

**SUPREME COURT OF NIGERIA**  
 20TH JUNE, 1995. SC. 91/1989  
**CORAM:- S.M.A. BELGORE, I.L. KUTIGI,**  
**U. MOHAMMED S.U. ONU, A.I. IGUH, JJSC.**

ISAAC O. NLEWEDIM ..... PLAINTIFF/APPELLANT  
 V.  
 KALU UDLMA ..... DEFENDANT/RESPONDENT

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**APPEALS** - *Findings of fact - Based on erroneous appraisal of certain facts - Whether appellate court's interference was proper.*

**CONTRACTS** - *Specific performance - Act of part performance must be unequivocal - And in conformity with the parties' agreement - For specific performance to be granted.*

**CONTRACTS** - *Specific performance of a lease - Failure to fulfil fundamental part of the agreement - Specific performance will not be granted.*

**CONTRACTS** - *Time - Whether of the essence - In the parties contract for lease of land.*

**EVIDENCE** - *Document - Claimed to be sent to defendant who denied receiving it - Where no credible evidence of service is tendered - Whether the document is of any value.*

**LEGAL DRAFTING** - *Lease - Need to be clear as to intent and purpose - Essential contents of a lease.*

**LEGAL DRAFTING** - *Memorandum - Statute of Frauds 1677 s.4. - Whether contents of qualify as a memorandum.*

### **FACTS**

The Plaintiff (herein appellant), Isaac O. Nlewedim on about 12th January, 1976 went into an agreement to purchase a piece of land from the Defendant (Respondent herein) and made part payment of three thousand five hundred naira (N3,500.00) of the agreed sum of five thousand one hundred naira (N5,100.00). The appellant made promise to pay the balance very soon thereafter. However, nothing was heard or seen of the appellant until the respondent by cheque, returned the part payment of the three thousand five hundred naira (N3,500.00) to him through his (Respondent's) Solicitor.

In reaction to the Respondent's refund of the part payment, the appellant instituted the action leading to this appeal, averring in his statement of

claim that on payment of the said sum of three thousand five hundred naira (N3,500.00) he “*was there and then let into possession*” and also allowed to survey the said land. At the trial, the appellant tendered evidence of the said survey plan and other documents and prayed for an order of the court:-

(1) (a) Compelling the Respondent to execute a formal deed of lease in his favour in respect of the said land,

(b) Granting damages for trespass on the said land against the Respondent.

(c) For Perpetual injunction restraining the Respondent from further trespassing in the said land;

(2) Alternatively (a) N20,000.00 being general damages for breach of contract, (b) Return of N 3,500.00 money paid to the Respondent.

Learned trial judge gave judgment in favour of the appellant. The Respondent appealed against that judgment. The Court of Appeal set aside the judgment and held in favour of the Respondent. The appellant has now brought this appeal to the Supreme Court.

#### **ISSUE FOR DETERMINATION**

*Whether there is a certain and enforceable agreement for a lease and, if so, whether specific performance of that agreement may be ordered.*

**HELD** (Unanimously dismissing the appeal per lead judgment of **BELGORE JSC**)

#### ***Document - Claimed to be sent to defendant***

1. In the face of the defendant denying receiving the letter and Exhibit D and without any other evidence than mere averment and evidence of the plaintiff and without Notice to produce the learned trial judge erred in admitting Exhibit C and in relying so heavily on it. This is a finding of fact of the trial Court which ordinarily should not be discountenanced by the Court of Appeal but the law is clear as to admissibility of such contentious document in the face of denial of having received a by the defendant. The procedure for tendering such document is after the statement of Defence had clearly traversed the averment of having sent it to the defendant and in the absence of a dispatch book indicating its receipt, or evidence of having sent it by registered post the probative value of such document will be worthless unless there are witnesses, credible enough that the defendant was served with it. (p. 1312 C)

#### ***Lease - Need to be clear***

2. A lease must be clear as to its intent and purpose and it must at least contain (i) the term of years, (ii) the rent payable and (iii) commencement date of the lease Exhibit A, to all intent and purposes, according to the Court of Appeal, never (a) indicated the term of years of lease; (b) the rent payable, and (c) the commencement date of the lease. (p. 1314 E)

***Contracts - Time - Memorandum - Statutes of frauds***

3. The Court of Appeal came to the conclusion that had the trial judge considered thoroughly the pleadings and the evidence before him and related them to the law, he would have come to a conclusion as to the essence of time to the contract. The statement of Defence in paragraph 5 is very clear and ample evidence was led to it that Exhibit A did not amount to a lease for 99 years and the contents thereof did not amount to a memorandum required under S.4 Statute of Frauds 1677. The Court of Appeal therefore rejected Exhibit A as a memorandum amounting to a lease. I have nothing to contradict this stance of the learned Justices after considering all the facts pleaded and the evidence before the Court, the learned trial judge was certainly in error or acted under inadvertence in holding that document to be as good as a memorandum of lease. (p. 1315 E)

***Appeals - Findings of fact***

4. Where the trial judge made an erroneous appraisal of certain facts, e.g. giving highly probative value to Exhibit A, a document of limited contents and falling far short of anything but a mere receipt, without all the necessary requirements of a lease and extrinsic verbal evidence was all that was required, I find the Court of Appeal was right to set aside the trial Court's finding offset on it. The trial Court never considered all the facts before it and leant more on the facts presented by the plaintiff and cursorily disbelieved the defendant. Certainly such finding of fact has not been based on all the evidence before that Court and interference with its finding is right. (p. 1316 A)

