

**SUPREME COURT OF NIGERIA**  
 18TH JULY, 1995. SC. 265/1990  
**CORAM:- M.L.UWAIS, LL. KUTIG, E. O. OGWUEGBU,**  
**U. MOHAMMED, Y.O. ADIO, JJSC**

CHIEF CLEMENT OBIJIAKU ..... APPELLANT  
 AND  
 J.B. ONUHA OFFIAH  
 (Suing as the head or “Okpala” ..... RESPONDENT  
 of J.N. Offiah’s family of Umuasele  
 Village, Onitsha Town)

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**APPEALS** - *Concurrent findings of fact - Appellate Court will not Interfere - Except where it is perverse or Miscarriage of justice is occasioned.*

**EVIDENCE** - *Burden of Proof - In civil cases - Not static - Is discharged by producing credible evidence.*

**LAND LAW** - *Arrears of rent and mesne profits - Whether the same thing - Distinction between the two.*

**LAND LAW** - *Tenancy - Nature of tenancy granted - When established by reference to manner of rent payment.*

**LANDLORD & TENANT** - *Mesne profits - Liability therefor - Whether to be awarded only following an order for recovery of possession.*

**LANDLORD & TENANT** - *Notice - Recovery of premises - Notice of intention to recover possession - Defect therein - Consequences thereof.*

### **FACTS**

The respondent as head of the J.N. Offiah’s family, in representative capacity, instituted an action in the High Court of Anambra State, Onitsha, claiming - Possession, Arrears of rent and mesne profits from the appellant. At the trial of the case, the respondent led evidence of the leasehold agreement between his (respondent’s) father and the appellant. By which agreement, the appellant was to and did demolish the structures formerly erected at the now No. 64 New Market Road, Onitsha and in its place built another house so as to occupy half of the property rent free. By the time the appellant completed the building, the respondent has become the head “Okpala” of the family, and as

such inherited his father's properties including the one now in issue. The respondent orally granted lease of his father's portion to the appellant in 1972 at the rent of N 140.00 per month which rent, was increased to N200.00 per month in 1976. The appellant who defaulted in the payment of the rent and the arrears which the respondent claimed to be N4,780.00 denied owing any arrears arguing that the expenses incurred by him in effecting repairs on the property offsets any rent claimed. The trial court at the close of the case, found for the respondent in respect of the N4,780.00 and a further N15,980.00 rent arrears for the period of the trial of the matter; but refused the claim for possession.

Dissatisfied, both the respondent and appellant, lodged crossappeal and appeal respectively at the Court of Appeal Enugu Division. That court dismissed both appeals. Whereupon, the appellant further appealed to the Supreme Court raising, what in the view of the apex Court amounted to a proliferation of issues, out of which the court has distilled one main issue for determination.

#### **ISSUE FOR DETERMINATION**

*Whether the respondent was entitled to his claim for arrears of rent and mesne profits as found by the learned trial Judge and affirmed by the Court of Appeal.*

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

#### ***Nature of tenancy granted***

1. As it was the respondent who contended that the nature of the tenancy granted by the respondent to the appellant was a monthly tenancy, the onus was on him to prove it. He could do so on the balance of probabilities as that is the standard of proof in civil cases. Having established, in this case, that the appellant was paying rent to the respondent at the rate of N140.00 every month. It followed, as a matter of law, that the tenancy in question in this case was a monthly tenancy by virtue of sections 8(1) and (2) of the Recovery of remises Law, Cap. 113 of the Laws of Eastern Nigeria, 1963 applicable Anambra State. There was no express stipulation as to the notice to be given by either party to determine the tenancy in question in this case. In the circumstance, the provisions of section 8(1) and (2) became applicable. The art below was, therefore, right in holding that the tenancy in question in this case was a monthly tenancy. (p. 1561 H)

#### ***Burden of prove in civil cases***

2. The respondent led evidence about the relevant period for which rent should be paid, the total of the various amounts paid by the appellant, and the amount

outstanding which came to N4,780.00. The learned trial Judge accepted the respondent's evidence and made a finding based on it. Having discharged the onus on him by producing credible evidence which, *prim facie*, established his claim, the onus shifted to the appellant to adduce credible evidence to prove his allegation that he was not owing any rent. In civil cases, the onus of proving particular facts is fixed by the pleading. However, it does not remain static but, shifts from side to side and the onus of adducing further evidence is on the person who will fail if such evidence is not adduced. (p. 1565 E)

