 which was signified or obtained on or about 12th September, 1985. The result of my observation above is that although Section 22 of the Act prohibits the

alienation of a right of occupancy without the consent of the Governor first had and obtained, it does not prohibit agreement so to do or preparations for the purpose of effecting such alienation.

In conclusion, I need only remark in passing that it is inequitable and morally despicable for the appellant, after obtaining a loan and after utilising the same to now turn round and allege that the agreement (Exhibit E) between it and the grantor of the loan i.e. the 2nd respondent, is null and void. In the case of Emmanuel O. Adedeji v. National Bank of Nigeria Ltd & Anor (1989) 1 NWLR (Pt. 96) 212, a case decided about the same time as Ajilo' s Case Akpata, J.C.A, as he then was, said at page 226 of the Report:

"Apart from the principle of law involved in this case it is morally despicable for a person who has benefited from an agreement to turn round and say that the agreement is null and void."

The decision in Ajilo' s Case as demonstrated above, would appear to have tempered the above attitude adopted by the Court of Appeal in this court's non invocation of the ex turpi causa principle. That notwithstanding, the result, in my view, is the same.

I accordingly resolve Issue 1 against the appellant. Coming to issue 4, the appellant's contention is:-

Whether the learned appeal Judges were right in law in failing to take into consideration the forcible take over of appellant's assets and trespass by the 1st respondent and the evidence that the respondents have been mortgagees in possession since 1987 and on the basis of which consideration to assess the damages that should be due to the appellant, even if the judgment debt is upheld.

Having held under issue 1 above that Exhibit E is valid as to consent, the entry unto the land by the 1st respondent (a receiver) at the instance or permission of the 2nd respondent as mortgagee, was ipso facto valid. As the appellant in the trial Court led no evidence relating to any damage done by the respondents for which such damages could have been recoverable, the claim for trespass would not have been proved any way. Further on damages to which the appellant says he is entitled but was not awarded any amount for loss of business, the gravamen of its case is founded on paragraphs 18 and 25 (9) of its Amended statement of claim wherein it pleaded:

*"18. The plaintiff will further contend that the invasion of its premises by the defendants by themselves, their agents and or servants with the aid of Vanni Security dogs and handlers amounts to aggravated trespass.
25(9) N1,800,000.00 representing total damages for trespass committed*

by the defendant” by the forcible entry of the 1st defendant on the plaintiffs premises and loss of business caused to the plaintiff by the said trespass.”

All that the lone witness for the appellant testified at the trial in support of the above pleading was inter alia that -

“The police took action by removing the dogs and their handlers. The handlers left on 1st June, 1987 but returned to the premises on 2nd June, 1987 accompanied by the 1st defendant who left a letter dated 2nd June, 1987. Exhibit H that he brought the dogs and their handlers. When the dogs and handlers returned on 2nd June, 1987 I did not make a report to the police again on 3rd June, 1987. The police came to the premises on 3rd June 1987 and asked the handlers of the dogs with their dogs to move C out of the plaintiff’s premises.”

The pleadings not having been given support in the evidence led, are deemed as having been abandoned. See *Ojikutu v. Fella* (1954) 14W.A.c.A. 628 and *Olarewaju v. Bamigboye* (1987) 3 NWLR (Pt. 60) 353 at 354 following *Emegokwue v. Okadigbo* (1973) 4S.C. 11 at 117-118. D

Besides, if by 2nd and 3rd June, 1987, namely after Exhibit E was delivered following the Governor’s consent in Exhibit E 1 way back in 1985 to the 2nd respondent, the latter’s receiver in the person of the 1st respondent who legally took possession of the mortgaged property for appellant’s default to pay the bulk of the mortgage money, cannot be guilty of forcible entry thereon nor liable in an action for trespass as hereinbefore illustrated. Furthermore, the arguments proffered by the appellant in support of this issue, as can be inferred from paragraph 6.0.6 of its brief, are to the effect that:

(i) the respondents as mortgagees in possession should have been F ordered by the court to render an account of the realisation derived from the mortgaged property to the appellant.

(ii) the money derived from the management of the mortgaged property should have been set off against the amount of the judgment debt upheld by the courts. G

Since the appellant made no claim for set-off nor proved any, it is, in my respectful view, not entitled thereto. It is trite that the court has a duty to confine its decision within respectable limits of the score of the inquiry before it. See *Obikoya v. Wema Bank Ltd. & Anor.* (1989) 1 NWLR (Pt. 96) 157; (1989) 1 SCNJ 127. It is also an established principle of law that H it is wrong for a court to award to a party what he did not claim vide *Awoyegbe & Anor. v. Ogbeide* (1988) 1 NWLR (Pt. 73) 695; (1989) 3 S.C.N.J. 99 and *Makanjuola v. Balogun* (1989) 3 NWLR (Pt. 108) 192 at 206. The trial court, in my opinion, was therefore right when it refused to

award the appellant any damages with regard to the alleged forcible entry and trespass and the court below was justified when it affirmed the same.