***Specific performance - Act of part performance***

5. The appellant as plaintiff relied on the mere surveying of the land as the act of possession and perhaps the payment of N3,500.00. The act of part performance to lead to equitable remedy of specific performance must be unequivocal and in conformity with the agreement of the parties. (p. 1316E)

***Specific performance of a lease***

6. If an agreement is vague, as in this case, it is more of oral agreement with Exhibit A at best indicating the existence of such agreement, it will not be enforced in the absence of clear evidence of its terms. Conduct of the plaintiff applying for specific performance is also of major importance in deciding whether or not to decree it. A purchaser of land cannot enforce specific performance if he fails to fulfil a fundamental part of the agreement, in the instant case, failure to pay in time when time was of the essence. (p. 1317 A)

**NOTABLE POINTS OF INTEREST****BELGORE JSC*****1. When amending claim would be necessary***

It would appear that the trial Court was promoting the receipt Exhibit A to the status of a full agreement. There are other matters pleaded and clearly in evidence before the Court e.g. that the defendant was in some financial difficulty domestically and in his business and the need for urgent fund necessitated his offering to sell the land. The statement of claim was appraised of this by the amended further statement of defence and the plaintiff never reacted to this by pleading. He could have amended his own statement of claim. (p. 1312H)

**ONU JSC*****2. When specific performance cannot be granted***

There being no clear, definite and enforceable agreement for a lease - payment part of the agreed consideration for the purported lease as well as re-surveying the land in expectation of a grant disclosed at the trial court being insufficient acts upon which part - performance could be rested, would in my view, not amount to sufficient part performance. This is the moreso, when the parties had not been shown to have reached any consensus ad idem in writing upon such issues as commencement date, covenants, rent, mode of determination, etc. as hereinbefore demonstrated. (p. 1318D)

**REPRESENTATION**

Chief M .O. B. Ohunta, for the Plaintiff/Appellant

Chief C. I. Ohakwe, for the Defendant/Respondent

**CASES REFERRED TO**

Fitzmaurice v. Bailey (1960) 9 H.L. cases 78

Fatoyinbo v. Williams (1956) 1 FSC 87

Okpiri v. Jonah (1961) All N.L.R. 102

Akinola v. Oluwo (1962) 1 All N.L.R. 224

Akinloye v. Eyiola (1968) NMLR 92

Adeyemi v. Bamidele (1969) 1 All N.L.R. 31

Maja v. Stocco (1968) 1 All N.L.R. 141

Lawal v. Dawodu (1972) 8-9 SC. 83

Balogun v. Agboola (1974) 10 S. C. 111

Adimora v. Ajufo (1989) 3 NWLR (Part 80) 1

Okafor v. Idigo (1984) 1 S.C.N.L.R. 481 (1984) 6 S.C. 1;

Amasa v. Kososi (1986) 4 NWLR (part 33) 57

Abdullahi v. The state (1985) 1 NWLR 523 at 528

Chukwueke v. Nwankwo (1985) 2 NWLR 195

**1308 Nlewedim v. Uduma (1995) 6 KLR Belgore JSC**

Banman v. James (1868)3 CH. App 508.

Gibson v. Manchester City Council (1979)1 W.L.R. 294

Marshall v. Beridge (1881) 19 Ch. D. 233

Harvey v. Pratt (1965) 1 W.L.R. 1025

Brilliant v. Michael (1944) 114 L.J.Ch. 5

**B STATUTE REFERRED TO**

Statute of Frauds 1677 s. 4

**LEADING JUDGMENT BY BELGORE JSC**

The appellant, Isaac O. Nlewedim around 12th January 1976 went into an agreement to purchase a piece of land called “*Ala Isimkpa*” at Umule village in Southern Ngwa Division of the then East Central State, later Imo State but now Abia State. In the Statement of Claim the plaintiff averred that the agreed sum was N5,100.00 (five thousand five hundred Naira) and that he paid N3500.00 (three thousand one hundred Naira) as part payment promising to pay the balance of N1,600.00 (one thousand six hundred Naira) immediately he (plaintiff) surveyed the land and that he was there and then let into possession; by this he seemed to take the “word” possession to mean what he described in the Statement of Claim as “*the plaintiff should go into immediate possession of the land in dispute and the plaintiff should survey the land in dispute and start exercising all acts capable of being exercised by a lessee*”. (italics mine for emphasis). The plaintiff claimed he by virtue of the said agreement went into immediate possession of the land in question, surveyed it and produced a plan No. UNE/429/75 which is Exhibit B in this case. By the Statement of Claim. Exhibit B aforementioned followed the agreement. The said agreement, on which the fate of this appeal depends is dated 12th day of January 1976: but remarkably, Exhibit B. Survey Plan to have been prepared after the agreement is dated and signed by a licensed surveyor on 18th December 1975 after the following words:

“*CERTIFIED AS TRUE COPY OF ORIGINAL PLAN MADE BY ME 18TH DEC., 1975,*”