### ***Concurrent finding of fact***

3. The learned trial Judge found that the balance of the rent which was outstanding and which the appellant was to pay to the respondent was N4,780.00 and the court below affirmed the decision. It was a concurrent finding. This court does not interfere with a concurrent finding of fact of lower courts except where it has been shown that it is perverse or has caused a miscarriage of justice. The finding in question in this case has not been shown to be unreasonable or perverse and it was not shown that it occasioned a miscarriage of justice. This court will, therefore, not interfere with it. (p. 1565 G)

### ***Arrears of rent and mesne profits distinguished***

4. Arrears of rent and mesne profits are not the same things. Soon the facts of a case, if a party is only entitled to recover a sum of money as arrears of rent, that sum of money cannot be awarded to him as mesne profits. Mesne profits means an intermediate profit, that is, profits accruing between the date that the defendant/tenant ceases to hold the premises as a tenant and the actual date that he gives up possession. Mesne profits are awarded in place of rents where the tenant remains in possession after the tenancy agreement has run out or been duly terminated. (p. 1567 C)

### ***Award of mesne profits***

5. I do not agree with the submission made for the appellant that mesne profits could only be awarded following an order for recovery of possession. The letter dated 14/9/79, Exhibit "A", terminated the tenancy of the appellant. In the circumstance, the appellant would be liable to pay rent up to the end or termination of the tenancy. If the tenant (appellant) gave up possession with effect from the date of termination, he would have been liable to pay rent up to the date of termination. If a tenant, as it was in this case, does not give up possession beyond the date of the termination of the tenancy, he will be liable to pay mesne profits for the period that he retains possession beyond the

termination of the tenancy. The contention or submission made for the appellant, on the point, was, therefore misconceived. (p. 1567 H)

***Effect of defective Notice to recover possession***

6. With reference to the respondent's claim for possession, it was purely on technical ground that possession of the property was not granted to the respondent. The court below rightly reversed the learned trial Judge on the validity of the notice, Exhibit "A", terminating the tenancy granted to the appellant by the respondent. The court below expressed the view, rightly in my view, that the one month's notice given to the appellant by the respondent was in order and was effective. It was the notice. Exhibit "B", of intention to recover possession that was issued and served too early and was, for that reason, defective. It was purely on that ground that that aspect or item of the respondent's claim tailed. (p. 1568 B)

**REPRESENTATION**

Appellant absent and unrepresented

B. Anyaduba for the Respondent

**CASES REFERRED TO**

Labiya v. Anretiola (1992) 8 N.W.L.R. (Pt. 258) 139

Oyediran v. Alebiosu 11, (1992) 6 N.W.L.R. (Pt. 249) 550

Trenco (Nig.) Ltd. v. African Real Estate & Investment Co. Ltd., & Anor. (1978) 4 S.C. 9 at p. 31

Mba-Ede v. Okufo (1990) 2 N.W.L.R. (Pt. 135) 787

Nigerian Maritime Services Ltd. v. Afolabi (1978) 2 S.C. 79 at p. 84

Ike v. Ugboaja (1993) 6 N.W.L.R. (Pt. 301) 539

Adegoke v. Adibi (1992) 5 N.W.L.R. (Pt. 242) 410

Oniotosho v. Oloriegbe (1988) 4 N.W.L.R. (Pt. 87) 225

Udih v. Izedonmwem (1990) 2 N.W.L.R. (Pt. 132) 357

Nigerian Construction and Holding Co. Ltd. v. Owoyele (1988) 4 N.W.L.R. (Pt. 90) 588

**STATUTES REFERRED TO**

Law Reform (Contracts) Law Cap. 66, Laws of Lagos State, s.5 Recovery of Premises Law, Cap. 113. Laws of Eastern Nigeria 1963. s. 8(1) & (2). Statute of Frauds 1677, s.4.