For, these reasons and the fuller ones contained in the judgment of my learned brother Bello, Chief Justice of Nigeria, a preview of which I had before now, I too dismiss this appeal. I make the same consequential orders as contained in the lead judgment inclusive of those as to costs.

ADIO JSC

I have had the opportunity of reading, in draft, the judgment just read by my learned brother, the Hon. Chief Justice of Nigeria, and I entirely agree that this appeal failed. Accordingly, I too dismiss the appeal and abide by the consequential orders, including the order for costs.

In view of some fundamental issues involved, I make some comments. The Hon. Chief Justice of Nigeria has, in the lead judgment, fully summarised the facts of this case and the issues involved. The appellant was a manufacturing company that obtained a loan, from the 2nd respondent, for the operation of its business. The security for the loan was the property of the appellant mortgaged to the 2nd respondent under a deed of mortgage. When the appellant defaulted in the repayment of the loan, the 2nd respondent, in exercise of its powers under the aforesaid mortgage deed, appointed the 1st respondent as a receiver for the purpose of selling the mortgaged property.

The mortgage deed was dated 8th October, 1985. It was, however, the case of the appellant that the date did not reflect the actual date on which the deed of mortgage was executed and that as the Governor's consent to the transaction was given after the date on which the deed was actually executed, the mortgage deed was null and void in view of the provision of section 22(1) of the Land Use Act.

It appeared, at first, that there was inconsistency in the decision of this court in *Savannah Bank (Nigeria) Ltd. v. Ajilo*. (1989) 1 NWLR (pt.97) 305 and the decision of the Federal Supreme Court in *Solanke v. Abed* (1962) NRNLR 92. It was then thought that if the aforesaid decisions were relevant for the purpose of the determination of this case, the inconsistency, if any, between them should be dealt with. That was one of the reasons which necessitated the invitation to and the participation of the amici curiae in the proceedings in this appeal. The submissions of the amici curiae on the relevant issues have been very useful in the determination of the relevant issues and we are very grateful to them. After due consideration of the submission made for the parties and the submissions of the amici curiae. The inevitable conclusion to which I have come is that the

decisions in Savannah Bank (Nigeria) Ltd., v. Ajilo, supra, and Solanke's case, supra, are not relevant to the issues involved in this appeal because, among other things, the Governor's consent was not obtained in relation to any of the transactions involved in the aforesaid two cases whereas the Governor's consent was obtained to the transaction involved in this case. The whole thing thus became hypothetical or academic questions. The Supreme Court has no jurisdiction to determine hypothetical or academic question and no further consideration will be given to that aspect of the matter. See Governor of Kaduna State v. Dada (1986) 4 NWLR (Pt. 38) 687.

One of the crucial issues in this appeal was whether the learned Justices of the court below were right in law in holding that the mortgage deed, Exhibit "E", was valid and lawful. The appellant pointed out that there was evidence before the court below on the basis of which the court below held that the deed of mortgage was executed before the consent of the Governor to the transaction was given. For that reason, the appellant contended, the court below should have gone further to hold that the mortgage deed was void in view of section 22(1) of the Land Use Act which provides as follows:-

"It shall not be lawful for the holder of a statutory right of occupancy granted by the Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sub-lease, or otherwise howsoever without the consent of the Governor first had and obtained:

Provided that the consent of the Governor -

(a) shall not be required to the creation of a legal mortgage over a statutory right of occupancy in favour of a person in whose favour an equitable mortgage over the right of occupancy has already been created with the consent of the Governor;

(b) shall not be required to the reconveyance or release by a mortgagee to a holder or occupier of a statutory right of occupancy which that holder or occupier has mortgaged to that mortgagee with the consent of the Governor;

(c) to the renewal of a sub-lease shall not be presumed by reason only of his having consented to the grant of a sublease containing an option to renew the same."

The contention for the respondents and by the amici curiae was that there was, in the circumstances of this case, no breach of the provisions of section 22(1) of the Land Use Act and, for that reason, the court below was right in holding that the mortgage deed in question was valid.