Curiously, the learned trial Judge never adverted to this lapse between what was pleaded and the evidence tendered in support. The agreement of 12th January 1976, which is supposed to be evidenced by a receipt. Exhibit A reads:

“*R E C E I P T*”

“*I. KALU UDUMA of Akanu Ohafia within Ania Community Council Area, Ohafia Division now resident at No. 30 Jubilee Road, Aba hereby received from ISAAC ONUEGBU NLEWEDIM of Ndoro village within Oboro Community Council area in Ikwuano Sub Division now resident at No. 39 Ekenna Avenue G.R.A. Aba, the sum of N3,500.00 (three thousand five hundred Naira) being part payment in respect of the consideration for the lease*

Nlewedim v. Uduma (1995) 6 KLR Belgore JSC 1309  
of 99 (ninety-nine) years of my free hold property known as and called "ALA ISIMKPA" situate and lying at Umule village in the Southern Ngwa, Ngwa Division of the East Central State of Nigeria, and more particularly described in Plan No. OKE/543/72, leaving a balance of N1,600.00 (one thousand six hundred Naira).

I undertake to execute formal lease in favour of the said Mr. ISAAC ONUEGBU NLEWEDIM as soon as I receive the said balance of N1,600.00. B

DATED AT ABA THIS 12TH DAY OF JANUARY, 1976 SIGNED AND DELIVERED BY

the above named KALU UDUMA (Sgd.)

in the presence of:-

KALU UDUMA

(Charles Ohunta) (Sgd.)

C.E. Ohunta

Name: Kalu Uduma PREPARED BY ME

Address: 30 Jubilee Rd. Aba M.O. B. OHUNTA ESQ.

Occupation: Trading BARRISTER-AT-LA W

17 CONSTITUTION CRESCENT

ABA.

Stamped and signed."

After 12th January, 1976, nothing was heard from the plaintiff about the balance of N 1,600.00 not until the 16th March 1977, over a year after, when Exhibit C, reading as follows:

"EXHIBIT "C" TENDERED, ADMITTED AND MARKED 14/3/79 RE- TENDERED AND ADMITTED AS EXH. "C"

ON 15/1/82 IN SUIT NO. A/77/77 BETWEEN ISAAC O. NLEWEDIM VERSUS KALU UDUMA

16th March, 1977.

MOB/ION: SP/Admin.IV/76

Mr. Kalue Unduma,

30, Jubilee Road,

Aba.

Dear Sir,

"I act for Mr. I. O. Nlewedim of No. 39 Ekenna Avenue Aba, to whom you granted a 99 years lease of a piece or parcel of land known as and called "ALA ISIMKPA" situate and lying at Umule Village. Mr. Nlewedim will be herein after referred to as "my client".

I am instructed that you agreed with my client that he should pay N3,500.00 down and go into possession of the land, and that you would execute a lease in favour of my client when he has a survey plan of the land ready and also pay up the balance of N1,600.00 still to be paid to you.

It is my instruction that my client has now got survey plan of the land ready, and has approached you with the outstanding N1,600.00 which he

*has tendered to you on a number of occasions, but that you have cleverly, put him off, and refused to receive the said money and also refused to carry out your undertaking to execute a formal lease in favour of my client.*

*I am instructed to invite you to my client's house on Friday the 19th of March 1976 to receive the said balance, and to execute the said lease."*

B       *"Yours faithfully,*  
           *(Sgd.)*  
           *M.O. B. Ohunta Esq.,*  
           *Barrister-at-law,*  
           *17, Constitution Crescent,*  
           *Aba."*

C       was written by solicitor to the plaintiff, to the defendant. Exhibit C was a reaction of the plaintiff to the letter from the defendant's solicitor refunding the deposit of N3,500.00 paid in January, 1976 by cheque. Otherwise, he did nothing since the alleged agreement of 12th January 1976. It is of interest to note that the Statement of Claim in paragraph 13 thereof averse:

D       *"Plaintiff approached the defendant on several occasions and tendered the balance premium of N1,600.00, and then asked defendant to execute a formal lease and the defendant refused to receive the said balance, and also refused to execute the said lease."*

E       This averment with mere cursory observation will appear that the plaintiff had on several occasions tendered the sum of N 1,600.00 and that the defendant refused to execute the deed of transfer to him. The real fact could hardly be hidden by the subsequent paragraph 14 in which a letter of 16th March 1976 and another of 12th June 1976 were pleaded. Two letters are among the documents tendered by the plaintiff with dates almost tallying with the pleading in paragraph 14 (*supra*) , but remarkable enough, the defendant  
 F       not only denied receiving them in paragraph 7(v) of the Statement of defence but they also bore different dates and serial numbers as follows:

(i) Exhibit C quoted earlier is dated 16th March 1977 and not 16th March, 1976 as in Statement of Claim.

(ii) Exhibit D is actually carrying the date 25th June 1976.

