

SUPREME COURT OF NIGERIA

26TH JUNE, 1998. SC 174/1994

**CORAM:- M. L. UWAIS CJN, I. L. KUTIGI, E. O. OGWUEGBU,
U. MOHAMMED, A. I. IGUH, JJSC**

METAL CONSTRUCTION (W.A.) LIMITED DEFENDANT/
APPELLANT

AND

CHIEF MOYO ABODERIN PLAINTIFF/RESPONDENT

APPEALS - New case - Allegation that Court of Appeal formulated a new case for the respondent - Is not correct - As that court entered judgment that was less than the amount claimed.

CLAIMS - Landlord & tenant - Alternative claims - In rent or compensation for use and occupation of the premises - Were properly made - As supporting material facts were pleaded.

LANDLORD & TENANT - Tenant at sufferance - Arises when a person is holding over after his tenancy has ended - Landlord is entitled to recover compensation for such use of his premises.

LANDLORD & TENANT - Mesne profit - Must not be based on the past rent - As landlord is entitled to recover the real higher value of the premises.

LANDLORD & TENANT - Termination of tenancy - Where found to have been pleaded - Lower court rightly based its award with effect from the right date.

LANDLORD & TENANT - Annual rental value of the premises - Based merely on respondent's ipse dixit - Was erroneously relied upon by lower court.

PLEADINGS - *Material facts - Inconsistent sets thereof - Though a party can plead two or more inconsistent sets of material facts - Facts relating to alternative claims should not be mixed up.*

PLEADINGS - *Landlord & tenant - Material facts - Where averred in the statement of claim - Any legal consequence of the pleaded facts can be presented.*

FACTS

The defendant/appellant was a tenant of the plaintiff/respondent since 1958 in respect of a premises situate at 13 Burma Road Apapa, Lagos. The last rent payable by the appellant under the tenancy agreement for the period 1974 to 1978 was N16,800.00 per annum. The parties disagreed as to the amount of rent payable which made the respondent determine the tenancy in 1978. Appellant's failure to vacate the premises led to an action for recovery of possession and mesne profit commenced by the respondent. On 20/2/80, the claim was dismissed on the ground that due six months notice to quit was not given to the appellant. Following the dismissal, the respondent served all the appropriate notices and commenced the present action.

The respondent claimed the sum of N1.5 million against the appellant being the cumulative amount of rent due on the premises. He claimed in the alternative a like sum for the occupation and use of the premises. The trial court dismissed the claim on the ground that there was no consensus ad idem between the parties on the issue of the new rent claimed. Both parties appealed to the Court of Appeal which dismissed the appellant's cross appeal but allowed respondent's appeal by awarding the sum of N800,400.00. Being dissatisfied, the appellant has further appealed to the Supreme Court raising a sole issue. The apex Court reduced the amount awarded by the lower court to the sum of N650,400.00

ISSUE FOR DETERMINATION

"Whether the Court of Appeal was right to base its award of Damages for use and occupation for the period commencing the 1st of July, 1981,

on the tenancy having been determined on the 30th of June, 1981."

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

Tenant at sufferance

1. It is trite that one who enters on land by a lawful title, and after his title has ended, continues to retain possession thereof without the consent of his landlord, is a tenant at sufferance and may be sued by his former landlord for compensation or damages for use and occupation of such land. As the general basis of the compensation of the kind claimed is the absence of consensus ad idem between the parties on the issue of the specific rent payable, the landlord may recover a reasonable satisfaction or compensation for the use and occupation of such premises held or occupied by the defendant as his tenant, or by his permission or sufferance. The claim is based on the fact of a holding over by a tenant after the determination of a tenancy. (1609 F)

Mesne profit - Must not be based on the past rent

2. The compensation is usually recovered as damages for breach of an express or implied agreement to pay for the use of the land or premises, and where the rent has been fixed, this, invariably, is evidence of the amount of damages to be recovered. But the landlord is not limited to such fixed rent; he may recover all the loss which has resulted from his dispossession of the land. Accordingly, where the previously fixed rent represents the true and fair value of the premises, mesne profits¹² are assessed at the amount of such rent; but if the real value is higher than rent, then the mesne profits must be assessed at the higher value. See Clifton Securities Ltd v. Huntley (1948) 2 All E.R. 283 at 284. (p.1610 B)

¹² See the case of *Obijiaku v. Offiah* (1995) 7 KLR 1554 where mesne profit was distinguished from arrears of rent. Mesne profit can be awarded even if there was no order for recovery of possession *Obijiaku v. Offiah* (supra)

Material facts - Inconsistent sets thereof

3. It cannot be disputed that either party to a suit may, in a proper case, include in his pleadings, alternative and inconsistent allegations of material facts as long as he does so separately and distinctly. A plaintiff is thus
 B entitled to plead two or more inconsistent sets of material facts and claim relief in the alternative, thereunder. He may also rely on several different rights alternatively, although they be inconsistent. See Philipps V. Philipps (1878) 4 Q.B.D 127 at 134. However, where alternative claims are al-
 C leged, the facts relating to such claims ought not be mixed up so as to show on what facts each alternative head of relief is claimed. See Davy v. Garrett (1978) 7 Ch. D. 473. In the same vein, a defendant may raise in his Statement of Defence as many distinct and separate, and therefore inconsistent defences as he may think proper. (p. 1611 E)
 D

