

SUPREME COURT OF NIGERIA

11TH JUNE, 1999. SC. 162/1992

**CORAM:- S. M. A. BELGORE, M. E. OGUNDARE, S. U. ONU,
O. ACHIKE, U. A. KALGO, JJSC.**

DR. M. T. A. LIMAN	APPELLANT
AND		
ALHAJI SHEHU MOHAMMED	RESPONDENT

ACTIONS - *Relief not claimed - Where defendant never asked for specific performance - It cannot be granted as a consequential order - As erroneously done by the lower courts.*

APPEALS - *Retrial order - Counter claim for damages for breach of contract - Where not considered at all by the lower courts - Retrial of the counter claim - Will be ordered by the Supreme Court.*

LAND LAW - *Sale - Breach of contract for sale - Aggrieved party may claim order for specific performance - Or damages for trespass - Both may be claimed in the alternative and not conjunctively.*

ORDERS OF COURT - *Consequential order - Can only relate to matters adjudicated upon - Order of specific performance which was never asked for - Is not a consequential order.*

FACTS

The plaintiff/appellant applied for and was granted the land in dispute by the Kano State Commissioner for Land and Survey. He subsequently sold the land to the defendant/respondent for the sum of N7,000.00 sometime in 1979. The defendant went into possession and commenced development of the land and later collected the certificate of occupancy issued in the plaintiff's name dated 2-6-81, Exhibit C. Plaintiff took advantage of a fire incident that burnt documents of the Ministry of Lands and Survey, Kano, in applying for recertification and securing another

certificate of occupancy Exhibit B dated 28-4-83. Armed with Exhibit B, plaintiff used the police in obstructing defendant's development of the land and subsequently filed an action before the High Court. He claimed inter alia, declaration that he has title over the plot in dispute and N50,000.00 being damages for trespass. Defendant in his counter claim claimed all sums of money spent on the development of the plot.

The trial court found in favour of the defendant and decreed specific performance which was never claimed in favour of the defendant. Plaintiff appealed to the Court of Appeal questioning whether having regard to the state of pleadings as well as evidence adduced, the defendant is entitled to have a decree of specific performance. The appeal was dismissed as the court below held that the trial judge exercised his discretion judiciously in decreeing specific performance. Being dissatisfied, the plaintiff has further appealed to the Supreme Court raising 3 issues.

ISSUES FOR DETERMINATION

"i. Whether the Court of Appeal was right in holding that the order of specific performance is a judicious exercise of the trial Judge's discretionary powers.

(ii) Whether the order for specific performance is consistent with the claim for damages.

(iii) Whether the order for specific performance is a consequential order"

HELD (Unanimously allowing the appeal in part and ordering a retrial of the counter claim per lead judgment of **OGUNDARE JSC**)

Land law - Sale - Breach of contract for sale

1. It follows that there are two remedies open to an aggrieved party in a contract for sale of land which is breached by the other party. These are: order for specific performance or damages for trespass. Each is a specific relief that must be specifically claimed. Both may, however, be claimed in the same action but in the alternative and not conjunctively. (p. 1813 H)

Consequential order - Relief not claimed

2. A consequential order can only relate to matters adjudicated upon. The defendant's counter-claim is one for damages for breach of contract. His evidence to the effect -

"I am asking the court to give me my plot which I purchase; this is plot 358."

does not amount to a specific claim for specific performance without any amendment of paragraph 19 of the statement of defence and counter-claim. His claim for damages was not considered, let alone decided upon, by the learned trial Judge. The order for specific performance cannot, in such a circumstance, be a consequential order. It flowed from nothing decided. Nor could it be given in lieu of damages. The two courts below are in my respectful view, in error to award to the defendant the order for specific performance which was never asked for by the defendant. That order must be set aside. (p. 1815 C)

Appeals - Retrial order

3. Defendant counter-claimed for, and led evidence in support of the claim for damages for breach of contract. The learned trial Judge and the Court of Appeal did not consider his case at all but went on a voyage of their own to consider a case not before them. I do not think it will be just and fair to merely allow this appeal, set aside the judgments of the courts below in so far as the counter-claim is concerned and dismiss same. That will be depriving the defendant of the opportunity to have a decision given on his claim. Consequently, I think the cause of justice requires that the counter-claim be remitted to the High Court of Kano State for it to be heard and determined by a Judge of that court other than Saka Yusuf, J. (p. 1815 G)

NOTABLE POINTS OF INTEREST

ONUJSC

1. Court is to adjudicate on case formulated by the parties

As the claim made by him (respondent) in the instant case was specific, leaving him with no option for election, the trial court was left with no

discretionary powers in the circumstance. Indeed, the court in such a case is bound to adjudicate between the parties on the basis of the case formulated by them. The court does not formulate cases for the parties otherwise it might find itself covered by the dust of the conflict. It is also a basic principle that parties are bound by their pleadings; such that anything not contained in the pleadings has to be ignored by the court in adjudicating between the parties. See Great Nigeria Insurance Co. Ltd v. Lad Group Ltd. (1986) 4 NWLR (part 33) 72. (p. 1820 A)

C
ACHIKE JSC

2. *Court not to act on ground of sympathy or sentiment*

It must be firmly stated that the legal and equitable jurisdictions of a court do not permit the court to act on grounds of sympathy or arbitrariness, no matter the compelling circumstances. In other words, there is no third arm of jurisdiction (outside law and equity) which permits the court to act on the basis of sentiment. Sentiment or passion is an ever-present element in human minds but law is an embodiment of justice and fairness. Therefore, stricto sensu, law is invariably divorced from element of passion. Consequently, the adjudication in the competing interests of the parties in litigation must be left unclouded by the element of passion. (p. 1828 G)

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REPRESENTATION

A. B. Mahmud (Hauwa Ibrahim, Miss, with him) for the Appellant
H. I. Enemaku for the Respondent

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CASES REFERRED TO

Great Nigeria Insurance Co. Ltd v. Lad Group Ltd. (1986) 4 NWLR (part 33) 72

African Continental Seaways Ltd. v. Nigerian Dredging Roads and General Works Ltd. (1977) 5 SC. 235 at 249-250

Ekpenyong v. Nyong (1975) 2 SC. 71 at 80-81

Fabunmi v. Agbe (1985) 3 SC. 28 at 83-84

Ademola v. Sodipo (1992) 7 SCNJ (Part 11) 417 at 446-447

Obayagbona v. Obazee & Anoru (1972) 5 SC. 254, and 258

Okon v. Administrator-General (Cross-River State) (1992) 6 NWLR 473 at 488-489

Akinbobola v. Pilson Fisko Nigeria Ltd. (1991) 1 NWLR 270, 288

Gibson v. Manchester City Council (1979) 1 WLR 294

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Odessa Tramways Co. Ltd. v. Mendel (1878) 8 Ch. D. 235

Sri Lanka Omnibus Co. Ltd. v. Perera (1952)

RULES REFERRED TO

Kano State High Court (Civil Procedure) Rules 0.9 r.7

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LEAD JUDGMENT BY OGUNDARE JSC

This appeal raises once again the propriety of a Court granting to a party a relief that party has not claimed nor applied for. The plaintiff, who is appellant before us, had sued the Defendant (now respondent) claiming, as per paragraph 10 of his amended statement of claim:

"(i) A declaration that he has title over plot No. 358, Sani Mai Nagge covered by certificate of Occupancy No. LKN/RES/82/2281.