**LEAD JUDGMENT BY ADIO JSC**

The respondent, in the Onitsha Judicial Division of the High Court of Justice of Anambra State of Nigeria, instituted an action against the appellant. The action was brought in the respondent's capacity as the head or "Okpala" or J. N. Offiah's family of Umuasele Village, Onitsha town and, according to paragraph 12 of the Statement of Claim, the following were the reliefs claimed by the respondent:

*"(a) Possession of the said three flats, five shops and five stores*

*(b) N4, 780.00 for arrears of rent up to and including 31/10/97*

*(c) Mesne profits at the rate of rent of N200.00 per month being at the rate of rent of the said three flats five shops and five stores and premises from 1/11/79 until possession is given up".*

The evidence led by the respondent was that one J. N. Offiah was his father who, before his death, entered into a leasehold agreement with the appellant in 1963 in relation to the property at No. 64, New Market Road, Onitsha, which belonged to his (respondent's) father. It was agreed between the appellant and the respondent's father that the appellant should, at his own expense, demolish the existing buildings at the said and erect, on the land at the same place, a duplex building in accordance with all a building plan. It was also agreed that, on the completion of the said building, the appellant should occupy half of it without payment of rent. The other half of it, which was identical with the one made available to the appellant, consisted of three flats on the first floor and five shops and five stores on the ground floor, belonged to the respondent's father. The respondent's died in 1966 and the appellant had not completed the building at that time.

The respondent was the head, "Okpala" of the family, and he was entitled to inherit his father's property including the property in question in this case.

When the building was completed, the respondent in 1972 orally granted a lease of his father's portion of the building to the appellant and the rent was at the rate of N140.00 per month. Subsequently, in March, 1976, the rent was increased to N200.00 per month. The appellant was paying rent regularly even after the increase up till sometime when he started to default. The respondent was issuing receipts to the appellant whenever he paid any rent. The building was slightly damaged during the civil war. The appellant repaired it but there was no agreement or understanding that the appellant could deduct his expenses for the repairs from the rent payable to the respondent in respect of his father's portion of the building. The balance of the rent due from the appellant was N4,780.00 being arrears of rent up to and including 31/10/79.

It is not necessary to set out the evidence relating to item (a) of the claim

of the respondent relating to possession of the property in question. That aspect of the respondent's claim was dismissed by the learned trial Judge. The appeal to the Court of Appeal on that aspect of the matter was dismissed and there was no further appeal, on it, to this court.

The appellant confirmed the arrangement or agreement between him and the respondent's father which they executed before the respondent's father died. He also confirmed that there was an oral agreement between him and the children of the respondent's father in relation to the portion of the building to be occupied by their father. The portion of the respondent's father in the building was orally granted to him at a rent of N140.00 per month for a period of 40 years. He was paying the agreed rent. He took possession of it and granted the said portion to sub-tenants. There were times when he made lumpsum payments and if those were added to the expenses he incurred in effecting repairs of the damage caused to his own portion and the portion of the father of the respondent in the property as a result of the civil war, he (appellant) was not owing any rent.

The learned trial Judge, bearing in mind the evidence led by both sides and the submissions made by their learned counsel, came to the conclusion that the amount outstanding as rent up to and including October, 1979, was N4,680.00 and he entered judgment for that amount and for N15,980.00 being arrears of rent for the period ending June 30, 1984. He found as a fact that, inter alia, the appellant agreed with an increase in the rent from N140.00 per month to N200.00 per month.

Dissatisfied with the judgment, the respondent lodged an appeal to the court below in relation to the refusal by the learned trial Judge to grant him possession of the property and the appellant cross-appealed in relation to the decision of the learned trial Judge in respect of items (b) and (c) of the respondent's claim. The court below dismissed both the appeal and the cross-appeal. Dissatisfied with the judgment of the court below, the appellant has judged a further appeal to this court.

The parties duly filed and exchanged briefs. The appellant filed an appellant's brief and the respondent in his own case filed a respondent's brief. A close examination of the issues formulated for determination in the appellant's brief shows that though it appears, at first, as if only five issues (numbered (a), (b), (c), (d), and (e)) were formulated, if account is taken of the minor or sub-issues also set out for determination, there are nothing less than eighteen issues. The same matter, for example, the question of the nature of the tenancy orally granted by the children of the respondent's father to the appellant, was repeated several times under different issues. In other cases there were main issues on