Alternative claims

4. A close examination of the respondent's claims reveals that they are couched in the alternative. The first arm of the reliefs is a claim in rent
 E whilst the second arm is based on compensation for Use and occupation of the premises in issue. Both arms of the claim are for the period 1st July, 1978 to 30th June, 1983. A claim for rent is clearly different from a claim in respect of use and occupation. The material facts in support
 F of the said alternative heads of claims were clearly pleaded in the further amended Statement of Claim. The claims were therefore properly made by the respondent. There can be no doubt that the respondent pleaded the expiration of the tenancy in issue by effluxion of time on 30th June, 1978. But it is equally correct that in paragraph 10 of the same further
 G amended Statement of Claim, he averred as follows -

"The plaintiff avers that since July, 1978, the defendants have refused to vacate the demised premises and are still occupying the same despite several quit notices served on them. The plaintiff will found on
 H the said quit notices at the trial." (p. 1612 A)

Material facts - Where averred

5. Averment of the notice to quit, Exhibit N, clearly tantamounted to an

averment of the determination of the tenancy with effect from the 30th June, 1981 as evidenced by the said Exhibit N. It cannot therefore be correct, as contended by learned counsel for the appellant, that the respondent failed to aver in his pleadings the determination of the tenancy by notice to quit in 1981. Material facts in respect of the claim were fully averred in the respondent's further amended Statement of claim. That was all the law required him to do. He needed not state any legal results flowing the facts pleaded. He was fully entitled, as happened in the present case, to present, in argument, any legal consequence of which the facts pleaded permitted. (p. 1612 G) C

Termination of tenancy

6. The real question is whether the Court of Appeal was right to base its award with effect from the 1st day of July, 1981 when, as contended by the appellant, the determination of the tenancy with effect from the 30th June, 1981 was not pleaded by the respondent. It is clear to me that the determination of the tenancy with effect from the 30th June, 1981 as found by the court below was not only pleaded but is fully supported by the evidence before the trial court. In my view, the court below was right to base its award in respect of the appellant's use and occupation of the premises from the 1st July, 1981. (p. 1614 B) D E

Annual rental value of the premises F

7. No doubt, there was the viva voce evidence of the respondent who claimed N400,000.00 as the annual rental value of the premises from the year 1981. This annual rental value however rested entirely on the ipse dixit of the respondent and was without any satisfactory proof. It was this value that the Court of Appeal, with respect, erroneously based its award on. As against that value is the expert report of P.W.2, Exhibit T, which showed that the reasonable rental value of the premises as at the 1st July, 1981 was N300,000.00 per annum. Learned counsel for the respondent has indicated and, quite rightly in my view, that he was prepared to accept this annual value of N300,000.00 as against the N400,000.00 awarded by the Court of Appeal. I think an award based G H

on the figure of N300,000.00 will meet the justice of this case on the question of the respondent's entitlement to the use and occupation of his premises by the appellant from the 1st July, 1981 to the 30th July 1983. (p. 1614 E)

B

Appeals - New case

8. It was further argued on behalf of the appellant that the court below in basing its judgment in respect of the respondents claim for use and occupation on the evidence of a determination of the tenancy in 1981 formulated a new case for the said respondent. I cannot, with respect, accept this submission as well founded. In my view, what the court of Appeal did was not to set up a new case for the respondent but merely to enter judgment for the respondent for less than what he had claimed.

D

Rather than compute the damages for use and occupation from 1978, it conservatively adjudged the appellant liable from the 1st July, 1981. And it is trite law that a court of law may enter judgment for less and never for more than a plaintiff has claimed. See Ekpenyong and others v.

E

Nyong and others (1975) 2 S.C. 71 at 81 - 82. (p. 1615 A)

REPRESENTATION

Ifeanyi Nweze Esq. for the appellant

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O. S. Sowemimo Esq. for the respondent

CASES REFERRED TO

Emegokwue v. Okadigbo (1973) 4 S.C. 113

Pan Asian v. Nikon (1980) 9 S.C. 1

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Clifton Securities Ltd v. Huntley (1948) 2 All E.R. 283 at 284

Berdan v. Greenwood (1878) 3 Ex. D.251 at 252

Coote v. Ford (1899) 2 Ch. 93

Peenok Investments Ltd v. Hotel Presidential (1980) 12 S.C.1 at 57

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Philipps v. Philipps (1878) 4 Q.B.D 127 at 134

Davy v. Garrett (1978) 7 Ch. D. 473

Ekpenyong v. Nyong (1975) 2 S.C. 71 at 81 - 82

Union Beverages v. Owolabi (1988) 2 N .W.L.R. (part 68) 128 at 133

Olurotimi v. Ige (1993) 8 N.W.L.R. (part 311) 257 at 271

LEAD JUDGMENT BY IGUHJSC

In the High court of Lagos State of the Federal Republic of Nigeria, The plaintiff, who is now respondent, instituted an action against B the appellant, who therein was the defendant, claiming as subsequently amended as follows-