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(ii) A declaration that the defendant is a trespasser over the land and therefore has no right to continue occupying the land or build, construct or erect any structure over the land.

(iii) A declaration that the defendant has no right to claim anything from the plaintiff in respect of the building the defendant started over the land.

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(iv) Damages limited to the sum of N50,000.00 for trespass."

The Defendant resisted the claim and in his statement of Defence, set up a counter-claim whereby he claimed as per paragraphs 18 and 19:

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"18. The Defendant avers claiming from the plaintiff all sums of money spent on the development of the said plot No. 358 Sani Mai Nagge as follows:-

(a) N7, 000.00 as per receipt dated 3/3/81

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(b) N6,000.00 being money spent on purchase of sand for leveling to shape the said plot No. 358.

(c) N20,000.00 being sum expended on the development of the

said plot No. 358 to its present stand and stage.

Total N33,000.00

19. AND the Defendant claims from the plaintiff the total sum of N33,000.00."

B Evidence was led on both sides at the trial and after addresses by learned counsel for the parties, the learned trial Judge found against the plaintiff and in favour of the Defendant. He adjudged in favour of the latter as follows:

C *"A specific performance is hereby decreed against the plaintiff to execute a proper deed of Conveyance in favour of the defendant."*

The plaintiff being unhappy with the judgment of the trial Court appealed to the Court of Appeal (Kaduna Division). One of the issues raised in the appeal was

D *"Whether, having regard to the state of the pleadings as well as the evidence adduced in this case, the respondent is entitled to have made in his favour; a decree of specific performance."*

The appeal was dismissed. Uthman Mohammed, JCA., (as he then was),
E delivering the lead judgment of the court concluded thus:

*"I therefore agree that the learned trial Judge had exercised his discretion judiciously in decreeing for specific performance instead of awarding damages against the appellant since there is overwhelming
F evidence that the appellant had sold plot 358 to the respondent for N7,000.00. The respondent had expended money, which the appellant himself admitted, in erecting structures on the land. It will be unjust to disturb an order made by the trial judge of specific performance."*

G The plaintiff was still dissatisfied and has now further appealed to this court upon two grounds of appeal which read:

*"1. The Court of Appeal erred in law when it held that the learned trial judge had exercised his discretion judiciously in decreeing for specific performance instead of awarding damages against the appellants
H as claimed by the Respondent.*

PARTICULARS

i. A party is entitled to the claim made by it before the court and no more.

ii. *The court does not make it a practice of awarding to a party what it did not claim.*

iii. *The Respondent's claim against the Appellant was clear and specific and did not leave room for the exercise of any discretionary powers by the trial Judge.*

2. *The Court of Appeal erred in law when it held that the Order of specific performance is not inconsistent with the Respondent's claim for damages.*

PARTICULARS

i. *The order for specific performance implies that the Respondent cannot have damages which is what he claimed.*

(ii) *Nowhere did the Respondent make a claim for specific performance of the contract.*

(iii) *Damages is a distinct remedy in contrast with specific performance."*

And in his brief of argument he raises the following three questions as calling for determination in this appeal, to wit:

"i. *Whether the Court of Appeal was right in holding that the order of specific performance is a judicious exercise of the trial Judge's discretionary powers.*

(ii) *Whether the order for specific performance is consistent with the claim for damages.*

(iii) *Whether the order for specific performance is a consequential order"*

The Defendant in his own brief, adopt these questions.

Before proceeding with this judgment let me state the facts, however-it briefly. The plaintiff a former senior lecturer at the Bayero University, Kano applied for and was allocated plot 358 Sani Mainage Layout by the Kano State Commissioner of Land and Survey - See Exhibit W dated 21st March 1978. Sometime in 1979, because he needed money, plaintiff decided to sell the land and did sell it to the defendant, through intermediaries, for the sum of N7,000.00 (seven thousand Naira). Defendant paid the said purchase price and went into possession and commenced development of the land. Sometime in 1981, plaintiff handed over to the

defendant his letter of allocation of the plot (Exhibit W) and a receipt for the purchase price (Exhibits D & W1). The defendant, with Exhibit W, collected from the Ministry of Land and Survey the Certificate of Occupancy issued in plaintiff's name and dated 2nd June 1981 (Exhibit C)

B There was a riot in Kano in 1981 resulting in the building of the Ministry of Lands and Survey being torched and documents burnt. The Ministry subsequently called on members of the public who had certificates of occupancy, etc. yet to collect to come forward for re-certification of their documents. The plaintiff took advantage of this situation
C and, on the pretence that the Certificate of occupancy in respect of Plot 358 had not been issued, applied for a re-certification and another certificate of Occupancy (Exhibit B) dated 28th April 1983 was issued to him.

D Armed with Exhibit B he now went to the land in dispute (Plot 358) where he found the defendant developing it. Plaintiff made a report to the Police who questioned the defendant. The defendant informed the police that it was the plaintiff who sold the land to him. The plaintiff's reply to this was that it was plot 368 he sold to the defendant and not plot
E 358. The police made enquiry at the Ministry of Land and Survey where they were told that plot 368 was never allocated to the plaintiff but only plot 358. On the strength of this information the police dropped further action on plaintiff's complaint. The plaintiff then instituted the action
F leading to this appeal and claimed as is hereinbefore stated.

The learned trial Judge made a number of findings of fact which are not questioned in this appeal. The findings include:

1. That there was a sale agreement between the plaintiff and the defendant in respect of the land in dispute.

G 2. That the defendant paid the contract sum of N7,000.00 and the plaintiff received same and issued Exh. D. a receipt for the said sum; Exh. D was written in hausa language.

H 3. That in consequences thereof plaintiff handed over to the defendant Exhibit W, the letter of allocation of the land to the plaintiff by which the defendant obtained from the Ministry of Land and Survey, Kano State, Exhibit C, the Certificate of Occupancy in respect of the land issued in the name of the plaintiff.

4. That the defendant has an equitable interest in the land.

5. That it was wrong of the plaintiff to have taken advantage of the 1981 rampage in Kano to go back to the Ministry of Land and Survey and collect from the Ministry a re-certification of Exhibit C

6. That the conduct of the plaintiff in obtaining a re-certification of Exhibit C from the Ministry, without disclosing to the Ministry that he had sold the plot concerned to the defendant was fraudulent; The learned Judge said:

"It was a fraud on the Ministry of Land and Survey as well as on the defendant for the plaintiff to obtain a re-certification of the Certificate of Occupancy on the grounds that the former one (i.e. Exhibit C) had been burnt during the rampage when in fact there was no certificate of Occupancy which was so burnt."