What appeared to be a controversy in this case had arisen as a result of the failure of the appellant to realise that certain legal consequences occurred or followed as a result of the instrument executed to secure the loan in question being a mortgage deed; it was not an ordinary agreement. A deed takes effect when it is signed, sealed and delivered. In the circumstance, the date on which a deed is executed may not necessarily be the date on which it takes effect. Delivery in the case of a deed depends on the intention of parties. See *Macedo v. Stroud* (1922)2 A.C. 330. A deed can be delivered either unconditionally, so as to take effect at once, or to take effect only on condition that it is not to be operative until an event happens or the condition performed, in which case it is an escrow only. In this particular case, the correspondence between the appellant and the 2nd respondent clearly showed that the intention of the parties was that the mortgage deed should take effect or become effective after the consent of the Governor had been given. In particular, a letter (Exhibit "E") contained the following statement:

D *"Please take note that the date of commencement of the transaction should not predate that of this consent."*

The consent referred to in the statement quoted above was the consent of the Governor to the transaction to which the mortgage deed related. In short, the parties to the mortgage deed had agreed that the date which should be inserted in the mortgage deed as the date of its commencement should be a date subsequent to the date on which the consent of the Governor was given. Pending the date on which the mortgage deed, in accordance with the intention of the parties, became effective, it was escrow. The insertion of the date of commencement in the mortgage deed, which date was subsequent to the date on which the consent of the Governor was given, was proper, legal and perfectly in order. For that reason, the provisions of section 22(1) of the Land Use Act were not contravened and the mortgage deed was legally valid.

It is for the foregoing reasons and the detailed reasons given in the lead judgment of my learned brother, the Hon. Chief Justice of Nigeria, that I agreed that this appeal failed. I too dismiss the appeal and abide by the consequential orders, including the order for costs.

IGUH JSC

H I have had the privilege of reading in draft the judgment just delivered by my Lord, the Honourable the Chief Justice of Nigeria. I agree entirely with the reasoning and conclusion therein. I wish, however, to say a few words of my own by way of emphasis only with regard to one or two questions that arise for consideration in this appeal.

The facts that gave rise to this appeal have been set out exhaustively in the lead judgment of my learned brother and I need not repeat them all over again. I will in this judgment concern myself only with some aspects of these facts which, in my view, are relevant to my contribution in this appeal.

This appeal is against the decision of the Court of Appeal, Ibadan Division, delivered on the 21st day of September, 1992. By this judgment, the court below affirmed the decision of the High Court of Oyo State, sitting at Ibadan delivered on the 24th April, 1990 which dismissed the plaintiff's claim and, with respect to the counter-claim, entered judgment for the 2nd defendant against the plaintiff in the sum of N364, 142.08 with interest at the rate of 10 1/2% effective from 1st March, 1987 until the date of judgment. It suffices to state that the plaintiff's claims were essentially declaratory and for an injunction together with damages caused to the plaintiff's machineries.

The facts of the case to a large extent, are morally despicable on the part of the plaintiff. In a nutshell the plaintiff sometime in 1979 applied for and obtained a loan of N215,000.00 from the 2nd defendant to finance the establishment of a nail industry. The loan with interest was to be fully refunded by the plaintiff to the 2nd defendant between 1980 and 1985. By December 1982, the project was completed and all the principal sum of N215,000.00 had been disbursed. As security for the said loan, a mortgage deed, Exhibit E in respect of the plaintiff's property at Ijebu Road, Ibadan was executed by the plaintiff about the year 1980. It was however not perfected until the 8th October, 1985 upon the receipt of the Governor's consent. The said deed was duly registered as No.2 at page 2 in Volume 2632 at the Land Registry, Ibadan. The plaintiff as at 1985 had refunded only the sum of N64,500.00 of the said loan to the 2nd defendant.

As at the 1st June, 1987, the plaintiff's indebtedness to the 2nd defendant with interest had risen to N354,61 0.27. Upon failure by the plaintiff to refund the said balance despite written demands, the 2nd defendant foreclosed the mortgage and appointed a receiver, the 1st defendant, to take over the factory with guards and dogs. It was as a result of this development that the plaintiff instituted this action against the two defendants claiming inter alia a declaration that the said deed of legal mortgage, Exhibit E, dated the 8th October, 1985 to the extent that it provides for and vests the 2nd defendant as Mortgagee with the power of sale of the mortgaged property is inconsistent with the provisions of the Land Use Act and is therefore unconstitutional, null and void. The plaintiff did also claim, again inter alia, a declaration that the transaction including the loan and the mortgage deed are all unenforceable, illegal and null void.

It ought to be emphasized that the main issue which the plaintiff vigorously argued is that the mortgage deed, Exhibit E, is void by reason of the fact that the Governor's consent thereto was obtained after the execution of the deed by the appellant even though the document bore a date subsequent to the said Governor's consent. In other words, the plaintiff B after obtaining a huge loan from the 2nd defendant and had fully utilised and benefited therefrom turned round to argued with great force that the transaction, including the loan it had enjoyed and the mortgage deed are all nudum pactum and therefore unenforceable and null and void.

As I have already observed, the trial court dismissed the plaintiff's C claims which dismissal was affirmed by the court below. The plaintiff has now further appealed to this court.