certain matters but the main issues were split into many sub-issues for determination. One is, therefore, not surprised that in arguing the issues set down by the appellant for determination at page 5 of his brief from paragraph 4. 1, 1. etc., argued issued (a) (i) to (iii), (b), (c) (i) to (iv), (d) (i) to (ii) and (e) (i) to (vi) together. The aforesaid issues argued together were entirely all the issues set out in the brief of the appellant for determination, This court takes an unfavourable view of proliferation of issues for determination formulated on the basis of grounds and has shown its dislike at such practice. it is perfectly all right for a number of grounds, where appropriate, to be formulated into a single congruous issue and it is undesirable to split the issue in a ground of appeal. S. Anretiola, (1992) 8 N.W.L.R. (Pt. 258) 139. True, there was group of appeal on the nature of the tenancy granted to the appellant. The issues was that three or four issues were formulated in the appellant's brief in respect of that matter alone. When the number of the issues formulated in a brief is far more than the number of the grounds of appeal, invariably it is a sign that something is wrong with the number of issues formulated. The respondent too, in this connection, committed the same error though on a lesser scale. He formulated what was described as "the principal issue" and thereafter proceeded to formulate seven subsidiary issues. There were three items in the claim of the respondent, namely, possession of the property in dispute; N4,780.00 for arrears of rent; and mesne profits at the rate of rent of N200.00 per month. The first item had been dismissed by the learned trial Judge and the respondent's appeal to the court below was dismissed. There was, so far, no appeal on the point, against the judgment of the court below. So, only two items of the respondent's claim are left to be determined by this and they are the amount representing the outstanding rent and the mesne profit, as found by the learned trial Judge and affirmed by the court below. Those two questions do not require for their determination the formulation of eighteen issues and seven subsidiary issues. In the circumstances, I am of the view that the principal issued formulated by the respondent, as slightly amended, is sufficient for the determination of this appeal. In considering the said principal issue, this court will determine the questions which are relevant to the principal issue, which is the main issue. It is as follows:-

Whether the respondent was entitled to his claim for arrears of rent and mesne profits as found by the learned trial Judge and affirmed by the Court of Appeal.

It is necessary, at this stage, to determine the nature of the tenancy granted to the appellant by the children of the respondent's father. The learned trial Judge considered the question and came to the conclusion that it was a

yearly tenancy. The question was one of the matters canvassed on appeal before the court below. The court below disagreed with the view of the learned trial Judge. In its own view, the tenancy was a monthly tenancy in view of the averments in the pleadings of the parties; the admissions in the pleading of the appellant and in his oral evidence; and the provision of section 8(2) the Recovery of Premises Law. The submission in the appellant's brief was that the appellant did not make the alleged admission, credited to him by the court below, either in his pleading or in his oral evidence. the respondent contended that both in the appellant's pleading and in his oral evidence, he (appellant) stated that he, pursuant to the oral agreement, took possession of the property in question at an agreed rent of N140.00 per month and, for that reason, the implication under section 8 of the Recovery of Premises Law became operative. B C

I think that there was substance in the contention of the respondent. An admission can be express or implied. It was common ground that there was an oral agreement between the appellant and the respondent that the property in question was leased to the appellant for a period of 40 years at an agreed rent of N140.00 per month. It was also common ground that pursuant to the agreement the appellant took possession of the property and subleased parts of it to several persons and that he (appellant) was paying rent to the respondent in relation to the tenancy granted to him. The respondent testified that he gave receipts to the appellant in relation to the rents paid by the appellant. Though the appellant denied that the respondent gave him receipts for the rent that he paid, the respondent tendered duplications of some of the receipts which he issued to the appellant, when rent was paid at certain times. They are exhibits "D" to "D7". They showed generally that the appellant was paying in arrears and that he was paying at the rate of N140.000 per month. For example, Exhibit "D" issued and dated 1st December, 1972, for one hundred and forty pounds was in respect of October and November, 1972. Exhibit "D" confirmed the evidence of the respondent that the used to issue receipts to the appellant whenever rent was paid. It was a duplicate of the original receipt number 2 with particulars of the appellant's bank cheque (No. 7/D 003005 of 1/12/72) issued for the said sum of one hundred and forty pounds. In the case of exhibit "D3", it was receipt number 6 dated 18/8/73 issued for N140.00 paid as rent for the month of July, 1973. Exhibit "D6", in its own case, was receipt number 10 dated 16/1/74 issued for the sum of N140.00 paid for the month of December, 1973. The inference that can reasonably be drawn, in the circumstance, was that the appellant was paying the rent at the rate of N140.00 every month. D E F G H