Not having been impugned in this appeal, these findings of fact are taken as correct. And it is upon these findings that the learned trial Judge dismissed plaintiff's claims and the court of Appeal affirmed the dismissal.

In decreeing specific performance the learned trial Judge had observed:

"The plaintiff in this case is not only in a position to convey substantially what the defendant had contracted to get but the substance of the whole transaction has made it imperative for the Court to call upon the plaintiff to complete his own side of the contract. I therefore, accept in its totality the evidence of the defendant and all his witnesses. The evidence of the plaintiff was based purely on a concocted story and it is hereby rejected."

The court below, in the lead judgment of Mohammed J.C.A. (as he then was) observed:

"Under our Civil Procedure Rules unless it is provided that a court can give any general but especially equitable relief to which the plaintiff may be entitled whether he has asked for it or not provided that it is not inconsistent with the reliefs claimed. See Fabunmi v. Agbe (1985) 1 NWLR (pt. 2) 299 at 321 to 322. See also Aguda's Practice and Procedure of Supreme Court, Court of Appeal and High Courts in Nige-

1810 Liman v. Mohammed (1999) 6 KLR Ogundare JSC
ria at page 247 para. 1909 - 19.11 and also the case of Garba v. University of Maiduguri (1986) 1 NWLR (pt. 18) 550."

It then opined:

B "A court has jurisdiction to grant any relief that it thinks appropriate to the facts of the case as proved, but if a party seeks to raise a new claim which he has not adumbrated in his pleading, in the course of the trial, the court should not give relief of that kind without first offering the opposite party, if taken by surprise, the opportunity to an adjournment - see Belmont Finance Corporation Ltd. v. Williams Furniture Ltd. (1979) 1 All ELR, 118."

C and decided as earlier quoted in this judgment. It is the grant of the order for specific performance that is being questioned in the appeal to this court. Perhaps I may at this stage state the scope of the rules of court D the court below presumably had in mind. Order 9 rule 7 of the Kano State High Court (Civil Procedure) Rules which provides:

E "Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative and it shall not be necessary to ask for general or other reliefs which may always be given as the Court or Judge in Chambers may think just to the same extent as if it had been asked for. And the same rule shall apply to any counterclaim made, or relief claimed by the defendant in his defence."

F does not permit a court grant that which is not specifically claimed but only to make consequential orders to give effect to the adjudication.

G It is submitted by learned counsel for the plaintiff that the claim of the defendant in his counter-claim is specific, that is, for damages and not in the alternative. It is conceded that the defendant could have claimed for specific performance and damages, in the alternative. But he did not do so, argues learned counsel. It is further argued that since the claim was specific, it did not leave the trial court with any discretionary powers in the circumstance. It is submitted that the court is bound to adjudicate between the parties on the basis of the case formulated by the parties themselves and that as parties are bound by their pleadings anything not contained in the pleadings of the parties must be ignored. After quoting from African Continental Seaways Ltd. v. Nigerian Dredging

Roads and General Works Ltd. (1977) 5 SC. 235 at 249-250, learned counsel observes that the issue of specific performance of the contract of sale of land in dispute was not raised by the defendant at the trial and submitted that it was wrong to award to the defendant what he did not claim. He cited in support Ekpenyong v. Nyong (1975) 2 SC. 71 at 80-81 and order 9 rule 7 of the High Court (Civil Procedure) Rules 1978 of Kano State. It is submitted that the court cannot, in the exercise of its powers to give general or other reliefs, whether asked for or not, substitute a claim for one that has been specifically made by a party to the suit in its pleadings. Learned counsel cites Fabunmi v. Agbe (1985) 3 SC. 28 at 83-84 per Obaseki JSC and Hon. Justice Adenekan Ademola v. Chief Harold Sodipo & Ors. (1992) 7 SCNJ (Part 11) 417 at 446-447, per Ogundare JSC. B C

On issue (2), it is submitted that the order for specific performance is inconsistent with the Respondent's claim for damages as the latter claim presupposes that the defendant is abandoning the contract but will like to reclaim all the things he lost as a result of his entering into the contract obligation. It is further submitted that the claim for damages is an antithesis of the order for specific performance and that one cannot serve as a supplement to the other in the circumstance of this case. On what is a 'consequential order', counsel cites Obayagbona v. Obazee & Anor. (1972) 5 SC. 254, and 258, per Sowemimo JSC (as he then was) and Mrs. Bassey Ita Okon v. Administrator-General (Cross-River State) & Anor. (1992) 6 NWLR 473 at 488-489 CA, per Akintan J.C.A. D E F

Learned counsel for the defendant argues to the contrary. While conceding that a party is bound by its pleadings, learned counsel argues, rather strangely, that the defendant led no evidence in support of his claim for damages and that claim ought then to have been dismissed, the order for specific performance would be a consequential order to such dismissal. G

I must confess I find the arguments of learned counsel not helpful to the defendant's case, nor answering, with respect, in any intelligible manner the forceful arguments raised in the Appellant's brief. I think the less said about the presentation of defendant's case in this court, H

the better. Suffice it to say, however, that there was evidence adduced by the defence tending, not only to the disproof of plaintiff's case but also in proof of defendant's counter-claim. I shall say more on this in this judgment.

B Coming now to the appeal before us, it is not plaintiff's case, as I understand it, that specific performance could not have been ordered given the facts of this case but that as that relief was not specifically claimed by the defendant in his counter-claim, it was not open to the trial court to make the order an the court below to affirm it.

C It is trite law that a court will not give to a party a relief that is not claimed. - See Ekpenyong v. Nyong. (supra); Fabunmi v. Agbe (supra); Ademola v. Shodipo (supra). This much is admitted by defendant's counsel and recognized by the two courts below. The court also recog-
D nized that the issue of specific performance was not pleaded by the defendant. That court, however, justified its affirmation of the order for specific performance made by the trial court when it said, per Uthman Mohammed JCA. (as he then was):

E *"Now it is pertinent to look into all the aspects involved in this case and consider whether the relief for specific performance is inconsis-*
F *tent with the relief of damages which the respondent pleaded in his counter-*
G *claim. Being an equitable remedy the relief for specific performance*
F *flows from the consequential orders a trial or Appeal Court may make at*
F *the conclusion of a decision for a breach of contract. In any action for*
F *breach of contract to deliver specific or ascertained goods a trial court*
F *may direct that the contract shall be performed specifically, without*
G *giving the defendant the option of retaining the goods on payment of*
G *damages, or upon such other terms and conditions as the court may seem*
G *just. Equally if the court is satisfied that a party is in breach of a con-*
H *tract over a sale of land it will direct for conveyance to the purchaser*
H *through a decree of specific performance. It is imperative for the trial*
H *Judge to exercise his discretion in order to avoid a multiplicity of pro-*
H *ceedings and make a judgment effective so far as that could be done*
H *without causing injustice to the other side - See Ajoke v. Amusa Yesufu*
H *Oba & Anor. (1962) 1 All NLR 73."*

The question that arises is: is the order for specific performance a consequential order flowing from the claim for damages for plaintiff's breach of the contract? I rather think not.