Both the plaintiff, hereinafter called the appellant, and the defendants, hereinafter called the respondents, filed and exchanged their respective written briefs of argument. In the appellant's brief, the undermentioned D issues were formulated for the determination of this court, namely:-

"3.01 Whether the learned appeal Judges were right in law in holding that the mortgage deed, Exhibit E, is valid and lawful.

3.02 Whether the learned appeal Judges were right in law in holding that evidence other than evidence before the Court including Exhibits L, E D & M need to be adduced by the appellant to prove the collusion as to the date on Exhibit E when such collusion would defeat the object of any law.

3.03 Whether the learned appeal Judges were right in law in not restricting themselves to the issues brought before them for adjudication.

F *3.04 Whether the learned appeal Judges were right in law in failing to take into consideration the forcible take-over of the appellant's assets and trespass by the 1st respondent and the evidence that the respondents have been mortgagees in possession since 1987 and on the basis of which consideration to assess the damages that should be due to the appellant, G even if the judgment debt is upheld."*

The respondents, for their part, adopted the same issues for the resolution of this court.

I think it ought to be mentioned that as it appeared from the briefs of argument filed by the parties, that there existed some inconsistency in H the decision of this court in Savannah Bank (Nigeria) Ltd. v. Ajilo (1989) 1 NWLR (Pt.97) 305 on the one hand and that of the Federal Supreme Court in Solanke v. Abed (1962) NNLR 92 on the other hand, some senior and eminent learned counsel were invited as amici curiae to address the court on the issue. Following this invitation, Chief F.R.A. Williams, S.A.N., Pro-

fessor A.B. Kasunmu, S.A.N. and Professor T.A. Omotola filed very useful briefs of argument and made stimulating and thought provoking oral submissions in amplification thereof. I think I should at this stage express my profound gratitude to these learned gentlemen of both the inner and utter bar for the scholarly presentation of their briefs and their oral submissions before this court.

B

Learned counsel for the appellant, Mr. E.A. Adekun in his arguments in the appellant's brief in respect of the first and second issues contended that in construing the effective date of the execution of Exhibit E, cognisance must be taken of the entire evidence before the court including Exhibits L, D & M. He argued that all the evidence before the court taken together establish that the deed of mortgage, Exhibit E, was executed before the Governor's consent was obtained. He described the date Exhibit E bore as collusive and false, inserted by the 2nd respondent or its agents to defeat the object of the Land Use Act which requires a consent first had and obtained before the instrument is executed. He referred to sections 22(1) and 26 of the Land Use Act and submitted that Exhibit E was therefore null and void and unenforceable. In this regard, he relied on the decision of his court in Savannah Bank (Nig.) Ltd. Ajilo (1989) 1 NWLR (Pt. 97) 305. Learned counsel stressed that section 22(1) of the Land Use Act requires the prior consent of the Governor before an interest in land is alienated. He contended that failure to obtain such prior consent before the execution of Exhibit E as required by law rendered the deed of mortgage null and void ab initio and the loan transaction illegal and unenforceable.

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E

Learned counsel for the respondents, Dr. H.O. Kusamotu in the respondents' brief conceded that Exhibit E was executed before the relevant Governor's consent was obtained but argued that this did not make the document invalid. He submitted that the appellant who argued otherwise was clearly under the erroneous misconception that the document could not be signed before the necessary consent was given. He referred to section 22(2) of the Land Use Act which enjoined the submission, by a holder of a statutory right of occupancy of an instrument executed in evidence of the transaction in order that the required consent may be signified by endorsement thereon and pointed out that the same must be read conjunctively with section 22(1) of the Act for a proper appreciation of the purport or intention of the law makers in the interpretation of the said section 22(1) of the Act. He drew attention to the decision in Denning v. Edwards (1961) A.C. 245 and argued that it is absolutely impossible to suggest that the Governor must give his approval to a transaction, the precise terms of which he knows nothing about. In his view, the provision of

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section 22(1) when read in conjunction with section 22(2) means no more
than that a transaction embodies in an agreement and subject to the pro-
vision of the Act will remain inchoate until the Governor's approval is ob-
tained. He submitted that Exhibit E the moment the Governor gave his
consent thereto became valid and lawful. He argued that there was no
evidence of collusion or falsity in connection with the date Exhibit E bore.
B He pointed out that the date, 8th October, 1985 reflected on Exhibit E was
in compliance with the instruction in the consent, Exhibit E1 which directs
that the date of the commencement of the transaction should not predate
that of the consent itself.

C Concluding his brief of argument, learned respondents' counsel
submitted that the appellant as a holder of a statutory right of occupancy
was the one saddled with the responsibility of obtaining the necessary
Governor's consent. He argued that the said appellant cannot now rely on
its own wrongful act, lapse, default or negligence to contend that Exhibit E
is void and unenforceable because it had failed to get the necessary consent.
D He was of the view that Savannah Bank (Nigeria) Ltd. v. Ajilo and
Solanke v. Abed, (supra), were both rightly decided on the particular facts
of those cases.