G       Therefore Exhibit C could not possibly have been written on 16th March 1976 and certainly not before Exhibit D as claimed in the statement of claim. The two letters, with respect to learned counsel for the appellant, could not have been in the same filing series as Exhibit C carries reference No. MCB/ION: Adm. IV/76 (even though written in 1977) and Exhibit D carries reference  
 H       number MOB/Adm. 12/1/76. This is moreso noteworthy when there is a clear pleading by the defendant that he never received any of the two letters. The learned trial Judge never adverted his mind to these discrepancies in the pleadings and evidence of the plaintiff, perhaps due to inadvertence the plaintiff's claim was:

*"WHEREFORE THE PLAINTIFF CLAIMS:-*

*1 (a) An Order of this Honourable Court compelling the defendant to execute a formal Deed of Lease in respect of a piece or parcel of land known as and called "ALA ISIMKPA" situate, lying and being at Umule village in Southern Ngwa Division within jurisdiction of this Honourable Court.*

*(b) N10,000.00 (ten thousand Naira) being damages for trespass on a piece or parcel of land in plaintiffs possession known as and called B "ALA ISI MKPA" lying and situate at Umule in Southern Ngwa Division within jurisdiction. The annual value of the land is N30.00 (thirty Naira).*

*(c) An Order of this Honourable court perpetually restraining the defendant from further entry into the said land and committing acts of trespass thereon.*

*2. In the alternative, the plaintiff claims from the defendant:-*

*(a) N20,000.00 (Twenty thousand Naira) being general damages C for breach of contract;*

*(b) N3,500.00 (Three thousand, five hundred Naira) being money paid by the plaintiff to the defendant."*

*DATED AT ABA THIS 12TH DAY OF JULY, 1977."*

The defendant after recounting how he first offered half of the land D to the plaintiff in early December 1975 but by early January 1976, i.e. 12th January 1976, he offered the entire land to him for the sum of N5,100.00 aforementioned and the question, of surveying the land was never discussed. He averred that Exhibit A (quoted earlier in this judgment) being a mere receipt, E and so marked, did not represent all the terms and conditions of the agreement to sell to the defendant and therefore insufficient to amount to a memorandum for purposes of S.4, Statute of Frauds 1677. The plaintiff, by his pleading, averred that the defendant might have changed his mind in selling the land as the value of land in the locality of the disputed one had appreciated due to F movement to Ariara Market adjacent to it from Ekeoha Market that was to close down. The defendant clearly traversed this by averring that Ariara Market was fully in existence by December 1975 and by that time Ekeoha Market had finally been closed down. As for possession, the defendant denied ever G putting the plaintiff in possession and that he only undertook to execute formal lease in favour of the plaintiff as soon as he received the final payment of N1,600.00 from the plaintiff. He (defendant) claimed to be all along in effective possession from 1972 and had in his possession a survey plan of the land and an approved building plan, Exhibit K since 1974. By offering to sell the H land to the plaintiff, he confided in him how desperate his business was in need of money, and that he had on site moulded several concrete blocks stacked in preparation to execute the building to the approved plan but now business and domestic necessity compelled him to sell to raise money. Thus, it was clearly conveyed to the plaintiff that time was of the essence.

At the close of all the evidence, the plaintiff, now appellant before this Court, abandoned his alternative claims as contained in paragraph 17 (2)



(a) and (b) of the Statement of Claim, to wit, damages for breach of contract and the money i.e. N3,500.00 already paid to the defendant/respondent. Thus what remained of his claim in the trial Court and in issue in the Court of Appeal and here is specific performance, damages for trespass and perpetual injunction.

The learned trial Judge reviewed the evidence and held that Exhibit C bearing the date 16th March 1977, should read 16th March 1976 and according to him

*"I am strengthened in this view by the last paragraph of Exhibit C which reads:*

*'I am instructed to invite you to my client's house on Friday 19th March 1976 to receive the said balance and execute the said lease'.*

*This paragraph makes it abundantly clear the letter Exhibit C was written on 16th March 1976 and not 16th March 1977."*

In the face of the defendant denying receiving the letter and Exhibit D and without any other evidence than mere averment and evidence of the plaintiff and without Notice to produce the learned trial Judge erred in admitting Exhibit C and in relying so heavily on it. This is a finding of fact of the trial Court which ordinarily should not be discountenanced by the Court of Appeal but the law is clear as to admissibility of such a contentious document in the face of denial of having received it by the defendant. The procedure for tendering such document is after the statement of defence had clearly traversed the averment of having sent it to the defendant and in the absence of a dispatch book indicating its receipt, or evidence of having sent it by registered post the probative value of such document will be worthless unless there are witnesses, credible enough to testify that the defendant was served with it. The defence also made a case out of Exhibit A (quoted earlier in this judgment) which was a receipt for the payment of N3,500.00 as part- payment. The learned Judge in his judgment made the following conclusion on Exhibit A:

*"Even though the plaintiff agreed that at the time the defendant was offering the land to him for sale he knew that he was in dire need of money, time for payment was never made of essence of the contract and if this was so, it should have been embodied in Exhibit "A" stipulated that the defendant should execute a formal contract as soon as the balance of N1,600.00 was paid. No time was fixed for the plaintiff to pay the balance or forfeit the land. Exhibit "A" was made on 12/1/76. Assuming that the production of a survey plan was a condition precedent to the payment of the balance of N1,600.00, Exhibit "B" was made on 18/12/75 and checked and passed on 6/5/76. This latter date is doubtful in view of Exhibit "C" written on 16/3/76 which claimed that the survey plan was ready by 16/3/76."*