Where there is a breach of a contract for the sale of land (as in this case) the aggrieved party has an option to regard the contract as still subsisting and sue for specific performance of the contract or for an injunction where the obligation is a negative one, or he may regard the contract at an end, and sue for damages for the breach of it. As Lord Justice Fry put it in his work on Specific Performance (see: 6th edition p. 21):

"If a contract be made and one party to it make default in performance, there appears to result to the other party a right at his election either to insist on the actual performance of the contract, or to obtain satisfaction for the non-performance of it."

He has a third option which is to sue for specific performance or for damages in the alternative but not both at the same time. See: Anaeze v. Anyaso (1993) 5 NWLR 1 where Wali JSC at page 26 observed:

"Where there is a valid enforceable contract and one of the parties thereto defaults in performance, as in this case, the other party has two options:

- (a) insist on the actual performance of the contract or*
- (b) seek damages for breach."*

Karibi-Whyte, JSC at page 39 of the report reiterated this view where he said:

"The principle is and has always been that where there is a valid enforceable contract between parties relating to transactions in respect of land, and one of the parties defaults in performance of his part the other contracting party who has performed his part; has the option either to seek the enforcement of the performance of the contract, or to claim for damages for its breach."

It follows that there are two remedies open to an aggrieved party in a contract for sale of land which is breached by the other party. These are: order for specific performance or damages for trespass. Each is a specific relief that must be specifically claimed. Both

may, however, be claimed in the same action but in the alternative and not conjunctively. I do not think the issue here calls for an exposition of the law on the statutory power of the court to award damages in addition to or lieu of specific performance or injunction. This jurisdiction has its origin in Section 2 of the Chancery Procedure Amendment Act 1858, generally known as Lord Cairn's Act, which provides:

"In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assumed in such manner as the court shall direct."

Although the Act has been repealed the jurisdiction to award damages survives and is now governed by section 18 of the Judicature (Consolidation) Act 1925. And being a jurisdiction vested in or exercisable by Her Majesty's High Court of Justice in England the same is vested in or exercisable by the Judges of the High Court of Kano State by virtue of Section 13(1) of the High Court Law Cap. 49 Laws of Northern Nigeria 1963 applicable in that State. Lord Cairn's Act only allowed for damages to be awarded in lieu of specific performance and not vice versa, as is the case in this appeal.

Being a specific relief, will it be right to say that an order for specific performance can be a consequential order flowing from a claim for damages? What is a consequential order is defined by Nnaemeka-Agu JSC in Akinbobola v. Pilson Fisko Nigeria Ltd. & Ors. (1991) 1 NWLR 270, 288 where he said:

"A consequential order is not one merely incidental to a decision but one necessarily flowing directly and naturally from, and inevitably consequent upon, it. It must be giving effect to the judgment already given, not by granting a fresh and unclaimed or unproven relief."

See also: Obayagbona v. Obazee (supra) where Sowemimo JSC, as he then was, observed:

"We think that by the very nature of the term 'consequential' any ;consequential orders' must be one giving effect to the judgment. In its ordinary dictionary meaning, the word 'consequential' means 'Following as a result, or inference; following or resulting indirectly' See the concise Oxford Dictionary 5th Edition, page 258. The word has never been regarded as a term of part. All the 'consequential orders' made by the learned trial Judge were not part of the claims before him and they do not necessarily follows as a result thereof or constitute an inference. A consequential order therefore, made subsequent to a judgment which detracts from the judgment or contains extraneous matters is not an order made within jurisdiction."

A consequential order can only relate to matters adjudicated upon.

The defendant's counter-claim is one for damages for breach of contract. His evidence to the effect -

"I am asking the court to give me my plot which I purchase; this is plot 358."

does not amount to a specific claim for specific performance without any amendment of paragraph 19 of the statement of defence and counter-claim. His claim for damages was not considered, let alone decided upon, by the learned trial Judge. The order for specific performance cannot, in such a circumstance, be a consequential order. It flowed from nothing decided. Nor could it be given in lieu of damages. The two courts below are in my respectful view, in error to award to the defendant the order for specific performance which was never asked for by the defendant. That order must be set aside.

With this conclusion, I need to consider what consequential order I now have to make. Defendant counter-claimed for, and led evidence in support of the claim for damages for breach of contract. The learned trial Judge and the Court of Appeal did not consider his case at all but went on a voyage of their own to consider a case not before them. I do not think it will be just and fair to merely allow this appeal, set aside the judgments of the courts below in so far as the counter-claim is concerned and dismiss same.

That will be depriving the defendant of the opportunity to have a decision given on his claim. Consequently, I think the cause of justice requires that the counter-claim be remitted to the High Court of Kano State for it to be heard and determined by a Judge of that court other than Saka Yusuf, J.

This appeal succeeds and it is allowed by me. The judgments of both the court below and the court of trial, in so far as they relate to the defendant's counter-claim, are hereby set aside. The plaintiff's claim however, stand dismissed. An order of retrial of the defendant's counter-claim is hereby made. Each party is at liberty to amend his pleadings in relation to the counter-claim. In view of the age of this case I further order that the retrial be given expeditious hearing.

In view of the dismissal of plaintiff's claims I affirm the orders for costs made by the two courts below. The costs of this appeal assessed at N10,000.00 are awarded in favour of the plaintiff against the Defendant.

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BELGORE JSC

The plaintiff's claim stands dismissed. I order retrial of the counter-claim before another judge of Kano State High Court with liberty to each party to amend his pleading. The trial to be expedited in view of the age of the case. I affirm the order of costs made in courts below in agreeing with the judgment of my learned brother, Ogundare, JSC.

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ONU JSC

I am in complete agreement with the reasoning and conclusion arrived at by my learned brother Ogundare, JSC in his leading judgment just delivered to the effect that an order of re-trial of the Counter-claim has become imperative for the reasons set out therein.

In the instant appeal, the appellant was the plaintiff in a suit he instituted against the respondent as defendant in the kano State High Court claiming among other things;

"(i) A declaration that he has title over plot No. 358, Sani Mai Nagge covered by Certificate of Occupancy No. LKN/RES/82/2281.

(ii) A declaration that the Defendant is a trespasser over the land and therefore has no right to continue occupying the land or build, construct or erect any structure over the land. B

(iii) A declaration that the Defendant has no right to claim anything from the plaintiff in respect of the building the defendant started over the land.