E Learned Amicus curiae, Professor A.B. Kasunmu S.A.N., in his
own brief observed that although there was an extensive review in the lead
judgment of the earlier decisions of the Supreme Court and the then Fed-
eral Supreme Court in Savannah Bank of Nigeria Ltd. v. Ajilo and Solanke
v. Abed, the issues raised in both cases are not of particular relevance to
the issues raised in the present case. In both cases, there was no consent to
the transactions involved as a result of which the issue for determination
F was the effect of lack of such consent to the transactions. In the present
case, however, the necessary consent was obtained to the transaction. The
argument of the appellant was centred on the interpretation of section
22(1) of the Land Use Act which prohibits the alienation of statutory right
of occupancy without the consent of the Governor first had and obtained.
G He argued that the effect of this section of the Act is that no matter what
instruments or documents are executed or when they are so executed, the
alienation can only be said to have taken effect after the necessary consent
has been obtained. He therefore submitted that regardless of whether an
instrument was signed, sealed or delivered, there would in fact be no trans-
H fer or alienation unless and until the Governor's consent had been ob-
tained. Learned Senior Advocate submitted that B. the Act nowhere stipu-
lates that such a consent must be in place before the execution of the
relevant document. He contended, on the contrary, that sections 22(2) and
26 of the Act presuppose the existence of an agreement of some sort be-

tween the parties which the Governor may give his consent to. He closely examined the decisions in Ajilo and Solanke cases and observed:-

"The apparent conflict between Ajilo and Solanke lies in the fact that in the two cases, the consent of the Governor was not obtained to the transaction. In Ajilo the transaction was declared null and

void and the mortgagee cannot exercise his power of sale since no B estate could have been passed on to it. In Solanke on the other hand, inspite of the lack of consent to the tenancy, equitable principles were used to sustain a claim for trespass by the Tenant which essentially is a wrong against possession despite the fact that he could not be said to be in possession without the consent of the Governor.

The question that arises is whether the Federal Supreme Court was right in its use of equitable principles/doctrines to give relief to the plaintiff in the Solanke case. It is, respectfully submitted that equity follows the law and cannot be used to defeat the provisions of the statute. Equity cannot contradict the law. It is quite clear from the provisions of Section 22 D that no estate (whether legal or equitable) will pass if there is no consent. That being the case, the tenant in Solanke's case cannot maintain an action for trespass since he cannot claim to be in possession."

He concluded by expressing appreciation for the efforts of the court to ensure that the Land Use Act is not used as an engine of fraud but E stressing that a way out must be found not by doing violence to the express provisions of the Statute which, according to him, is what Solanke's case would seem to be doing.

Learned Senior Advocate of Nigeria, Chief F.R.A. Williams, in his own brief argued that although the ratio decidendi in Solanke's case was F correctly deduced in this case, yet the reasons given for the decision by the Federal Supreme Court were, with respect, untenable and should be disapproved. He submitted that Solanke and Ajilo cases were rightly decided but that Solanke's case was decided under section 11 of the Land and Native Rights Ordinance, Cap. 105 of the 1948 Edition of the Laws of Nigeria and G not under section 22 of the Land Use Act. He observed that the plaintiff's contention on the validity of Exhibit E was based on the allegation that whilst it was executed in or about 1980, the Governor's consent was obtained in or about September, 1985. The plaintiff consequently argued that the legal mortgage was therefore invalid because it was executed before the H Governor's consent was obtained. The defendant, on the other hand, argued that the Governor's consent having been given before the mortgage deed was dated, the deed is valid and lawful by virtue of section 22 of the Land Use Act. He pointed out that the trial court seemed to consider that

the material point in time as to when Exhibit E. became effective is when the deed of mortgage was dated. The Court of Appeal, for its own part, appeared to think that the said material point was the time of the execution and sealing of Exhibit E. In his own view, such material point in time was the moment of the delivery of the deed and he urged this court so to hold.

B Chief Williams argued that in the case of any transaction created by deed, the law is settled that such transaction does not come into effect prior to delivery and he cited in support the decisions in *Goddard's case* (1584) 2 Co. Rep. 46; 76 E.R. 396 and *Vincent v. Premo Enterprises Ltd.* (1969) 2 Q.B. 609 at 619-620. He submitted that until the necessary consent of the Governor was given or obtained, Exhibit E was only an escrow. He stressed that the date of execution of Exhibit is not material to the operation of section 22 of the Land Use Act as the deed had not become effective at that date. It only became effective after its delivery to the defendant following the Governor's consent. Accordingly in the case of alienation by any instrument made by deed, the steps taken by the holder of the statutory right of occupancy become unlawful only when he takes the final step of making delivery of the deed without the consent of the Governor first had and obtained and not when it was executed or sealed.