As it was the respondent who contented that the nature of the tenancy

granted by the respondent to the appellant was a monthly tenancy, the onus was on him to prove it. He could do so on the balance of probabilities as that is the standard of proof in civil cases. See Oyediran v. Alebiosu 11, (1992) 6 N.W.L.R. (Pt. 249) 550. Having established, in this case, that the appellant was paying rent to the respondent at the rate of N140.00 every month. It followed, as a matter of law, that the tenancy in question in this case was a monthly tenancy by virtue of sections 8 (1) and (2) of the Recovery of Premises Law, Cap. 113 of the Laws of Eastern Nigeria, 1963 applicable in Anambra State. There was no express stipulation as to the notice to be given by either party to determine the tenancy in question in this case. In the circumstance, the provisions of section 8(1) and (2) became applicable. The relevant provisions of the section are:-

- “8. (1) *Where there is no express stipulation as to the notice to be given by either party to determine the tenancy the following periods of time shall be given:-*
- (a) .....
  - (b) *in the case of monthly tenancy, a month’s notice.*
  - (c) .....
  - (d).....
- (2) *The nature of a tenancy shall, in the absence of any evidence to the contrary, be determined by reference to the time when the rent is paid or demanded.”*

The court below was, therefore, right in holding that the tenancy in question in this case was a monthly tenancy.

Another matter seriously canvassed in the briefs of the parties in the lower courts was the question whether the provision of section 4 of the Statue of Frauds, 1677, was applicable in this case so as to exclude the giving of oral evidence of the terms of the agreement. The learned trial Judge decided that the legislation could not be used as an instrument of fraud and he accepted oral evidence of the terms of the oral agreement between the appellant and the respondent because, among other things, mere was ample evidence of performance pursuant to the said agreement. The court below affirm decision of the learned trial Judge on that point. The following was the view expressed by me court below on the matter:-

“*The doctrine of part performance presupposes that if a plaintiff, here the plaintiff on record, has partly carried out his part of the contract, in reliance on that promise of the defendant, it would be inequitable to allow defendant to plead the statute to the detriment of the plaintiff. If this is the situation, specific performance will be decreed in the plaintiff’s favour, all the terms of the contract sought to be avoided may be proved by evidence”.*

In reality, none of the parties to this case was dissatisfied with the admission of oral evidence by the learned trial judge affirmed by the court below. His Lordship did not allow the statute to be used as an instrument of fraud that oral evidence of the terms of the oral agreement was admitted. That was how it was possible to have on record the fact that the property in question was leased by the respondent to the appellant; that pursuant to the agreement possession thereof was taken by the appellant; that the appellant had sublet portions of the property in question to several tenants who had occupied the portions sublet to them; and that the appellant had for many years been paying rent to the respondent who was receiving it. B

In the present case, the claim of the respondent, under consideration, relates to the amount, if any, due as rent and to the question of the amount, if any due from the appellant as mesne profits. If, in the end, the respondent was able to prove the amount, if any, due as arrears of rent and the amount, if any, due as mesne profits, the respondent would have, in the circumstances of this case, made a case in equity against the appellant who cannot be heard to deny the existence of the grant of the lease of the property in dispute by the respondent to him. See Trenco (Nig.) Ltd., v. African Real Estate & Investment Co. Ltd. & Anor., (1978) 4S.C. 9 at p. 31. In Lagos State, section 5 of the Law Reform (Contracts) Law, Cap. 66 of the Laws of Lagos State contains provision similar to the provision of section 4 of the Statute of Frauds, 1677 and section 4 of the Statute of Frauds is no longer applicable in the State. In other words, the provision of section 5 of the Law was substituted for the provision of section 4 of the Statute of Frauds 1677. In situation somewhat similar to the present case in

Mba-Edev. Okufo, (1990) 2 N.W.L.R. (Pt. 135) 787, which, in my view, was correctly decided, Babalakin, LC. A., (as he then was) stated inter alia, as follows:- C D E F