It would appear that the trial Court was promoting the receipt of Exhibit A to the status of a full agreement. There are other matters pleaded and clearly in evidence before the Court e.g. that the defendant was in some financial difficulty domestically and in his business and the need for urgent fund

necessitated his offering to sell the land. The statement of claim was appraised of this by the amended further statement of defence and the plaintiff never reacted to this by pleading. He could have amended his own statement of claim. In the face of all these, the trial Court found for the plaintiff and made the final order as follows:

*"1. This case was pending before the Land Use Act, 1978, the plaintiff is hereby ordered to apply to the appropriate authority for a certificate of occupancy as provided in the Transitional Provisions of the said Act since by virtue of the said Act, the defendant cannot now convey the land.*

*2. The plaintiff is to pay the defendant the said balance of N1,600.00.*

*3. The defendant, his agents and or servants are hereby restrained from further encroachment on the parcel of land in dispute namely, that verged pink in Exhibit "J".*

*4. I award N1,000.00 to the plaintiff against the defendant for the acts of trespass committed by him on this land .*

*5. I assess the costs of this action at N300.00 payable by the defendant to the plaintiff."*

Against this judgment an appeal was lodged before the Court of Appeal, Enugu Branch. After considering the grounds of appeal and issues based on them (the plaintiff as respondent filed a document he called a Brief but it contained or formulated no issues for determination), the leading judgment aptly set out what was before the trial Court as per statement as claim as follows:

4. Sometime in or around the 1st week of December 1975 the defendant came to the plaintiff's house at No. 39 Ekenna Avenue, Aba, accompanied by one Charles E. Ohunta, plaintiff's townsman, who brought and introduced the defendant to the plaintiff. The defendant on that occasion informed the plaintiff that he, the defendant was in serious financial difficulties arising from slump in his business which was faced with imminent collapse, and therefore intended to lease one of his properties, precisely, the land in dispute, which he then offered to lease to the plaintiff in order to use the proceeds therefrom to reactivate his business. Both the plaintiff and the defendant entered into an oral agreement for the lease of the land in dispute by the defendant to the plaintiff.

5. Both the plaintiff and the defendant agreed that the plaintiff would pay to the defendant a premium of N5, 100.00 (five thousand one hundred Naira), and annual rent of N12.00 (Twelve Naira) payable every January.

6(a) Both the plaintiff and the defendant agreed that plaintiff should firstly make a part-payment of N3,500.00 (Three thousand five hundred naira) after which the plaintiff should go into immediate possession of the land and start exercising all acts of a lessee thereon.

(b) The defendant and the plaintiff further agreed that the defendant, who later however explained that he was immediately in serious need of money, and so requested for some advance payment which the plaintiff paid on 9th December 1975 by a African Continental Bank Cheque No. 19/0019454 of 9th December 1975 for N 1,500.00 (one thousand, five hundred naira). Both parties there

after agreed that N2,000.00 (two thousand naira) to complete the said part payment of N3,500.00 (three thousand five hundred naira) would be paid in plaintiff's Solicitor's office so as to enable the plaintiff obtain a proper receipt for such payment, and both parties fixed 12th January 1976 as a date for that payment.

B (c) On 12th January 1976, both the plaintiff and the defendant went to the office of plaintiff's Solicitor at No. 17 Constitution Crescent, Aba, whereat, plaintiff paid a further N2,000.00 (two thousand Naira) to the defendant, by a African Continental Bank Cheque No. 19/0019458 of 12th January 1976, to complete the agreed part payment of N3,500.00 (three thousand five hundred naira) now leaving a balance of N1,600.00 agreed to be paid after the plaintiff has received the survey plan from his Surveyor.

7. Both the plaintiff and the defendant agreed that the defendant would execute a deed of lease in favour of the plaintiff, as soon as the plaintiff's Survey plan was ready and the balance of N1,600.00 was paid by the plaintiff.

D 8. The plaintiff paid the said N3,500 and went into possession of the land on dispute immediately. This summary is from amended statement of Claim. The cheques in issue mentioned in the above summary were before the Court and at any rate they were not denied by the plaintiff who could amend his statement of claim to thrash out all the matters in the statement of defence not met by the plaintiff. A lease must be clear as to its intent and purpose and

E it must at least contain  
(i) the term of years,  
(ii) the rent payable and  
(iii) commencement date of the lease.

F Exhibit A, to all intent and purposes, according to the Court of Appeal never  
(a) indicated the term of years of the lease;  
(b) the rent payable, and  
(c) the commencement date of the lease.

G It is however to be observed that both parties agreed to the assignment of the land which is known and not in dispute. The conditions (a) - (c) above might have been what the parties discussed orally. The trial Judge merely held he never believed the defendant and his witness, Mr. Ohunta who was the middleman between the parties as to how time was of the essence of the contract. Assuming the number of years will be 99 years and that the sum of N5, 100.00 was for the entire term, the date of commencement was certainly  
H conditional on a formal lease being executed to reflect all the covenants. The formal agreement could only be executed after the payment of the balance of N1,600.00 which was not paid in time to satisfy the urgent and desperate need of the defendant for the money. The Court of Appeal then found as follows:

*"Neither in Exhibit A nor in the entire pleadings of the respondent nor in the evidence offered before the court was there a scintilla of evidence*