*"(i) The sum of N1,500,000.00 (One Million, Five Hundred Thousand Naira) being the cumulative amount of rent due on the pre- C
mises at 13, Burma Road, Apapa, Lagos State for the period 1st July, 1978 to 30th June, 1983 at he rent of N400,000.00 per annum from 1st July, 1993 until possession is given up.*

Particulars of Rent

Amount

Rent 1st July, 1978 - 30th June, 1979 N200, 000.00 D

Rent 1st July, 1979 - 30th June, 1980 N250,000.00

Rent 1st July, 1980 - 30th June, 1981 N300,000.00

Rent 1st July, 1981 - 30th June, 1982 N350,000.00

Rent 1st July, 1982 - 30th June, 1983 N400,000.00 E

TOTAL

N1,500,000.00

*(ii) Alternatively a like sum for the Defendant's occupation and use of the premises at 13, Burma Road, Apapa, Lagos State for the pe- F
riod 1st July, 1978 to 30th June, 1983 at the rent of N400,000.00 per annum from 1st July, 1983 up to the time of judgment."*

Pleadings were ordered in the suit and were duly settled, filed and exchanged.

At the subsequent hearing, both parties testified on their own G behalf and the plaintiff called witnesses.

The brief facts of this case are not in dispute. These are that the defendant was the tenant of the Plaintiff since the year 1958 in respect of the latter's premises situate at 13 Burma Road , Apapa, Lagos State. The last rent payable by the defendant to the plaintiff under the tenancy agree- H
ment for the period 1974 -1978 was N16,800.00 per annum.

In the year, 1978, the plaintiff determined the tenancy at the expiration of the tenancy with effect from the 30th June, 1978. This was

as a result of disagreement between the parties over the question of the amount of rent payable by the defendant in respect of the premises. When the defendant failed and/or neglected to vacate the premises, the plaintiff sued him for recovery of possession thereof in suit No. LD/931/78, Exhibit U. He also claimed mesne profits from the 1st July, 1978 until possession was given up. This claim was dismissed on the 20th February, 1980 on the ground that the defendant, as a yearly tenant, was entitled to six months notice to quit. This length of notice the court found was not given to the defendant. The defendant had paid its rent up to the 30th June, 1978 at the agreed rent of N16,000.00 per annum.

Following the dismissal of the said suit, Exhibit U. 6 months notice to quit, Exhibit N. and notice of intention to recover possession of the premises, Exhibit O, were served by the plaintiff on the defendant. Thereafter, the present action was commenced by the plaintiff, claiming as already set out above.

At the conclusion of hearing, the learned trial Judge, Adeniji, J. on the 13th February, 1986 dismissed the plaintiff's claims, holding, in effect, that there was no consensus ad idem between the parties on the issue of the new rent claimed by the plaintiff with effect from the 1st July, 1978. He also dismissed the alternative claim in respect of money due for the use and occupation of the premises.

Being dissatisfied with the said judgment, both the plaintiff and the defendant lodged appeals against the same to the Court of Appeal, Lagos Division. In a unanimous decision on the 7th day of March, 1990, the Court of Appeal allowed the appeal of the plaintiff but dismissed the cross-appeal of the defendant. It entered judgment for the plaintiff in the sum of N800,400.00 being arrears of rent up to and including the 30th June, 1983 with mesne profits or compensation for the use and occupation of the premises at the rate of N400,000.00 per annum from the 1st July, 1981 until the date of judgment or the date on which possession was given up, whichever was earlier.

Aggrieved by this decision of the Court of Appeal, the defendant has as appealed to this court.

Pursuant to the Rules of this court, the parties through their

respective counsel, filed and exchanged their briefs of argument. The defendant, which hereinafter will be referred to as the appellant also filed a reply brief to the respondent's brief of argument.

The sole issue identified on behalf of the appellant which this court is called upon to determine is as follows-

"Whether the Court of Appeal was right to base its award of Damages for use and occupation for the period commencing the 1st of July, 1981, on the tenancy having been determined on the 30th of June, 1981."

The plaintiff, who hereinafter will be referred to as the respondent, while adopting the issue for determination as formulated by the appellant added what he described as a "corollary issue" which runs thus-

"Whether the award of damages made by the Court of Appeal can be fitted within the scope of the Plaintiff/Respondent's claim as pleaded in the further Amended Statement of Claim."

I have closely examined the two issues set out by learned counsel for the respondent and they seem to me to involve the same principles of law. I will accordingly adopt them for my consideration of this appeal. I propose, however, to consider both issues together as they revolve around the same orbit.

At the oral hearing of the appeal, both learned counsel for the parties adopted their written briefs of argument and proffered additional submissions in elaboration thereof.

The main contention of learned counsel for the appellant, Ifeanyi Nweze Esq.