(iv) Damages limited to the sum of N50,000.00 for trespass. C

(v) Any further order or other orders as this court may deem fit to make in the circumstances of the suit."

The respondent set out in his defence and Counter-claim against the appellant the gravamen of his case inter alia as follows:-

"10. The defendant also avers that he has every right of claim D against the plaintiff having regard to the transaction mentioned above and also claim from the plaintiff in respect of the building he the defendant started on the land as well as for the development and improvement of the said land. E

18. The Defendant avers claiming from the plaintiff all sums of money spent on the development of the said plot No. 358 Sani Mai Nagge as follows:

(a) N7,000.00 as per receipt dated 3/3/81. F

(b) N6,000.00 being money spent on the purchase of sand for levelling the said plot No. 358.

(c) N20,000 being sum expended on the development of the said plot No. 358 to its present stand and stage. Total N33,000.00

19. AND the Defendant claims from the plaintiff the total sum G of N33,000.00."

After pleadings had been duly exchanged by the parties, the case went to trial following which after a review of the evidence adduced, the learned trial Judge (Saka Yusuf, J.) held: H

(a) that the respondent purchased the plot of land (No. 358 Sani Mai Nagge) in dispute through DW2, Alhaji Dandauda

(b) that since the appellant failed to show that he had a better

right or title thereto, the most appropriate and adequate remedy in the matter was to decree specific performance in favour of the respondent.

The appellant being dissatisfied with the said decision appealed to the Court of Appeal (hereinafter in the rest of this judgment referred to simply as the court below). That court affirmed the trial court's decision wherein Uthman Mohammed, J.C.A. (as he then was) who wrote the leading judgment stated inter alia as follows:

"I therefore agree that the learned trial Judge had exercised his discretion in decreeing for specific performance instead of awarding damages against the appellant since there is overwhelming evidence that the appellant had sold plot 358 to the respondent for N7,000.00. The respondent had expended money, which the appellant himself admitted, in erecting structures on the land. It will be unjust to disturb an order made by the trial Judge of specific performance."

Being further aggrieved by the said decision, the appellant has appealed to this court upon two grounds out of which the following three questions have been submitted by him (the respondent adopts the same) for our resolution, viz:

- "(i) Whether the Court of Appeal was right in holding that the order of specific performance is a judicious exercise of the trial Judge's discretionary powers.*
- (ii) Whether the order for specific performance is consistent with the claim for damages.*
- (iii) Whether the order for specific performance is a consequential order."*

In agreeing in toto with my learned brother in his lucid consideration and the subsequent rendering of answers to all three questions in the negative, I wish firstly to advert to the provisions of Order 9 rule 7 of the Kano State High Court (Civil Procedure) Rules which state:

"Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative and it shall not be necessary to ask for general or other reliefs which may always be given as the Court or Judge in Chambers may think just to the same extent as if it had been asked for. And the same rule shall apply to any counter-

claim made, or relief claimed by the defendant in his defence."

This rule, in my humble opinion, does not permit a court to grant that which is not specifically claimed or asked for but enables it only to make consequential orders to give effect to the adjudication. Thus, by way of analogy if a contract exists, then an order of specific performance would B issue to enforce the terms thereof. See Halsburys Laws of England, 3rd Edition, Volume 6, paragraph 430 at page 210. Conversely, an order of specific performance as in the case under consideration, will not be made unless there is a definite and certain contract. See Gibson v. Manchester City Council (1979) 1 WLR 294. See also Odessa Tramways Co. Ltd. v. Mendel (1878) 8 Ch. D. 235; Sri Lanka Omnibus Co. Ltd. v. Perera (1952) AC. 76 (P.C) and Halsburys Laws of England (ibid) where the learned authors have stated that "specific performance of an agreement to take and pay for shares or to allot shares may be obtained." See also D Duncuft v. Albrecht (1841) Simon's Reports, Chancery Vol.s. 1-17 (1826 - 1852).

Not so with the instant case involving the sale of land where specific performance as would appear clear from paragraphs 10, 18 and E 19 of the respondent's Statement of Defence, which I had hereinbefore set out, was not made out. See Ogunbambi v. Abowaba (1951) 13 WACA 222 and Folarin v. Durojaiye (1988) 1 NWLR (part 70) 35. This relief not having been specifically asked for or claimed, neither the deci- F sion of the trial court decreeing it nor the judgment of the court below unequivocally affirming same, should be allowed to stand. This court's attitude not to grant such reliefs when not specifically asked for, has been expressed through several cases among which are Etim Ekpennyong & 3 Ors. v. Inyang Effiong Nyong & 6 Ors. (1975) 2 SC. 71 at 80, G Ekpanya v. Akpan (1989) 2 NWLR (Part 101) 86 at 98; Nigerian Housing Development Corp. Ltd & Anor. v. Yaya Mumuni (1977) 2 SC. 57 at 81; Obajinmi v. Attorney-General, Western Nigeria (1986) NMLR 96 and Obioma v. Olomu (1973) 3 SC. 1. Without doubt, the claim of the re- H spondent as set out in paragraphs 10, 18 and 19 above is specific; it having not been made in the alternative. Had it been otherwise, it could, in my view, have been so stated and all the respondent would have done

was that he could have claimed specific performance of the contract of sale as an alternative to the claim to damages. Such a situation, in fact, could have left the learned trial Judge with the discretion of granting either of the two claims. As the claim made by him (respondent) in the instant case was specific, leaving him with no option for election, the trial court was left with no discretionary powers in the circumstance. Indeed, the court in such a case is bound to adjudicate between the parties on the basis of the case formulated by them. The court does not formulate cases for the parties otherwise it might find itself covered by the dust of the conflict. It is also a basic principle that parties are bound by their pleadings; such that anything not contained in the pleadings has to be ignored by the court in adjudicating between the parties. See Great Nigeria Insurance Co. Ltd v. Lad Group Ltd. (1986) 4 NWLR (part 33) 72 and African Continental Seaways Limited v. Nigeria Dredging Roads and General Works Limited (1977) 5 SC. 235 at 249-250. See also Bullen and Leake on Precedents of pleadings. The issue of specific performance of the contract of sale of the plot of land ordered by the trial court and affirmed by the court below was not an issue raised in his pleadings. What he claimed before the trial court was damages - short and to the point.