E Chief Williams finally dealt exhaustively with the effect of contravention of the Act as provided for in sections 22 and 26 of the Act. I do not however find it necessary to consider this aspect of learned counsel's brilliant submissions in view of the ultimate conclusion I will reach in this appeal.

F Professor J.A. Omotola, of learned counsel in his own submissions closely examined the statutory provisions upon which the decisions in *Savannah Bank (Nig.) Ltd. v. Ajilo* and *Solanke v. Abed* supra, were reached and contended that sections 22(1) and 26 of the Land Use Act read together appear to be in *pari materia* with Section 11 of the Land and Native Rights Ordinance, Cap. 105, Laws of Nigeria, 1948. Both provisions prohibit transfers of right of occupancy without the necessary consent.

H Learned counsel next proceeded to examine the *rationes decidendi* in the above two cases and concluded that there is in fact no conflict in their decisions. He submitted that at best, one may recognize conflicting obiter dicta without more. He therefore urged this court to decide the present appeal on its peculiar facts and was of the view that there would be no need to overrule any of the two decisions. He urged that the issue for determination in this appeal is the stage the consent of the Governor must be obtained for Exhibit E to be valid. He submitted that it could not be seriously argued that the provisions of section 22 of the Act require parties

to a proposed transaction to apply to the Governor for an approval of their mere intention to enter into an agreement. He delved into the consequence of failure to obtain the necessary consent but, as I have already observed, it will be unnecessary for me to consider the issue in the present appeal.

At the oral hearing of the appeal on the 24th January, 1995, the appellant which was represented by its Managing Director. Mr. M.A. Adejoro submitted a written address in explanation of the appellant's brief. He urged the court to allow the appeal and to hold that Exhibit E is illegal and unenforceable.

Learned counsel for the respondents together with the learned amici curiae adopted their respective briefs of argument and made oral submissions in amplification thereof.

I think I ought to observe straightaway that the court below in its lead judgment per Ogundere, J.C.A. formulated the first issue for resolution as follows:"

As can be from the issues formulated, the main issue was whether the deed of mortgage was in fact executed in 1980 before the governor's consent in 1985. In which case the mortgage deed will be caught by the provisions of section 22 of the Land Use Act which stipulates that the prior consent of the governor must be sought and obtained before the deed of mortgage is executed. Savannah Bank v. Ajito (1989) 1 NWLR (Pt.97) 305."

I must say that I agree entirely with Professor Kasunmu, S.A.N., that the first issue as formulated by the Court of Appeal is, with respect, erroneous as the Land Use Act no where stipulates that the consent of the Governor must be in place before the relevant document is executed. In my view, this first issue which incidentally is the main issue for determination in this appeal is whether the consent of the Governor obtained subsequent to the execution of the deed of mortgage. Exhibit E, by the appellant is contrary to the provisions of section 22(1) of the Land Use Act and renders the transaction null and void.

The appellant had argued that the entire evidence before the court established that Exhibit E was executed before the Governor's consent was obtained. It was submitted that the instrument was therefore null and void and unenforceable in any circumstance. For the respondents, it was conceded that Exhibit E was executed by the appellant before the relevant Governor's consent was obtained but it was argued that this prior execution of Exhibit E before the Governor's consent was obtained would not make the instrument invalid as contended by the appellant.

For a better appreciation of this main issue, it is necessary to set

out sections 22(1) and 26 of the Land Use Act. These provide as follows:-

"22(1) It shall not be lawful for the holder of a statutory right of occupancy granted by the Military Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise howsoever without the consent of the Military Governor first had and obtained."

Section 26 of the Act then provides:-

"26 Any transaction or any instrument which purports to confer on or vest in any person any interest or right over land other than in accordance with the provisions of this Decree shall be null and void."

The first point that must be made is that section 22(1) of the Land Use Act prohibits the holder of a statutory right of occupancy from alienating his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise without the consent of the Governor first had and obtained.

Section 26 of the Act expressly provides that any transaction which purports to confer on or vest in any person any interest or right over land other than in accordance with the provisions of section 22(1) shall be null and void. The real issue that now arises for decision is the stage this all important consent of the Governor must be obtained for the relevant transaction to be legally valid and enforceable.