Was that no where in the further amended Statement of Claim did the respondent plead the determination of the tenancy with affect from the 30th June, 1981. He submitted that the respondent's case, both in this pleadings and in both courts below, was that the determination of the tenancy was by effluxion of time with effect from the 30th June, 1978. He conceded that the Court of Appeal was right when it held that the appellant did not challenge Exhibits N and O. He, however, argued, relying on the decision of this court in Emegokwue v. Okadigbo (1973) 4 S.C. 113, that both notices went to no issue as they were not pleaded by

the respondent. Learned counsel contended that the court below was in error by basing its award for use and occupation of the premises on the inadmissible evidence of the determination of the tenancy in 1981. By so doing, he claimed that the court below thereby formulated a new case for the respondent. He stressed that the annual rent payable by the appellant in respect of the premises as at 1978 when tenancy expired but was further purportedly determined by the notice to quit, Exhibit K, was N16,800.00. He remained the court that Exhibit K was declared invalid by the judgment, Exhibit U. He therefore argued that since the tenancy continued to subsist there after, the rent payable remained at N16,800.00. He therefore submitted that any award to the respondent for use and occupation must, in the circumstances, remain the sum of N16,800.00 per annum being the last agreed rent payable by the appellant in respect of the premises.

Learned counsel for the respondent, O.S. Sowemimo Esq., in his reply, submitted that the Court of Appeal, having regard to the scope of the further amended Statement of Claims, was fully justified in computing the award of compensation for the use and occupation of the premises from the 1st July, 1981. He conceded that the appellant's tenancy expired on the 30th June, 1978 by effluxion of time and was not renewed thereafter. But he referred, in particular, to paragraph 10 of the further amended Statement of Claim where "several quit notices" served on the appellant by the respondent since 1978 were expressly pleaded. These were Exhibit N, dated the 29th December, 1980 and Exhibit O, dated the 14th June, 1981 respectively. He made reference to the decision in Revandervell's Trust (No. 2) (1974) 1 CH. 269 and contended that the further amended Statement of Claim contained all the material facts which were duly testified to by the respondent. He submitted that those material facts were sufficient to sustain the decision of the court below. Learned counsel argued that the Court of Appeal did was not to set up any new case for the respondent different from that he pleaded but to award to him less than the amount of compensation he had claimed.

Relying on the decision in Pan Asia v. Nikon (1980) 9 S.C.1, he submitted that there was no doubt that the appellant held over the pre-

premises at the expiration of its tenancy. He contended that what had generated argument was the issue of when this holding over commenced to enable the question of compensation or damages for use and occupation of the premises to be computed from that date. He claimed that the respondent led unchallenged viva voce and expert evidence on the issue of reasonable compensation due to him for the use and occupation of the premises by the appellant. He stressed that the validity of the notices, Exhibits N and O was at no time challenged by the appellant. The respondent was also not cross-examined on his testimony that the appropriate rent in respect of the premises as at the 1st July, 1978 was N400,000.00 per annum. When, however, the attention of learned counsel was drawn to Exhibits T, Q and R in which the respondent's expert witness, P.W.2, a Chartered Estate Surveyor and a partner in the firm of Knight Frank and Rutley demanded the annual rent of N300,000.00 in respect of the premises as at the 30th June, 1981, he indicated, quite rightly in my view, that he would be prepared to accept the lower figure of N300,000.00 contained in those letters as against the N400,000.00 awarded by the Court of Appeal. He urged this court to dismiss the appeal.

Before I proceed to consider the sole issue for determination in this appeal which, essentially, is whether the Court of Appeal was right in basing its award for use and occupation from the 1st of July, 1981, the tenancy having been determined on the 30th June, 1981, it may be necessary to examine briefly and generally, claims for use and occupation of land.

It is trite that one who enters on land by a lawful title, and after his title has ended, continues to retain possession thereof without the consent of his landlord, is a tenant at sufferance and may be sued by his former landlord for compensation or damages for use and occupation of such land. As the general basis of the compensation of the kind claimed is the absence of consensus ad idem between the parties on the issue of the specific rent payable, the landlord may recover a reasonable satisfaction or compensation for the use and occupation of such premises held or occupied

by the defendant as his tenant, or by his permission or sufferance. The claim is based on the fact of a holding over by a tenant after the determination of a tenancy. So, in Pan Asian v. Nikon (1980) 9 S.C. 1, this court, per Obaseki, J.S.C. explained the position as follows-

B *"After the service of a written notice or at the end of the term granted and the tenant holds over without the permission of the landlord, the tenant is liable to pay mesne for the use and occupation of the premises till he delivers up possession."*

C The compensation is usually recovered as damages for breach of an express or implied agreement to pay for the use of the land or premises, and where the rent has been fixed, this, invariably, is evidence of the amount of damages to be recovered. But the landlord is not limited to such fixed rent; he may recover all the loss D which has resulted from his dispossession of the land. Accordingly, where the previously fixed rent represents the true and fair value of the premises, mesne profits are assessed at the amount of such rent; but if the real value is higher than rent, then the mesne E profits must be assessed at the higher value. See Clifton Securities Ltd v. Huntley (1948) 2 All E.R. 283 at 284.