On the second issue, it is settled law that a plaintiff or defendant in his counter-claim as in the instant case, cannot claim a relief which is inconsistent with the relief specifically claimed. So held this court in David Fabunmi v. Abigail Ade Agbe (1985) 3 SC. 28 at 83 - 84; (1985) 1 NWLR (Part 2) 299 where, in the words of Obaseki, JSC:

"A plaintiff or Defendant in the counter-claim cannot claim a relief which is inconsistent with the relief specifically claimed. See Cargill v. Bower (1878) 10 Ch. D 502. I am of the opinion that the court must have jurisdiction to grant the relief that it thinks appropriate to the facts as proved. If a party seeks to raise a new claim which has not been adumbrated in his pleadings in the course of the trial, in my opinion, the court should not given relief of that kind at any rate without offering the opposing party an opportunity for an adjournment and giving an opportunity to say whether she has been taken by surprise, or has been preju-

dicted by the fact that that particular form of relief has not been explicitly claimed earlier. See *Belmont Finance Limited v. Williams Furniture Limited* (1979) 1 All E.R. 118 at 131-132; *Taiwo Okeowo v. Mrs. Migliore* (1979) 11 SC. 138 at 197-199; *D.O. Olugbode v. Oyesina* (1977) 5 SC. 79 at 86-88. This however does not detract from the law and the decisions of this court are that the court will not grant any relief not before it." (Underlining above is mine for emphasis). B

See also the recent decision of this court in Hon. Justice Adenekan Ademola v. Chief Harold Sodipo & Ors. (1992) 7 SCNJ (Part 11) 417 at 446-447 - a case not entirely dissimilar to the one in hand where Ogunbare, JSC, C made the following pertinent observations:

"It is not defendant's contention that the orders complained of are outside the jurisdiction of the court to make where they are specifically asked for, it is that as they were not specifically asked for in the case in hand the orders ought not to have been made. Motunwase v. Sorungbe (supra) and other cases cited in plaintiff's brief are, in my respectful view, not relevant. D

It is not disputed that these orders additional to the reliefs claimed and granted, were never asked for by the plaintiffs. Nor is it right to say as has been submitted by Ogunbare, that the order for account is alternative to the relief for removal of defendant as executor and trustee. No such alternative relief was ever claimed by the plaintiffs. And none of these orders could be said to be ancillary or incidental to any relief proved and granted so as to make such a relief effectual It is difficult for me to reconcile this opposing attitude of the court below to the two orders made by the learned trial Chief Judge." F G

From the foregoing, it is clear that the question of making a claim not expressly shown on the pleading of a party to an action is not an issue shown on the pleading of a party which depends entirely on the exercise of the trial Judge's discretionary powers as the court below seems to have viewed. It is a matter touching on the rights of the opposing party to be heard. If then that right was denied the opposing party, it cannot be safely stated that the court has exercised its powers judiciously. See H

Eronini v. Iheuko (1989) 2 NWLR (Part 101) 46 at page 61 and Oluwa Glass Co. Ltd. v. Chief Oladapo Ehinlanwo (1990) 7 NWLR (Part 160) 14 at 32.

Thus, I am of the firm view that when in his leading judgment
 B Uthman Mohammed, J.C.A. (as he then was) stated, inter alia:

"Now it is pertinent to look into all the aspects involved in this case and consider whether the relief for specific performance is inconsistent with the relief for damages which the respondent pleaded in his counterclaim. Being an equitable remedy the relief for specific performance flows from the consequential orders a trial or Appeal Court may make at the conclusion of a decision for a breach of contract." (underlining is mine for commence);

he was clearly in error since the order for specific performance is not
 D consistent with the respondent's claim for damages. This, in my view, is so because claim for damage made in such circumstance presupposes that the respondent is abandoning the contract but will like to reclaim, as it were, all the things he lost as a result of his entering into the contract
 E obligation.

On question 3, the court below has stated that being an equitable remedy, the relief for specific performance flows from the consequential orders a trial or appeal court may make at the conclusion of a decision
 F for a breach of contract. While I concede that the order of specific performance is an equitable remedy, in the circumstance of the counterclaim filed by the respondent before the trial court in which he specifically claimed for damages, I am of the view that it cannot be said that an order or specific performance of the said contract is a consequential
 G order made sequel to the decision of the trial court.

As to what constitutes a consequential order, I only wish to adopt my learned brother, Ogundare, JSC's clear exposition of the law through the cases as elucidated therein by him to wit: Frederick
 H Obayagbona v. Obazee & Anor. (1972) 5 SC. 247 at 254, Mrs. Bassey Ita Okon v. Administrator General (Cross-River State) & Anor. (1992) 6 NWLR (part 248) 473 at 488 and 489 and Akinbola v. Plisson Fisko Nigeria Limited & Ors. (1991) 1 NWLR (part 167) 270 at 288 - all of

which have left me in no doubt that the conclusion arrived at by the trial court, and which the court below wrongly affirmed to the effect that it is a consequential order is indeed a substantive order. Indeed, in the case under consideration, there has been no other order in respect of the counter-claim save that for specific performance decreed by the trial court, which B in turn, cannot be said to be a consequential order. A fortiori the court below, in my firm opinion, erred when it held by inference that the other for specific performance is a consequential order and that it is not inconsistent with the claim for damages made by the respondent in his counter-claim. The specific performance ordered not having flowed from the C decision arrived at by the trial court can not be regarded as a consequential order and I so hold. This is because it was neither asked for nor does it relate to the matter hitherto adjudicated upon.

For the reasons given by me and the fuller ones contained in the D leading judgment of my learned brother Ogundare, JSC I, too, am of the view that this appeal succeeds and it is allowed by me. The judgments of the trial court as well as that of the court below, in so far as they relate to the counter-claim, are hereby set aside. The Appellant's claims however E stand dismissed and I too, endorse the respondent's counterclaim to be retried before another Judge with all the orders for costs and accelerated hearing made therein.

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ACHIKE JSC

The plaintiff, a former lecturer at the Bayero University, Kano sold a parcel of land, plot No.358 situate at Sani Mai Nagge, Kano, to the G defendant through some middlemen for N7,000.00 at a time the plaintiff was in financial straits. By Exhibit D the plaintiff acknowledged the receipt of the price paid for the land, i.e. the consideration for the contract of sale of same, and in due course, he handed over the relevant H documents relating to the said plot of land to the defendant. At all material times, the defendant had made some progress in erecting a building thereon, for which he had incurred some expenses. To the utter bewilderment of the defendant, the plaintiff initiated an action at the Kano High

Court against him claiming a declaration of title over the said plot No. 358 and N50,000.00 damages for trespass. The defendant denied the claim and counter-claimed for a total sum of N33,000.00, being the price he paid for the plot and the amount he spent at that level on his building on the said land. The case proceeded to trial and on conclusion, the learned trial Judge dismissed the plaintiff's claim and decreed specific performance in favour of the defendants but said nothing about the counter-claim. The plaintiff appealed to the Court of Appeal, the appeal was dismissed and the order for specific performance in favour of the defendant/respondent was affirmed. Still dissatisfied, the plaintiff further appealed to this Court on two grounds of appeal and formulated three issues for determination, namely,

"(a) *Whether the Court of Appeal was right in holding that the order of specific performance is a judicious exercise of the Judge's discretionary powers.*

(b) *Whether the order for specific performance is consistent with the claim for damages.*

(c) *Whether the order for specific performance is a consequential order."*

These issues for determination were adopted by the respondent in his own brief.