I think it ought to be stressed that the holder of a statutory right of occupancy is certainly not prohibited by section 22(1) of the Act from entering into some form of negotiations which may end with a written agreement for presentation to the Governor for his necessary consent or approval. This is because the Land Use Act does not prohibit a written agreement to transfer or alienate land. So long as such a written agreement is understood and entered into subject to the consent of the Governor, there will be no contravention of section 22(1) of the Land Use Act by the mere fact that such a written agreement is executed before it is forwarded to the Governor for his consent. I agree entirely with Chief Williams, S.A.N. that section 22(1) prohibits transactions or instruments whereby the holder of statutory right of occupancy purports to alienate as a complete action, his right of occupancy by assignment, mortgage, transfer of possession, sublease or otherwise, the absence of the relevant consent of the Governor first had and obtained notwithstanding. In my view, section 22(1) of the Land Use Act does not cover purported alienations or alienations which the parties did not intend to become immediately effective until necessary approval by the Governor is obtained. It does however cover and strike at transactions which effectively purport to enable an assignee, mortgagee or

sublessee of the right of occupancy to exercise his rights there under without the prior consent of the Governor.

The next crucial question, as Chief Williams, S.A.N. quite rightly posed, must be at what point in the transaction relating to the mortgage deed, Exhibit E, did the plaintiff/appellant effectively put the 2nd respondent, the mortgagee, in a position where, but for the want of the Governor's consent, it would have been able to exercise the rights of a mortgagee there under. He asked in his brief.

"Was it at the time of the execution and sealing of Exhibit E (as the Court of Appeal appears to think) or was it at the time of the delivery thereof (as the Supreme Court is now urged to hold)". C

The law appears to be well settled that any transaction created by deed, such as the mortgage deed, Exhibit E, does not come into effect prior to delivery. In this connection, the learned authors of Halsbury's Laws of England, 4th Edition. Volume 12, Paragraph 1329 expressed the issue as follows:- D

"1329. Delivery of Deed

In order to be effective a deed must be delivered as the act and deed of the party expressed to be bound by it, as well as sealed. No special form or observance is necessary for the delivering of a deed, and it may be made in words or by conduct. The usual form of delivery a deed by words is for the executing party to say, while putting his finger on the seal, "I deliver this as my act and deed". It is not necessary, however, to follow this form of execution; nor is it necessary that the deed should actually be delivered over into the possession or custody either of the person intended to take the benefit of the deed, or to a third person to the use of the party taking the benefit of the deed; though if the party to be bound so hands over the deed, that is sufficient delivery without any words. E F

What is essential to delivery of the document as a deed is that the party whose deed the document is expressed to be (having first sealed it) shall by words or conduct expressly or implied acknowledge his intention to be immediately and unconditionally bound by the provisions contained in it." G

I am in agreement with the above statement of the law and must, with respect, fully endorse the same. The law as to the delivery of a deed seems to me crystal clear and this is that a transaction created by deed H does not come into effect or become effective prior to the delivery. A deed is binding on the maker of it, even though the parts have not been exchanged, as long as it has been signed, sealed and delivered. It has to be stressed however that the term delivery, in law, is not synonymous with the

physical exchange of signed and sealed documents between the parties thereto. It does not also mean the handling over of a document to the other side. It does mean and has been judicially interpreted to connote an act done so as to evince an intention to be bound. Even though the possession of such deed still remains with the maker, or his solicitor, he is bound by it B if he has had it delivered in law by doing some unequivocal act whether by words or action evincing an intention to be bound.

It ought to be mentioned that a delivery may be conditional. In that event, the deed is generally referred to as an escrow and does not and cannot become binding or effective until the condition has been performed C or fulfilled and it matters not whether or not the maker has parted with possession of the deed. See *Goddard's Case* (1584) 76 E.R. 396 at 398, *Vincent v. Premo Enterprises Ltd.* (1969) 2 Q.B. 609 at 619, *Xenos v. Wickham* (1866) L.R. 2 H.L. 296 and *Beesly v. Hallwood Estate Ltd.* (1961) Ch. 105. I should also perhaps observe that the mere fact that a D deed has been dated, executed or sealed does not in law indicate that it is delivered. See *Mowatt v. Castle Street and Iron Works Co.* (1887) 34 Ch. D 58 at 62.

Having made the above observations, the question must be asked whether Exhibit E was sent to the Governor by the parties thereto with the E intention or in the understanding that it was not only an effective and enforceable deed but that the provisions were also immediately and unconditionally binding on them as a concluded transaction. I think not. It seems to me indisputable from the totality of the evidence before the court that Exhibit E was forwarded to the Governor with the knowledge of both parties F that his consent was required by law in order to complete the transaction or make it effective and enforceable. In these circumstances, it appears to me plain that the document, Exhibit E, was delivered as required by law after the Governor gave his approval thereto and addressed his letter of consent. Exhibit E.1 to the appellant.