*“In this case the contract between the appellant and the respondent was never reduced in writing but the law will not allow the provisions of this law to be used as an instrument of fraud and so where there is part performance of a contract its specific performance will be enforced as if the terms of the contract have been reduced into writing. Section 5 (3) (c) of the Law Reform (Contracts) Law above recognizes this doctrine and makes provision for same”* G

The Statute of Frauds used to cause hardship when an oral contract had been wholly or partly performed. Equity, therefore, developed the doctrine of part performance. Under the doctrine, a party who has partly performed the contract can enforce it, notwithstanding the fact that there is no written evidence of the contract. The learned trial Judge was right in granting specific performance of H

the oral agreement and the court below was also right in affirming the decision, on the point.

B The next question for consideration is the amount, if any, rent payable in respect of the property in question. The respondent led evidence that the rent used to be at the rate of N140.00 per month which was later increased, with the consent of the appellant, to N200.0 per month. The appellant was paying the rent even after the aforesaid increase but stopped after some time. It was the evidence of the respondent that he issued receipts by him to the appellant whenever he paid rent and he (respondent) duplicates of the receipts issued by C him to the appellant. The learned trial Judge found, and the court below affirmed the finding, that it w that the appellant was not being given receipts by the respondent for the rent being paid by him. The learned trial Judge accepted the evidence of the respondent on the amount paid as rent by the appellant and D found that the respondent did not agree with the appellant that he should setoff his alleged expenses for the repair of the property as a result of the damage to it during the civil war. The court below affirmed what the learned trial Judge did and also endorsed the amount which the learned trial Judge found as rent. In affirming the finding about the amount due as arrears of rent, the court below stated, inter alia, as follows.

E *“For the plaintiff it was contended that the defendant owes arrears of N10, 280 from April, 1975 to October, 1979, but that he paid N5,500.00 in 1978 and 1979, Leaving a balance of N4, 780.00 a claim supported by receipts. Exhibits D-D7, and E -E5. For the defendant, it was also contended that, up F to and including October, 1979, he had paid all his rents, but got no receipts to show for them. If this is so, and the tendered receipts are contested by him, then it seems to me that, clearly, the evidential onus is on him to prove, not only what rents he paid for the period between AI’ 1975 to October. 1979 inclusive. and also that the admitted sum N5, 500. 00 was the payment of the rent in gross as specified in the schedule to be produced by him. It is clearly the Law that G if he as defendant, made no effort to produce the receipts, or by any other credible evidence outside his ipse dixit, rebut their authenticity, specified how rents were paid, the trl.1 court was, without doubt, entitled to act on the unchallenged evidence of the plaintiff before it ...”*

H The court below added that there was no setoff or counterclaim properly before the court in relation to the expenses allegedly incurred for the repair done to the property because of the damage to it as a result of the civil war. The court pointed out that the evidence of the appellant’s witness on the cost of the alleged repairs contradicted the evidence of the appellant. So, there

was no credible evidence, on the point, before the learned trial Judge.

The contention of the appellant was that the copies of the receipts tendered by the respondent were not genuine in that they were made by the respondent for the purpose of this case. The appellant also criticized the learned trial Judge for stating that he willingly made things difficult for himself in relation to proof of how much he had paid as rent and the rate of the various pay which he alleged that he made to the respondent. The appellant also argued, in his brief, that it was wrong for the court below to hold that the evidence which he led, on the points, was based on his own ipse dixit and that the evidence led by the respondent on the said points was unchallenged. It was submitted for the respondent that he led evidence on the particulars, in his pleading, relating to arrears of rent and the mesne profits claimed. The appellant did not include any setoff or counterclaim in his pleading. Though the appellant paid certain lump sums, he was given receipts in relation to the lump sums which indicated the relevant periods.