*in the evidence offered by the respondent about the commencement date. An agreement for a lease without the commencement date of the lease is invalid. Neither can the respondent take cover under the conjecture made by the trial Judge in respect of the commencement date. In this regard, I will borrow the words of Lord Denning MR. in Harvey v. Pratt (1965) 2 All E.R. 786/788 where he said:*

*“It is settled beyond question that, in order for there to be a valid agreement for a lease, the essentials are that there shall be determined not only the parties, the property, the length of the term and the rent, but also the date of its commencement. It is not sufficient to say that it can be supplied by an implied term as to reasonable time.*

*It cannot be assumed either that the term is to commence from the date of the agreement: Fitzmaurice v. Bayley (1960) 9 H.L. Cases 78.”*

Even if the agreement is oral, the Court of Appeal was of the view that paragraph 5 of the Statement of Defence which reads

*“As regards paragraph 8 of the statement of claim, the defendant will contend that the receipt signed by the defendant did not contain all the terms and conditions precedent to the grant of a lease for 99 years and that the contents thereof are insufficient to amount to a memorandum for the purposes of section 4 of the Statute of Frauds, 1677.”* amply explain the value placed on the receipt, Exhibit A. Thus, the Court of Appeal held that the parties, in the face of Exhibit A, cannot be presumed to have agreed to the “execution of a formal lease” as continuing to a time ad infinitum. On the face of Exhibit A the date of commencement of the lease proposed is not indicated and it is not to be presumed that it would start that very day i.e. 12th January 1977. The Court of Appeal looked for support in the English case of Fitzmaurice v. Bayley (1960) 9 H.L. Cases 78. The Court of Appeal came to the conclusion that had the trial Judge considered thoroughly the pleadings and the evidence before him and related them to the law, he would have come to a conclusion as to the essence of time to the contract. The statement of defence in paragraph 5 is very clear and ample evidence was led to it that Exhibit A did not amount to a lease for 99 years and the contents thereof did not amount to a memorandum required under S. 4 Statute of Frauds 1677. The Court of Appeal therefore rejected Exhibit A as a memorandum amounting to a lease. I have nothing to contradict this stance of the learned Justices after considering all the facts pleaded and the evidence before the Court, the learned trial Judge was certainly in error or acted under inadvertence in holding that document to be as good as a memorandum of lease. An appellate Court will not disturb the findings of fact of the trial Court once the trial Court has made a proper appraisal of all the legal evidence before it. This has been the law all along and it is too late in the day to change it as the stand of this Court has always been based on the justice of the case. See authorities of this Court over the years from Fatoyinbo v. Williams (1956) 1 FSC 87; (1956) SCNLR 274; Okpiri v. Jonah (1961) 1 All WLR 102, Akinola v. Oluwo (1962) 1 SCNLR 352 (1962) 1 All NLR 224 to Akinlore v. Eyiola (1968) NMLR 92. But the rule is not a hard and fast one as there are exceptions. If the fact as found by the trial Court has no

evidence to support it, Adeyemi v. Bamidele (1968) 1 All NLR 31, Maja v. Stocco (1968) 1 All NLR 141 (1968) NMLR 372; Lawal v. Dawodu (1972) 8-9 SC 83, the appellate Court will interfere. But within narrow and limited instances where the trial Judge made an erroneous appraisal of certain facts, e.g. giving highly probative value to Exhibit A, a document of limited contents and falling far short of anything but a mere receipt, without all the necessary requirements of a lease and extrinsic verbal evidence was all that was required, I find the Court of Appeal was right to set aside the trial Court's finding of fact on it. The trial Court never considered all the facts before it and leant more on the facts presented by the plaintiff and cursorily disbelieved the defendant. Certainly such finding of fact has not been based on all the evidence before that Court and interference with its finding is right - Balogun v. Agboola (1974) 10 SC 111; (1974) 1 All NLR (Pt. 2) 66; Obisanya v. Nwoko (1974) 6 SC 35; Akibu v. Opaleye (1974) 11 SC 189; Gwawoh v. Commissioner of Police (1974) 11 SC 243; Okpaloka v. Umeh (1976) 9-10 SC 269; Suenu v. Babaoye (1977) 11-12 SC 15; Ebha v. Ogodo (1984) 1 SCNLR 372; Akpor v. Iguorigu (1978) 2 SC 115; Adimora v. Ajufu (1988) 3 NWLR (Pt. 80) 1. As the Court of Appeal found no substance in Exhibit A to promote that document to the status of memorandum of lease and that time was of the essence of the agreement that the document does not amount to a binding contract.