G It ought in fairness to be mentioned, as was pointed out by Chief Williams, S.A.N., that the delivery date of Exhibit E was clearly not made an issue by the parties at the trial. This was because it appeared all concerned erroneously fixed their mind to the fact that the material date for the purpose of the consent required by section 22(1) of the Land Use Act was H the date Exhibit E was executed. Attention was therefore not drawn to the issue of the delivery of the deed. It suffices for the present time to emphasize that a deed takes effect from the moment of delivery as against any other written instrument which takes effect from the date of execution, and although the date expressed in the instrument is *prima facie* taken as the

date of delivery or execution, this does not exclude extrinsic evidence of the actual date of such delivery or execution. See Halsbury's Laws of England, 4th Edition, Volume 12. Paragraph 1486 and section 127 of the Evidence Act. But as I have pointed out, the date of execution of the deed, Exhibit E, cannot be regarded as material to the operation of section 22(1) of the Land Use Act as the instrument only became effective from the time of its delivery which as I have stated, was after the Governor's consent to the transaction had been obtained. It seems to me from a close examination of Exhibits E, E1 and the entire evidence before the court that the deed of mortgage, Exhibit E was delivered on the date the instrument bears, that is to stay, the 8th October, 1985.

Still dealing with the main issue under consideration, reference must be made to section 22(2) of the Land Use Act which provides thus:-

"The Governor when giving his consent to an assignment, mortgage or sublease may require the holder of a statutory right of occupancy to submit an instrument executed in evidence of the assignment, mortgage or sublease and the holder shall when so required deliver the said instrument to the Governor in order that the consent given by the Governor under subsection (1) may be signified by endorsement thereon" (Italics supplied for emphasis).

A close study of section 22(2) of the Land Use Act clearly confirms that it does recognise cases where some form of written agreement or instrument executed in evidence of the relevant transaction is submitted to the Governor in order that the necessary consent under section 22(1) may be signified by endorsement thereon. This being so, I do not conceive that it can be argued with any degree of seriousness that there is anything unlawful in the entering into or execution of Exhibit E before the Governor's consent was obtained as this procedure is expressly covered by section 22(2) of the Land Use Act. The legal consequence that arises in such a situation is that no interest in land passes under the agreement until the necessary consent is obtained. Such an agreement so executed becomes inchoate until the consent of the Governor is obtained after which it can be said to be complete and fully effective. I am therefore of the firm view that section 22(1) of the Land Use Act prohibits the alienation of a right of occupancy without the consent of the governor first had and obtained but does not prohibit agreement to alienate or in respect of terms and conditions for the purpose of effecting such alienation if and when the Governor gives his consent to the transaction in issue.

My above view finds considerable support in the case of Denning v. Edwards (1961) A.C. 245 at 253 - 254 where Viscount Simonds on the interpretation of section 88(1) of the Crown Lands Ordinance, the provi-

sions of which are in pari materia with section 22(1) of the Land Use Act had this to say:-

"It has been argued that the consent of the Governor must be obtained before the agreement is entered into and that subsequent consent is insufficient. Some form of agreement is inescapably necessary before the

B *Governor is approached for his consent.*

Otherwise negotiation would be impossible. Successful negotiation ends with an agreement to which the consent of the Governor cannot be obtained before it is reached. Their Lordships are of opinion that there was nothing contrary to law in entering into a written agreement before the

C *Governor's consent was obtained.*

The legal consequences that ensued was that the agreement was inchoate till that consent was obtained. After it was obtained the agreement was complete and completely effective."

I am, with respect, in full agreement with the views of Viscount D Simonds and fully endorse the same. A contravention of the requirement of section 22 of the Land Use Act occurs in the case of allegation of a statutory right of occupancy carried out by deed at a time when the relevant deed is delivered and not at a time when it is executed or sealed.

There is therefore no contravention of section 22 of the Land Use Act in E this case and, in the circumstance, the effect of the contravention of the section does not now arise in the present case for consideration. I am of the settled view that the consent of the Governor obtained subsequent to the execution of the deed, Exhibit E is not contrary to the provisions of section 22(1) of the Land Use Act and does not render the transaction unenforce- F able, null and void. In the circumstance, I am of the opinion that the basis on which the appellant is challenging the validity of Exhibit E is ill-founded and misconceived. I agree with the two courts below that Exhibit E is not in contravention of section 22(1) of the Act and that it is entirely valid and enforceable. The 2nd defendant/respondent was therefore entitled under G the law to foreclose the mortgage in issue as it did. In the same vein, the 1st respondent's entry into the mortgaged premises is, in my view, lawful.

On the issue of damages, it is the finding of the trial court that this was not satisfactorily established before it. This finding is affirmed by the court below. I have myself studied the evidence led on the point and find no H reason to disturb these findings of the courts below on the issue.

It is for the above and the more reasons contained in the lead judgment of my Lord, the Chief Justice of Nigeria that I too, hereby dismiss this appeal. I abide by the consequential orders including those as to costs therein made.