In the present case, it is not in dispute that the appellant was a tenant of the respondent on the premises in issue from as far back as the F 1st July, 1958. It is conceded that the appellant fully paid his rents up to and including the 30th June, 1978. The parties are also in agreement that the appellant held over the premises on the expiration of its tenancy on the said 30th June, 1978. There was no agreement between them as to the precise amount of rent that was payable by the appellant in respect of G the premises with effect from the said 1st July, 1978.

There can be no doubt that this a proper case in which the respondent was entitled to bring the present action against the appellant for compensation and / or damages for use and occupation of the premises H in issue for the period it was held over by the appellant. The next question must now be whether, as contended by the learned counsel for the appellant, the respondent's case was not that the tenancy was determined on the 30th June, 1981 and whether the respondent's evidence of the

determination of the tenancy on the 30th June, 1981 was inadmissible.

In this regard, the Court of Appeal stated as follows-

"The defendants are therefore correct in their contention that as long as the tenancy still subsisted, so too the rent of N16,000.00 per annum, until varied by consent. The question then is whether or not the tenancy still subsisted as of 1982 when the present suit was commenced? Chief Sowemimo, SAN, referred to Exhibit J and the Defendant's Exhibit F at page 127 to support the termination of the tenancy, but this cannot be correct. In fact, both Exhibits led to Exhibit U, in which the learned Judge held that the proper notice of termination had not been given. It does appear, however, that following Exhibit U, the plaintiff served the necessary notices in termination of the tenancy. They are Exhibits O (page 142) and N (page 143). By Exhibit N, the tenancy was determined with effect from 1st July, 1981. The defendants have not challenged Exhibits O and N as improper. It was after both exhibits that the plaintiff commenced the present action. In my view, therefore, the defendants can only be heard to say that their rent up to 30th June, 1981 (when Exhibit N was issued) was N16,800.00. After that date, the defendants stayed over."

It cannot be disputed that either party to a suit may, in a proper case, include in his pleadings, alternative and inconsistent allegations of material facts as long as he does so separately and distinctly. A plaintiff is thus entitled to plead two or more inconsistent sets of material facts and claim relief in the alternative, thereunder. He may also rely on several different rights alternatively, although they be inconsistent. See Philipps V. Philipps (1878) 4 Q.B.D 127 at 134. However, where alternative claims are alleged, the facts relating to such claims ought not be mixed up so as to show on what facts each alternative head of relief is claimed. See Davy v. Garrett (1978) 7 Ch. D. 473. In the same vein, a defendant may raise in his Statement of Defence as many distinct and separate, and therefore inconsistent defences as he may think proper. See Berdan v. Greenwood (1878) 3 Ex. D.251 at 252, Coote v. Ford (1899) 2 Ch. 93 etc.

A close examination of the respondent's claims reveals that they are couched in the alternative. The first arm of the reliefs is a claim in rent whilst the second arm is based on compensation for Use and occupation of the premises in issue. Both arms of the claim are for the period 1st July, 1978 to 30th June, 1983.

A claim for rent is clearly different from a claim in respect of use and occupation. The material facts in support of the said alternative heads of claims were clearly pleaded in the further amended Statement of Claim. The claims were therefore properly made by the respondent.

There can be no doubt that the respondent pleaded the expiration of the tenancy in issue by effluxion of time on 30th June, 1978. But it is equally correct that in paragraph 10 of the same further amended Statement of Claim, he averred as follows -

"The plaintiff avers that since July, 1978, the defendants have refused to vacate the demised premises and are still occupying the same despite several quit notices served on them. The plaintiff will found on the said quit notices at the trial."

Pursuant to the said averment, the respondent testified at the trial and tendered the notice to quit, Exhibit N and the seven days notice of intention to recover possession, Exhibit O. It is clear that by Exhibit N, the respondent further determined the tenancy in issue with effect from the 30th June, 1981. In my view, paragraph 10 of the further amendment Statement of Claim pleaded service of various other notice to quit on the appellant by the respondent apart from the earlier determination of the tenancy with effect from the 30th June, 1978, by effluxion of time.

Averment of the notice to quit, Exhibit N, clearly tantamounted to an averment of the determination of the tenancy with effect from the 30th June, 1981 as evidenced by the said Exhibit N. It cannot therefore be correct, as contended by learned counsel for the appellant, that the respondent failed to aver in his pleadings the determination of the tenancy by notice to quit in 1981. Material facts in respect of the claim were fully averred in the respondent's further amended Statement of claim. That was all the

law required him to do. He needed not state any legal results flowing the facts pleaded. He was fully entitled, as happened in the present case, to present, in argument, any legal consequence of which the facts pleaded permitted.