The Court of Appeal adverted to the question of part performance. The trial Court agreed the defendant wanted to sell the land because of the financial straits he found himself and his business in but he nonetheless held that that Exhibit A was still binding because of the initial payment of N3,500.00 leaving a balance of N1,600.00. But the question most uppermost in the mind of the Court of Appeal which trial Court treated lightly is that of possession. Entry into possession must not be clandestinely or stealthily but with the permission of the lessor so as to constitute the act of part performance in a case of this nature. The appellant as plaintiff relied on the mere surveying of the land as the act of possession and perhaps the payment of N3,500.00. The act of part-performance to lead to equitable remedy of specific performance must be unequivocal and in conformity with the agreement of the parties. Maddison v. Alderson (1883) 8 AC 467,479. There was no cogent evidence that immediately after payment of N3,500.00 the plaintiff was put in physical possession, Exhibit A is silent on possession and there is evidence that the defendant had actually surveyed the land years before he even met the plaintiff. Certainly the preponderance of evidence before the trial Court indicates the defendant rather than the plaintiff was all along in possession. The substance of the agreement between the parties is for the plaintiff to pay the full price quickly, time being of the essence, the plaintiff failed in this. Whoever seeks equitable remedy like specific performance must show that he is vigilant and does all that was required of him to have clear hand to enforce the contract. *Vigilantibus et non dormientibus jura subveniunt.*

The agreement, slightly revealed by Exhibit A, was yet to be drawn up: even according to Exhibit A which is just a receipt for payment of N3,500.00 and indication that formal agreement would be drawn up upon the payment of N1,600.00, it was not

meant to be the agreement capable of amounting to a lease. If an agreement is vague, as in this case, it is more of oral agreement with Exhibit A at best indicating the existence of such agreement, it will not be enforced in the absence of clear evidence of its terms. Conduct of the plaintiff applying for specific performance is also of major importance in deciding whether or not to decree it. A purchaser of land cannot enforce specific performance if he fails to fulfill a fundamental part of the agreement, in the instant case, failure to pay in time when time was of the essence. I am therefore in full agreement that there is no merit in this appeal and I dismiss it with N1,000.00 costs to the respondent.

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**KUTIGIJSC**

I have had the privilege of reading in advance the judgment just delivered by my learned brother Belgore, J.S.C. with which I agree. I will also I dismiss the appeal with costs as assessed.

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**MOHAMMEDJSC**

I have a preview of the judgment just delivered by my learned brother, Belgore, J.S.C., and I agree with him that this appeal has no merit at all. Accordingly, for the same reasons as given in the lead judgment which I hereby adopt as mine, the appeal is dismissed with N1,000.00 costs in favour of the respondent.

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**ONU JSC**

Having had the advantage of a preview of the judgment of my learned brother Belgore, J.S.C. just delivered, I am in entire agreement with it that the appeal lacks merit and must perforce fail.

In adding a few comments of mine thereto, I only wish to touch briefly on issues 1 and 2 taken together, which are related to both grounds 2 and 3 of the grounds of appeal. These two issues, in my view, so strike at the root of the entire case that their consideration and disposal will, in my view, not only culminate in the resolution of the appeal against the appellant, but will render the reciprocal treatment of issue 3 which is devolved from ground 4 almost superfluous.

**ISSUES 1 AND 2**

The kernel of the complaints borne out of the two issues (1 and 2 respectively) is whether the purchase receipt, Exhibit A, satisfied section 4 of the Statute of Frauds 1677 as a memorandum of an agreement for a lease capable of enforcement by an order for specific performance and whether there was sufficient pleading of the said statute by the defendant/respondent in the Statement of defence. The decision of the court below to the effect that Exhibit A does not qualify within the intendment of section 4 of the Statute as

a memorandum evidencing an agreement for a lease of land capable of enforcement by an order of specific performance because there was no certainty on such vital ingredients of a lease such as the amount of rent payable, the date of commencement, the terms as to covenants and the amount of rent payable, not having been faulted, ought not to be disturbed vide -

- B
1. Adimora v. Ajufo (1988) 3 NWLR (Pt. 80) -1
  2. Okafor v. Idigo (1984) 1 SCNLR 481 (1984) 6 SC. 1;
  3. Amasa v. Kososi (1986) 4 NWLR (Pt. 33) 57;
  4. Abdullahi v. The State (1985) 1 NWLR, 523 at 528
- and Chukwueke v. Nwankwo (1985) 2 NWLR (Pt. 6) 195 See also Re Days Will Trust (1965) 1 WLR 1519 and Ranman v. James (1868) 3 CH APP. 508.
- C
- Exhibit A being held to be merely a receipt for the sum of N3,500 “*In respect of the consideration for the 99 years*” it (Exh. 'A') could at best be no more than provisional and inchoate; in which case, the remedy available to the appellant is at best an action for damages for breach. Be it noted, however, that appellant had at the stage of address abandoned his alternative claims in
- D paragraph 7 (2) (a) and (b) of the Statement of Claim. There being no clear, definite and enforceable agreement for a lease, payment of part of the agreed consideration for the purported lease as well as re-surveying the land in expectation of a grant disclosed at the trial court being insufficient acts upon which part-performance could be rested, would in my view, not amount to
- E sufficient part performance. This is moreso, when the parties had not been shown to have reached any consensus ad idem in writing upon such issues as commencement date. Covenants, rent, mode of determination, etc as hereinbefore demonstrated. Thus, had there been reliance on a proper plea of the Statute of Frauds, which is not the case here, the appeal would still have failed
- F on the grounds that Exhibit A cannot ground a claim for a specific order to execute a lease in the absence of a consensum ad idem between the parties with respect to the vital ingredients of such a lease. The payment of part of the
- H consideration, it ought to be stressed, ought to be viewed side by side with appellant’s failure to pay the balance of the agreed sum within a reasonable time. Both issues are therefore accordingly resolved against the appellant.
- G

### ISSUE 3:

Issue 3 which relates to ground 4 and asks whether the plaintiff disclosed sufficient acts of part-performance, being secondary to and subsumed in issues 1 and 2 considered together above, can only arise if the two

H issues are resolved in favour of the appellant. Since they have been resolved against the appellant, this issue too must equally be resolved against him.