I shall take the three issues together as they appear to overlap in their treatment.

The crux of this appeal is whether on the pleadings and evidence the trial court was right to have decreed the order for specific performance which was unanimously affirmed by the Court of Appeal. The defendant's/respondent's counter-claim was specifically a claim rooted in damages. There was no claim for specific performance by him in the alternative to his claim for damages, although the appellant concedes that much that such claim in the alternative was feasible. The law is now firmly settled that the parties are bound by their pleadings as set out in the statement of claim and statement of defence. So also is the court adjudicating the issues in controversy between the parties. The aim of such orderliness in trial procedure is to avert surprises being sprung on the

unsuspecting adversary. Undoubtedly, this cautions restraint on pleaders is much to be encouraged. See Ezonwu v Onyechi (1996) 3 NWLR (Pt.438) 499. The corollary to this rule of pleading is that neither the trial court nor the court exercising appellate jurisdiction can generously award a party a relief it has not sought specifically. See Ekpenyong & Ors v. Inyang Nyong & Ors (1975) 2 SC.71, 80. It is also not possible for the court to grant a party a relief he has not asked for under the pretext that it is a consequential order. One must be quite clear in one's mind what constitutes a consequential order; it must manifestly flow from the judgment handed down by the court and not contradict the said judgment which, as it were, it should supplement. Nnaemeka-Agu, JSC explained the term consequential order lucidly in Akinbobola v. Plisson Fisko Nigeria Ltd. & Ors (1991) 1 NWLR 270,288:

" A consequential order is not one merely incidental to a decision but one necessarily flowing directly and naturally from, inevitably consequent upon, it. It must be giving effect to the judgment already given, not by granting a fresh and unclaimed or unproven relief a proper consequential order need not be claimed and sustained from the facts before the court."

In the case in hand, there is no doubt that an order for specific performance is a specific order or relief which a party who has performed his own obligation under a contract may wish to claim against the contract-breaker, invariably as an alternative claim for a breach of contract, where the facts of the given case so justify. Obviously, applying the above-mentioned rule of pleadings, specific performance, be it the only relief or even as an alternative relief, must be pleaded so that evidence would be led at the trial to sustain it. The order for specific performance not being a consequential order it would be pretentious for such order to be made where the specific claim before both the trial court and the Court of Appeal was a claim in damages. And, what is more, a claim for damages is mutually exclusive to a claim for the relief of specific performance. We are bound to emphasize that while a claim for damages is rooted either in common law or under a statute, a decree for specific performance is unquestionably a relief that can only arise in

equity.

A little background information may assist to elucidate on the reason why the two lower courts persistently granted the equitable relief of specific performance not claimed by the respondent in his counter-claim and declined to give any consideration whatsoever to the counter-claim which sounded explicitly in damages. Despite the fact that the appellant, a person in the standing of a University Lecturer, had handed-over the relevant documents, Exhibits W and W1 covering the land, plot No. 358, in Sani Mai Nagge, Kano to the respondent in consideration for the receipt of N7.000.00, the contract price thereof, the learned trial Judge specifically found, inter alia,

(1) 'That it was wrong of him (meaning the plaintiff/appellant) to have taken the advantage of the 1981 rampage (in Kano) to go back and collected a re-certificate of Exhibit C (i.e. the certificate of Occupancy obtained by the defendant.)

(2) It was fraudulent on the part of the plaintiff/appellant to have obtained the re-certification of Exhibit C and reclaimed the same place of land without disclosing to the re-issuing authority that he had divested himself of the property.'

The learned trial Judge summarized appellant's abominable conduct graphically:

"Thus was a found on the Ministry of Land and Survey as well on the defendant for the plaintiff to obtain a re-certification of the Certificate of Occupancy on the grounds that the former one (i.e.. Exhibit C had been burnt during the rampage when in fact there no Certificate of Occupancy which was so burnt."

No doubt, it is the above state of the case (and the sympathy arising therefore which is clearly unsustainable or tenable in law) that impelled the trial court to make the order for specific performance.

It is manifest that the Court of Appeal was equally sympathetic in favour the respondent wherein it affirmed the order for specific performance, per the leading judgment of Uthman Mohammed JCA. Permit me to quote him in extenso:

"It is pertinent to look into all the aspects involved in this case

and consider whether the relief for specific performance is inconsistent with the relief of damages which the respondent pleaded in his counter-claim. Being an equitable remedy the relief for specific performance flows from the consequential orders a trial or appeal court may make at the conclusion of a decision for a breach of contract. In any action for breach of contract to deliver specific or ascertained goods a trial court may direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages, or upon such other terms and conditions as the court may seem just. Equally if the court is satisfied that a party is in breach of a contract over a sale of land it will direct for conveyance to the purchaser through a decree of specific performance. It is imperative for the trial Judge to exercise his discretion in order to avoid a multiplicity of proceedings and make a judgment effective so far as that could be done without causing injustice to the other side - See Ajoke v Amusa Yesufu Oba & Anor (1962) 1 All NLR 73.

I therefore agree that the learned trial Judge had exercised his discretion judiciously in decreeing for specific performance instead of awarding damages against the appellant since there is over-whelming evidence that the appellant had sold plot 358 to the respondent for N7,000.00."

I wish to draw attention to a few issues with regard to the above excerpt in the leading judgment of the Court of Appeal. First, the order for specific performance, undoubtedly, is an equitable remedy and in an appropriate case, it may be ordered as an alternative relief in an action for breach of contract, particularly where the award of damages for the said breach of contract cannot adequately compensate the innocent party. The lower Court as shown in the above excerpt, went further to hold that the order for specific performance being equitable "it flows from the consequential orders a trial of appeal court may make at the conclusion of a decision for a breach of contract." I am clearly of opinion that this view of the law is manifestly erroneous and insupportable. While a trial or an appellate court has inherent powers to make consequential orders at the conclusion of a decision, such consequential orders cannot, in my

view, include an order for specific performance because that order (or relief) cannot flow from a decision of the court in an action for a breach of contract. The true position, as I understand it, is that whereas an order for specific performance is one that the court can make after the conclusion of a trial in an action for breach of a contract, a consequential order, on the other hand, flows the decision the court has reached, e.g. the costs awarded by the court.

Finally, an order for specific performance being characterized as a specific claim, as earlier noted, can only be made if proper evidence is led to encompass the pleadings in this regard. This is so because the matter how favourably disposed the court may be towards making an order for specific performance, it cannot itself overlook the rules of pleadings and production of sufficient evidence to found a decision in favour of the claimant. See Emegokwue v Okadigbo (1973) 1 All NLR (Pt.1) 379 of (1973) NMLR 192.