In this connection, it is pertinent to make reference to the observation of Lord Denning M.R. in Re Vandervell's Trust (No. 2) (1974) 1 CH. 269 where the learned Lord said as follows -

Mr. Balcombe for the executors stressed that the points taken by Mr. Mills were not covered by the pleadings. He said time and time again "This way of putting the case was not pleaded" "No such trust was pleaded". And so forth. The more he argued, the more technical he became. I began to think we were back in the bad old days before the Common Law Procedure Acts 1852 and 1854, when pleadings had to state the legal result; and a case could be lost by the omission of a single averment: See Bullen and Leake's Precedents of pleadings 3rd Edition (1868) P.147. All that have been long swept away. It is sufficient for the pleader to state the material facts. He needs not state the legal result. If, for convenience, he does so, he is not bound by, or limited to, what he has stated. He can present, in argument, any legal consequence of which the facts permit. The Pleadings in this case contained all the material facts."

See too Peenok Investments Ltd v. Hotel Presidential (1980) 12 S.C.1 at 57. I am, with respect, in total agreement with the above exposition of the law by the noble Lord and fully endorse the same.

It is plain to me that the respondent was claiming in his further amended Statement of Claim was payment of N1,500,000.00 by the appellant being rent due on the premises in issue or, alternatively, for use and occupation of the premises; both claims covering the period 1st July, 1978 to 30th June, 1983 at the rate therein particularized and thereafter from 1st July, 1983 until possession is given up or until the date of judgment, at the rate of N400,000.00 per annum. The Court of Appeal entered judgment in favour of the respondent in his claim for use and occupation of the premises by the appellant at the rate of N16,800.00 per annum from the 1st July, 1978 to the 30th June 1981 and at the rate of

N400,000.00 from the 1st July, 1981 until the 30th June, 1983. The court below, in the face of the uncontradicted viva voce evidence before the trial court, enhanced the annual value of the premises to N400,000.00 per annum with effect from the 1st July, 1981, a day after the determination of the tenancy on the 30th June, 1981 by Exhibits N and O. **The real question is whether the Court of Appeal was right to base its award with effect from the 1st day of July, 1981 when, as contended by the appellant, the determination of the tenancy with effect from the 30th June, 1981 was not pleaded by the respondent.**

It is clear to me that the determination of the tenancy with effect from the 30th June, 1981 as found by the court below was not only pleaded but is fully supported by the evidence before the trial court. In my view, the court below was right to base its award in respect of the appellant's use and occupation of the premises from the 1st July, 1981.

Another angle of viewing, the decision of the Court of Appeal is from the fact that although on the evidence and the pleadings of the respondent, the tenancy was determined by effluxion of time on the 30th June, 1978, there was no reliable evidence of the true annual value of the premises for the period 1st July, 1978 to the 30th June, 1981. **No doubt, there was the viva voce evidence of the respondent who claimed N400,000.00 as the annual rental value of the premises from the year 1981. This annual rental value however rested entirely on the ipse dixit of the respondent and was without any satisfactory proof. It was this value that the Court of Appeal, with respect, erroneously based its award on.**

As against that value is the expert report of P.W.2, Exhibit T, which showed that the reasonable rental value of the premises as at the 1st July, 1981 was N300,000.00 per annum. Learned counsel for the respondent has indicated and, quite rightly in my view, that he was prepared to accept this annual value of N300,000.00 as against the N400,000.00 awarded by the Court of Appeal. I think an award based on the figure of N300,000.00 will meet the justice of this case on the question of the respondent's entitlement to the use and oc-

cupation of his premises by the appellant from the 1st July, 1981 to the 30th July 1983.

It was further argued on behalf of the appellant that the court below in basing its judgment in respect of the respondents claim for use and occupation on the evidence of a determination of the tenancy in 1981 formulated a new case for the said respondent. I cannot, with respect, accept this submission as well founded. In my view, what the court of Appeal did was not to set up a new case for the respondent but merely to enter judgment for the respondent for less than what he had claimed. Rather than compute the damages for use and occupation from 1978, it conservatively adjudged the appellant liable from the 1st July, 1981. And it is trite law that a court of law may enter judgment for less and never for more than a plaintiff has claimed. See Ekpenyong and others v. Nyong and others (1975) 2 S.C. 71 at 81 - 82, Union beverages v. Owolabi (1988) 2 N .W.L.R. (part 68) 128 at 133, Olurotimi v. Ige (1993) 8 N.W.L.R. (part 311) 257 at 271 etc.

The conclusion I therefore reach in this appeal is that the question posed by the two issues under consideration must be answered in the affirmative. There will therefore be judgment for the respondent against the appellant in the sum of N650,400.00 being damages and /or compensation payable by the appellant to the respondent for the use and occupation of the respondent's premises situate at No. 13, Burma Road, Apapa, Lagos by the said appellant for the period 1st July, 1978 to the 30th June, 1983 at the under-mentioned annual value, namely -

- (i) 1st July 1978 - 30th June, 1979 N16,800.00
- (ii) 1st July 1979 - 30th June, 1980 N16,800.00
- (iii) 1st July 1980 - 30th June, 1981 N16,800.00
- (iv) 1st July 1981 - 30th June, 1982 N300,000.00
- (v) 1st July 1982 - 30th June, 1983 N300,000.00

TOTAL N650,400.00

and thereafter at the rate of N300,000.00 per annum from the 1st day of July, 1983 until the date of this judgment or the date on which possession was given up, whichever is earlier in point in time.