The question whether the respondent was issuing receipts to the appellant for rent paid from time to time by the appellant had been considered. The conclusion was receipts were being issued to the appellant. That was the finding of the learned trial Judge which was affirmed by the court below. The appellant was the tenant and the respondent was the landlord. As it was the respondent that was claiming the sum of N4, 780. 00 as arrears of rent the onus was on him to prove it. The respondent led evidence about the relevant period for which rent should be paid, the total of the various amounts paid by the appellant, and the amount outstanding which came to N4,780.00. The learned trial Judge accepted the respondent's evidence and made a finding based on it. Having discharged the onus on him by producing credible evidence which, prima facie, established his claim, the onus shifted to the owing any rent. In civil cases, the onus of proving particular facts is fixed by the pleadings. However, it does not remain static but, shifts from side to side and the onus of adducing further evidence is on the person who will fail if such evidence is not adduced. See Nigerian Maritime Services Ltd., v. Afolabi, (1978) 2 S.C. 79 at p.84, Ike v. Ugboaja (1993) 6 N.W.L.R. (Pt. 301) 539; and Adegoke v. Adibi, (1992) 5 N.W.L.R. (Pt. 242) 410. The learned trial Judge found that the balance of the rent which was outstanding and which the appellant was to pay to the respondent was N4,780.00 and the court below affirmed the decision. It was a concurrent finding. This court does not interfere with a concurrent finding of lower courts except where it has been shown that it is perverse or has caused a miscarriage of justice. See Adebanjo v. Brown, (1990) 3 N.W.L.R. (Pt. 141) 611; and Ajuwon v. Adeoti (1990) 2 N.W.L.R. (Pt. 132) 271. The finding in question

in this case has not been shown to be unreasonable or perverse and it was not shown that it occasioned a miscarriage of justice. This court will, therefore, not interfere with it.

I now come to the award made to the respondent in respect of mesne profits. I have pointed out, elsewhere in this judgment, that the Judge erroneously held that the tenancy granted by the respondent appellant was a yearly tenancy and that, for that reason, the notice of termination of the tenancy agreement, which the respondent should give to the appellant, was one year. The learned trial Judge stated, inter alia, as follows:-

*“Having held that the defendant was entitled to a year’s notice should give up possession, it means that the defendant still possession but has not paid his rent from November, 1979 till ..... The plaintiff has sought to recover this as mesne profits, but they should now be recoverable as arrears of rent.”*

The learned trial Judge then awarded the sum of N15,980.00 to the respondent being arrears of rent due to him from the appellant November, 1979 to 30th June, 1984. The court below, rightly in my view pointed out that the tenancy granted to the appellant was monthly tenancy that, therefore, the appropriate notice of termination of the tenancy should be given to the appellant was one month and not one year. There the sum of N15,980.00 which the learned trial Judge awarded to the respondent as arrears of rent should really be mesne profits. The court below expressed its view on the matter, inter alia, as follows:-

*“In law, therefore, as from 1/11/79 up to the date of this judgment, on the findings of the lower court which this court will not disturb, the defendant has been holding over, and thereafter, has been a trespasser. If I may say so with respect, it is not the law and I am unable to accept the contention the learned S.A.N. that a plaintiff is entitled to mesne profits, only when the trial court orders the defendant to deliver up possession to the plaintiff. If this case, the plaintiff’s case is that the defendant has held over from 1/11 79, on the day he should have quitted the premises and delivered up possession.”*

The court below pointed out that at the end of the trial on 11/6/84 the learned trial Judge entered judgment for the sum of N15,980.00 for the respondent being arrears of rent but, for reasons not clear on the record, awarded mesne profits of N15,980.00 instead up to 30/6/84.

The contention of the appellant was that the respondent did not claim the sum of N 15,980.00 as arrears of rent. For that reason, the court below should

not have affirmed the decision of the learned trial Judge entering judgment for the aforesaid amount. It was argued for the appellant that arrears of rent and mesne profits were two different things. In the appellant's view, mesne profits could only be awarded following an order for recovery of possession failed, property in dispute. It was, therefore, contended that as the learned trial Judge held that the claim for possession failed, the claim for mesne profits should fail with it. B

The submission made for the respondent was that as there was a finding made by the learned trial Judge, affirmed by the court below, that the monthly tenancy granted to the appellant was validly determined by Exhibit "A", the appellant started to hold over from 1/11/79 and was liable to pay mesne profits from that date. In the circumstance, the respondent was entitled to the arrears of rent up to October, 1979, and to mesne profits from 1/11/79 until he gives up possession. C