It is for these reasons and the fuller ones contained in the lead judgment of my learned brother Belgore. J.S.C. with which I had earlier expressed my concurrence, that I too dismiss this appeal and affirm the decision of the

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court below. I abide by the consequential orders made therein inclusive of those as to costs.

### IGUHJSC

I have had the advantage of a preview of the lead judgment just delivered by my learned brother Belgore, J.S.C. and I agree entirely with him that this appeal is without substance and should be dismissed. B

The principal issue for determination in this appeal is whether there is a certain and enforceable agreement for a lease and, if so, whether specific performance of that agreement may be ordered.

In this regard, the appellant tendered Exhibit A which, admittedly, is a receipt, issued by the respondent herein to the appellant. for the sum of N3,500.00 being - *“part payment in respect of the consideration for the lease of 99 (ninety nine) years of my free hold property known as and called “Ala Isimpka” situate and lying at Umele Village in Southern Ngwa, Ngwa Division of the East Central State of Nigeria, and more particularly described in plan No.OKE/543/72, leaving a balance of N 1,600.00. I undertake to execute formal lease in favour of the said Mr. Isaac Onuegbu Nlewedim as soon as I receive the said balance of N1,600.”* (Italics supplied for emphasis) C D

The real issue for consideration is whether the said receipt. Exhibit A, satisfied the provisions of Section 4 of the Statute of Frauds, 1677 as a memorandum of an agreement for a lease capable of enforcement by an order for specific performance. E

I think the point must be made that there can be no order for specific performance unless there is a definite and certain contract. See Gibson v. Manchester City Council (1979) 1 WLR 294. Want of certainty in a contract is aground for resisting an order for specific performance. See Douglas v. Baynes (1908) A.C. 477. Where, as in the present case, the contract is for a lease, any uncertainty as to the date on which the term is to commence will be fatal to the lease, unless the contract itself and the surrounding circumstances make it clear that the term is to begin from the date when possession is delivered. See Marshalls v. Beridge (1881) 19 Ch. 233, Harvey v. Pratt (1965) 1 WLR 1025, Re Lander and Bogley’s Contract (1892) 3 Ch 41 and Brilliant v. Michael (1944) 114 L.J. Ch. 5. F G

It is also well settled that before an agreement for a lease may be regarded as valid, its essential terms, such as the parties concerned, the property involved, the duration or length of the term, the rent payable, the date of its commencement, the terms as to covenants and the mode of its determination must inter alia be certain. See Harvey v. Pratt. supra at p. 788. An agreement for a lease. Therefore, to be capable of enforcement by an order of specific performance must be certain as regards its essential terms. See too Fitzmaurice v. Bayley (1860) 9 H.L. Cases 78, Re Days Will Trust (1965) 1 WLR. H



1519 and *Banman v. James* (1868) 3 Ch, App, 508, In particular, such an agreement for a lease without a certain date of commencement cannot be specifically enforced for want of certainty. I will now examine Exhibit A against the background of the above propositions of law.

B A close study of Exhibit A reveals in no mistakeable term that but for the parties to the lease, the premium payable, the term of 99 years and the property involved. there is a total lacuna, as to the other essential elements of a valid agreement for a lease such as the commencement date of the lease, the rent payable, the terms as to its covenants and the mode, if any, of its determination. These missing essential elements were neither pleaded by the appellant in his Statement of Claim nor was evidence led before the court in respect thereof. In my view, Exhibit A cannot ex facie be regarded as a complete and sufficient contract to constitute a certain and valid agreement for a lease capable of enforcement by an order of specific performance.

D An agreement for a lease is like any other contract and in accordance with the general principles of the law of contract, it will not be binding or enforceable on the parties until there is a consensus ad idem both upon matters which are basic and cardinal to every agreement for a lease, and also upon matters that are part of the particular bargain concerned. See *Rossiter v. Miller* (1987) 3 A.C. 1124 at 1151. These cardinal terms of an agreement for a lease comprise, as I have already indicated, the parties, the premises, commencement and duration, rent and covenants in respect thereof. See *Halsbury's Laws of England* 3rd Edition Volume 23, Paragraph 1039 at page 440. I therefore agree with the Court of Appeal that Exhibit A did not qualify as a memorandum of an agreement for a lease capable of enforcement by an order for specific performance in view of the uncertainties I have referred to above.

F On the issue of whether the appellant established sufficient acts of part performance to support an order for specific performance, it is the view of the court below that there had been no part performance to warrant a specific performance. I have myself considered all the evidence led before the court but can find no reason to fault this finding. At all events, whether or not part performance was established by the appellant in this case cannot now be regarded as any matter of great moment. This is because of my finding that there can be no specific performance of an agreement for a lease such as Exhibit A when the parties had not reached a consensus ad idem on vital issues such as the commencement date. The covenant, rent and mode of determination of the lease among others.

H It is for the above and the more detailed reasons contained in the lead judgment of my learned brother, Belgore, J.S.C., that I too, dismiss this appeal as unmeritorious. I abide by the order as to costs therein contained.