The question, which is the gravamen of this appeal, is whether the trial court was right in making the order for specific performance of the contract of sale of land covering plot No. 358 in Sani Mai Nagge, Kano in favour of the respondent, which said order was unanimously affirmed by the Court of Appeal? I am irresistibly bound to turn in an answer in the negative. It is true today that the court of law is a court of equity to the extent only that a modern court generally can exercise and award both legal and equitable reliefs, but in no other sense. First, the above statement of the law which facilitates the administration of justice in one court based on law and equity does not enable the very same court to arbitrarily exercise its legal and equitable jurisdictions. Being a court established under the statute, those two jurisdictions remain inviolate and compartmentalized, and can only be exercised where the existing rules and practice of law and equity so permit, but not otherwise.

Second, it must be firmly stated that the legal and equitable jurisdictions of a court do not permit the court to act on grounds of sympathy or arbitrariness, no matter the compelling circumstances. In other words, there is no third arm of jurisdiction (outside law and equity) which permits the court to act on the basis of sentiment. Sentiment or passion is

an ever-present element in human minds but law is an embodiment of justice and fairness. Therefore, stricto sensu, law is invariably divorced from element of passion. Consequently, the adjudication in the competing interests of the parties in litigation must be left unmuddled by the element of passion.

In my view, the order for specific performance made by the two lower courts, as I had stated earlier, based, not on the sentiment to do substantial justice between the parties is legally indefensible and cannot be allowed to stand. This conclusion should not be erroneously taken to mean that this Court does not frown on the diabolical dishonesty and fraud, as found by the trial court, perpetrated by the appellant on the unsuspecting respondent nor is it to be said that the position of the defrauded respondent though hapless is hopeless. I am clearly of the view, that quite on the contrary, the laws of this country are not benefit of remedy to meet such circumstances posed in this case where the appellant unabashedly engages in the unwholesome act 'to eat his cake and have it' to the chagrin of the innocent contracting party. Thank God, the apex Court in the land cannot remain emasculated to redress such over-reaching misconduct of the appellant, if the monumental decision of the Supreme court in Bello v. A-G of Oyo State (1986) 5 NWLR (Pt.45) 28 is anything to go by.

It is clear, even on compassionate grounds, that the order of specific performance cannot be made in the alternative, having regard to the circumstances of this case, more so when no such alternative claim was made nor any decision reached by the trial court even on the respondent's counter-claim. The interest of justice clearly demands that an opportunity be accorded to the respondent for the consideration of his counter-claim.

In the result, I think the appeal has merit and the same succeeds and is accordingly allowed. The judgment of the trial court dismissing the Appellant's claim, of course, remains dismissed as the same has not been appealed against, while the judgments of the two lower courts in relation to the counter-claim are set aside. I hereby order a retrial of the Defendant's/Respondent's counter-claim, and each party being free to

amend his pleadings with regard to the counter-claim.

I abide by all orders as to costs and all other consequential orders in relation to the retrial of the counter-claim.

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KALGO JSC

In this action, which commenced in the Kano High Court, the appellant claimed against the respondent, inter alia, for declaration that he has title to plot No.358 Sani Mai Nagge covered by a Certificate of occupancy No. KN/RES/82/2281 and N50,000.00k damages for trespass. The respondent denied the claim and filed a counter-claim totalling N33,000.00k for price he paid for the plot and the amount he expended at that stage on the development of the said plot. The case went to trial, evidence called and at the end, the learned trial judge Saka J. dismissed the claims of the appellant and ordered specific performance in favour of the respondent. He however said nothing about the respondent's counter-claim in his judgment. The appellant appealed unsuccessfully to the Court of Appeal, Kaduna. He now appealed to this Court on two grounds and raised three issues for the determination of this Court. It is pertinent to observe from these issues that the appellant was not complaining about the dismissal of his claims by the two lower Courts but complained substantially about the order of specific performance made by the learned trial judge and affirmed by the Court below. The question therefore which this Court is called upon to determine shall be: could the order for specific performance made by the learned trial judge and affirmed by the Court below, in the special circumstances of this case, be regarded as consequential to any orders made by the trial Court? That order of specific performance complained of reads:-

"A specific performance is hereby decreed against the plaintiff to execute a proper deed of conveyance in favour of the defendant."

It is clear from the pleadings of the parties at the trial that no mention was made of the issue of specific performance. The order for specific performance was therefore not claimed or asked for by either party. It is settled law that a Court, not being a charitable institution, can award less

but not more than what is claimed by a party. See Akapo v Hakeem Habeeb (1992) 6 NWLR (part 247) 266 at 296 Ezeonwu v Onyechi (1996) 3 NWLR (part 438) 499 at 520 - 521. Ekpenyong & Ors v Inyang Nyong & Ors (1975) 2 SC 71 at 80; Union Beverages Limited v. M. A Owolabi (1988) 2 NWLR (part 68) 128. And although a Court can law- B fully make a consequential order in any particular case, the circumstances giving rise to the order must be within the definition outlined by this Court in Akinbobola v Plisson Fisko Nigeria Limited & Ors (1991) 1 NWLR (PART 167) 270 AT 288, where Nnaemeka-Agu, JSC said:-

"In my view, the learned counsel for the respondent has taken a rather simplistic view of what a consequential order means. A conse- C quential order is not one merely incidental to a decision but one necessarily flowing directly and naturally from, and inevitably consequent upon, it. It must be giving effect to the judgment already given, not by grant- D ing a fresh and unclaimed or unproved relief. An order made without a trial on one of the issues, as in the case, or as observed by this Court in Obayagbona v Obazee (1972) 5 SC.247, one though made after the judg- E ment detracts from it, is not a proper consequential order. Nor can a consequential order properly be made to give a party entitlement to a relief he has not established in his favour. A proper consequential order need not be claimed but a substantive order must be claimed and sus- F tained from the facts before the Court". (Underlining mine).

The trial Court made no decision in respect of the respondent's counter-claim and the relief of specific performance which was not claimed or proven in this case, cannot by any stretch of imagination be taken to flow from the dismissal of the appellant's claims.

There is no doubt that following the above definition of what is G a consequential order, the order of specific performance made ex-gratia, by the learned trial judge in the instant case, as quoted above, cannot in my view, pass as a consequential order in this appeal having regard to all the circumstances. It was therefore wrong for the trial Court to have H made the said order and the Court below to affirm the same.

I therefore find myself entirely in agreement with the reasoning and conclusion reached by my learned brother Ogundare, JSC in his

leading judgment that this appeal is meritorious. I allow it and set aside the decisions of the trial Court and the Court of Appeal in respect of the order for specific performance. I also adopt the consequential orders for the trial of the respondent's counter-claim by a judge of the Kano State High Court other than Saka Yusuf J. and abide by the orders for costs made in the leading judgment.

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