Arrears of rent and mesne profits are not the same things. So on the facts of a case, if a party is only entitled to recover a sum of money as arrears of rent, that sum of money cannot be awarded to him as mesne profits. Mesne profits means an intermediate profit, that is, profits accruing between the date that the defendant/tenant ceases to hold the premises as a tenant and the actual date that he gives up possession. See Omotosho v. Oloriegbe, (1988) 4 N.W.L.R. (Pt. 87) 225; and Udih v. Izedonmwem, (1990) 2 N.W.L.R. (Pt. 132) 357. Mesne profits are awarded in place of rents where the tenant remains in possession after the tenancy agreement has run out or been duly terminated- See Nigerian construction and Holding Co. Ltd. v. Owoyele (1988) 4 N.W.L.R. (Pt. 90) 588. A court has no power to award to a party what the party has not claimed. See Ekpeyong v. Nyong, (1975) 2 S.C. 71. However, it was submitted for the respondent that the mistake of the learned trial Judge did not occasion a miscarriage of justice and this court should not interfere with the confirmation of the award made by the learned trial Judge. Though, at first, the learned trial Judge entered judgment for arrears of rent, what he, in any case, awarded to the respondent was described by him as mesne profits. I agree entirely with the aforesaid submission that there was no miscarriage of justice occasioned by the mistake as what was awarded was, in any case, mesne profits. Success of a ground of appeal alone is not sufficient to warrant the reversal of a decision unless the error in law effects the decision in a way which is crucial to the decision. See Ayoola v. Adebayo & Ors., (1969) 1 All N.L.R. 159 at p. 164. D E F G H

I do not agree with the submission made for the appellant that mesne profits could only be awarded following an order for recovery of possession. The letter dated 14/9/79, Exhibit "A", terminated the tenancy of the appellant. In the circumstance, the appellant would be liable to pay rent up to the end or

termination of the tenancy. If the tenant (appellant) gave up possession with effect from the date of termination, he would have been liable to pay rent up to the date of termination. If a tenant, as it was in this case, not give up possession beyond the date of the termination of the tenancy, he will be liable  
 B to pay mesne profits for the period that he retains possession beyond the termination of the tenancy. The contention or submission made for the appellant, on the point, was, therefore misconceived.

With reference to the respondent's claim for possession, it was purely on technical ground that possession of the property was not granted to the  
 C respondent. The court below rightly reversed the learned trial Judge on the validity of the notice, Exhibit "A", terminating the tenancy appellant by the respondent. The court below expressed tile view, rightly in my view, that the one month's notice given to tile appellant by the respondent was in order and was effective. It was tile notice, Exhibit "B", of intention to recover possession  
 D that was issued and served too early and was, for that reason, defective. It was purely on that ground that that aspect or item of the respondent's claim failed. The following was tile view of the court below, on the point:-

*"There is however a lapse, a fundamental matter upon plaintiff's  
 E claim in my view, would have floundered. I also believe learned trial Judge struck this note but he came to the right decision for the wrong reasons. Ground 9 of the cross-appeal has raised the crucial invalid notice of possession of the land and has complained that Exhibit "B" does not constitute proper legal service on him..... This ground complains that the plaintiff/  
 F appellant did not allow the (7) days' notice of intention to apply to the court for possession to run out he issued the summons for possession. This no doubt is a technical ground, but is fundamental and valid ..... Once the tenancy is determined, or has come to an end, whichever is the case, there must be a seven days' notice..... In the result, I hold that the claim for possession  
 G was rightly refused but for wrong reasons. I would therefore strike out the appeal for possession as it stands."*

On the whole, the appeal does not succeed. The judgment of tile court below is affirmed. The appeal is dismissed with N1,000.00 costs to the respond-  
 H ent.

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UWAISJSC

I have had the advantage of reading in draft the judgment read by my

learned brother Adio, J.S.C. I agree that the appeal has no merit and that it should be dismissed. I accordingly hereby dismiss it with N1,000.00 cost to the Respondent.

**KUTIGLJSC**

B

I have had a preview of the judgment just delivered by my learned brother Adio, J.S.C. I agree with his conclusion that the appeal fails. I would also dismiss it and abide by all the orders contained in the lead Judgment.

**MOHAMMEDJ.S.C**

C

I entirely agree with my learned brother, Adio JSC., that this appeal ought to be dismissed. I have had the advantage of reading the draft of my Lord's judgment and I have nothing more I can usefully add. This appeal is dismissed. I abide by the order in the lead judgment on costs.

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