The appeal is otherwise without merit and the same is hereby dismissed with costs to the respondent against the appellant which I assess and fix at N10,000.00.

B

UWAIS CJN

I have had the privilege of reading in draft the judgment read by my learned brother Iguh, J.S.C. I entirely agree. I have nothing more to add.

C

Accordingly the appeal has failed and it is hereby dismissed with N10,000.00 costs to the Respondent.

D

KUTIGI JSC

I read in advance the judgment just delivered by my learned brother, Iguh, JSC. I will also dismiss the appeal and enter judgment for the respondent at N16,800.00 per annum from 1/7/78 up to 30/6/81 and E at N300,000.00 per annum from 1/7/81 up to 30/6/83 and thereafter at N300,000.00 per annum until the date of this judgment or the date on which possession was given up if earlier. The respondent is awarded costs fixed at N10,000.00 (Ten Thousand Naira) only.

F

OGWUEGBU JSC

I have read in draft the judgment just delivered by my learned brother Iguh, JSC. and I entirely agree with his reasoning and conclusion. I will however wish to add my own comments on the only issue identified by the appellant for our determination in the appeal namely:-

" Whether the Court of Appeal was right to base its award of damages for use and occupation for the period commencing the 1st of H July 1981, on the tenancy having been determined on the 30th June, 1981."

The Court of Appeal in its judgment held as follows:

" It does appear however that following Exhibit U the plaintiff

served the necessary notice in termination of the tenancy By Exhibit N the tenancy was determined with effect from 1st July 1981. The Defendants have not challenged Exhibits N and O as improper. In my view therefore the Defendants can only be heard to say that their rent up to 30th June 1981 (When Exhibit N was issued) was N16,800.00. After that date, the Defendant stayed over and were liable for use and occupation." B

It was argued in the appellant's brief that this conclusion was wrong because the plaintiff did not plead in his further amended statement of claim that the tenancy was determined in 1981, that on the contrary, the plaintiff /respondent had contended in his pleading and in the Court of Appeal that the tenancy terminated in 1978 by effluxion of time and the issue of termination of the tenancy in 1981 was not raised in the ground of appeal. D

It was further submitted on behalf of the appellant that there was no pleading on Exhibits "O" and "N", that defendant had no need to oppose the admission of the exhibits in evidence because they went to no issue as parties are bound by their pleadings and the termination of tenancy in 1981 was a material fact on which the court below based its judgment on use and occupation. We were referred to the case of Emegokwue v. Okadigbo (1973) 8 NSCC 220. E

The following submissions were also made on behalf of the appellant: F

1. That in awarding damages in favour of the plaintiff for use and occupation of the premises from 1981, the court below set up a case for the plaintiff which he did not set up himself.

2. To sustain the alternative claim for use and occupation since 1981 as opposed to 1978, the plaintiff ought to have specifically pleaded in the alternative to his averment, that the defendant was his tenant at all material times, That the tenancy terminated by a notice to quit in 1981 and that plaintiff therefore claims arrears of rent up to 1981 and thereafter, for use and occupation of the premises. G H

3. That the court below gave judgment to the plaintiff on both claims (i) and (ii) without effectively amending the statement of claim to

read arrears of rent from 1978 to 1981 and thereafter, a claim for use and occupation which was not the case made out by the plaintiff himself.

I consider it necessary to set out paragraph 14 of the further amended statement of claim containing the two claims of the plaintiff. It

B reads:-

"Whereof the plaintiff claims:

(i) *the sum of N1,500,000.00 (one million, five thousand naira) being the cumulative amount of rent due on the premises at 13 Burma Road, Apapa , Lagos State for the periods 1st July, 1978 to 30th June, 1983 and the rent of N400,000.00 per annum from 1st July, 1983 until possession is given up.*

<u>Particulars of Rent</u>	<u>Amount</u>
.....	
D Total	N1,500,000.00

(ii) *Alternatively a like sum for the Defendant's occupation and use of the premises at 13, Burma Road, Apapa, Lagos State for the periods 1st July, 1978 to 30th June, 1983 and the rent of N400,000.00 per annum from 1st July, 1983 up to the time of Judgment."*

For the respondent it was submitted in his brief that the court below was correct in computing the award of damages for use and occupation from 1st July, 1981 bearing in mind that the tenancy was determined on 30-6-81 and the scope of the further amended statement of claim. The court was specifically referred to paragraphs 6,7,8 and 10 of the further amended statement of claim. It was submitted that the plaintiff at the trial gave evidence and tendered exhibits "N" and "O" dated 29th December and 14th June, 1981 respectively and given the totality of the plaintiff's claim as presented to the court, it was wrong to suggest that claim was tied to termination of the tenancy on a particular date. The court was referred to the case of In re vandervell 's Trust (N0.2) (1974) 1 Ch. 269 at 321.

It was also submitted that in the present case, the plaintiff's pleadings contained all material facts and the evidence presented was sufficient to sustain the claim and instead of computing the damages for use and occupation from 1978, the court below adjudged the defendant liable from 1981. Learned counsel referred the court to the case of Ekpenyong

& Ors v. Nyong and Ors. (1975)2 SC 71 in support of his contention that a court can give judgment for less than is claimed but not more.

It was further submitted that the claim for damages for use and occupation of the premises was based on the fact of holding over after the determination of the lease and the case of Pan Asian v. Nikon (1980)9 SC 1 cited and relied upon. The learned respondent's counsel referred to the pleadings, and that the plaintiff led unchallenged expert evidence on the quantum of damages for use and occupation of the premises. Counsel referred to paragraph 10 of the further amended statement of claim to the effect that the defendant had been in occupation of the premises since 1978 without the plaintiff's consent and without paying rent and following Exhibit "U", fresh notices to quit were served on the defendant. We were referred to the expert evidence of P.W.2 in respect of rents payable on the property over the years from 1978 to 1987. P.W. 2 tendered Exhibits "T", "Q" and "R" in which demands for rent of N300.000 as at 30th June, 1981 were made.

The claim for use and occupation arises where a tenant who entered by a lawful demise or title, and, after that has ceased, wrongfully continues in possession without the assent or dissent of the land lord or the person next entitled. The defendant did not pay rent from 1st July, 1978 and its tenancy was determined on 1st July, 1981 by virtue of Exhibits "N" and "O". It became a tenant at sufferance from that date. A contract to pay a reasonable sum by way of compensation for use and occupation of the premises was implied and there was no agreement between the parties as to the exact amount payable as rent from 1st July, 1978. The defendant did not dispute that its tenancy was effectively determined by Exhibits "N" and "O".

His complaint appears to me to be that the plaintiff did plead specifically in his claim (II) that the defendant was his tenant at all material times, that his tenancy terminated by notice to quit in 1981 and the plaintiff therefore claims arrears of rent from 1st July, 1978 to 30th June, 1981 and thereafter, for use and occupation of the premises. I will at this stage set out paragraph 10 of the further amended statement of claim wherein the plaintiff pleaded as follows:

"10. The plaintiff avers that since July, 1978, the Defendant have refused to vacate the demised premises and are still occupying the same despite several notices to quit served on them. The plaintiff will found on the said notices at the trial." (underlining is for emphasis).

B The viva voce evidence of the plaintiff and Exhibits "N" and "O" were the materials relied upon by the court below to come to the conclusion that the tenancy was determined on 1st July, 1981 and from that date, the defendant came liable for a claim for use and occupation of the premises. That paragraph and the evidence adduced took care of the ineffective notices to quit leading to the judgment in Exhibit "U".

C . What the plaintiff did in this case was to make his case in the alternative. A plaintiff may rely upon several different rights alternatively, although they may be inconsistent. See Philips v. Philips (1878) 4 D Q.B.D. 127 at 134. When alternative cases are alleged as in this case, the facts relating to them should be stated separately and not mixed up in order to show on what specific facts each alternative head of relief is claim. See Davy v. Garret (1878) 7 ch.D. 473 at 489. The defendant in E the present proceedings cannot allege that the facts of the alternative claims were not stated or that he did not know what case he had to meet.

Granted that the plaintiff's averment that the tenancy was determined in 1978 was held ineffective by virtue of Exhibit "U", its determination in 1981 was averred in paragraph 10 of the further amended statement of claim. The fact that several notices to quit were served was F pleaded and evidence of that was led and Exhibits "N" and "O" were admitted in evidence without objection. Exhibits "N" and "O" established that the tenancy was determined with effect from 1st July, 1981. The G facts contained in Exhibits "N" and "O" are separate and distinct from the notices to quit which led to the judgment in Exhibit "U". They also support the relief sought in the alternative claim. See Bagot v. Easton (1877) 7 Ch.D.1.

H In the alternative relief, the plaintiff claimed for use and occupation for the periods 1st July, 1978 to 30th June, 1983 and the rent of N40,000.00 per annum from 1st July, 1983 up to the time of judgment. The court below found that the tenancy was determined by Exhibits "N"

and "O" hence the plaintiff was bound by the agreed rent of N16,000.00 up to 30th June, 1981. After the determination of the tenancy compensation for use and occupation was calculated from 1st July, 1981. In effect, the court below awarded less and not more than what the plaintiff claimed. The court did not go beyond its jurisdiction when it granted the relief which it found due. See Ekpenyong v. Nyong & Ors. (supra) at 80-81.

In the final result and for the reasons given above and for the fuller reasons in the judgment of my learned brother Iguh, JSC. with which I am in complete agreement, I will dismiss the appeal and make the same consequential orders as contained in the lead judgment including the order as to costs.

D

MOHAMMED JSC

I agree with the opinion of my Lord Iguh, J.S.C. , in the judgment just read that this appeal has no merit and ought to fail. I have had the advantage to read the judgment of my learned brother, in draft, before now. The appeal dismissed with costs as assessed and awarded in the lead judgment.

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