

COURT OF APPEAL
LAGOS DIVISION
8TH JULY, 1999. CA/L/340/97
CORAM:- G. A. OGUNTADE, S. GALADIMA,
P. O. ADEREMI, JJCA.

ENGR. OBIDI NWABUEZE EZENWA APPELLANT
AND

1. ROY EKONG

(Executors of the Estate of late Major
General J. Y. Ekong (Rtd.)

2. CAXTON NIGERIA LIMITED RESPONDENTS

3. MRS. GUDRUN EKONG

4. CYRIL OLUWATOYIN PINHEIRO

ACTIONS - Leave to defend - Refused in this case - Was wrong - As it amounts to denial of justice.

APPEALS - Notices of appeal - Subsequent discontinuance thereof - Has no effect on the transfer of the property in dispute - That was legally done before the case was instituted.

CONTRACTS - Agency - Authority of the Agent - Where limited to finding a buyer - Any conclusion of the sale agreement by the agent - Will be null and void.

COURTS - Findings of trial court - Are perverse in view of the printed evidence.

CONTRACTS - Legal contract - Offer and acceptance - Consensus ad idem - Certainty of terms - Are elementary basis for existence of any contract.

CONTRACTS - Specific performance - Claimant must fail - If there is a

default on his part - To discharge his own obligations under the contract.

LAND LAW - Sale - *Nemo dat quod non habet* - Raised by the plaintiff
- Would rather apply against him.

FACTS

Before the High Court Lagos the plaintiff/4th respondent filed an action against the defendants claiming jointly and severally an order of specific performance of the contract of sale in respect of the property in dispute. The 1st and 3 respondents as executors are the owners of the property in dispute, plot 50 Babs Animashaun Street, Surulere, Lagos. The 2nd respondent was their agent charged with the responsibility of finding a buyer. The defendant/appellant was the person that eventually bought the property. The plaintiff sought to establish that he already had an existing contract with the 1st - 3rd respondents so that any sale to the appellant was null and void.

By a summons on notice, plaintiff moved the trial high court to enter judgment in his favour by granting an order for specific performance against the defendants. After appraising the affidavit and counter affidavits filed by the parties, the trial court in a reserved ruling granted the prayer of the plaintiff. Being aggrieved, the 4th defendant/appellant has now appealed to the Court of Appeal.

ISSUES DETERMINATION

1. *Whether the learned trial Judge could make an order of specific performance of the contract for the sale of the land as prior to the said order and indeed the suit the 1st and 3rd Respondents had divested themselves of their rights and title to same absolutely and in favour of the appellant herein.*

2. *Was the learned trial Judge right in holding that the 2nd Respondent had the apparent or ostensible authority to bind the 1st and 3rd Respondents in contract for the sale of the said property and therefore could enter into contract of sale of the property with the 4th Respondent on behalf of the 1st and 3rd Respondents.*

3. *Could the learned trial Judge from the evidence before him*

have held that there was a valid contract of sale of the said property between the 1st and 3rd Respondent of the one part and the 4th Respondent of the other part which contract was specific performance.

HELD (Unanimously allowing the appeal per lead judgment of **ADEREMI JCA**)

Contracts - Legal contract

1. It is very elementary that for any contract to come into existence there must be an unmistakable and precise offer and an unconditional acceptance of the terms mutually agreed upon by the parties thereto. In other words, the parties must be in consensus ad idem as regards the terms and conditions, thereof. The parties must be seen to intend to create legal relations and the promise of each party, in a simple contract other than that under seal must be backed by consideration. Both sides must be clear as to what the more fundamental and crucial terms of the agreement connote for a legal contract to come into fruition. If the terms of the agreement are uncertain or vague as to defy ascertainment with reasonable degree of certainty there will be no valid contract capable of offering itself for enforceability in law. See (1) *Pan Africa Bank Ltd. v. Ede* (1998) 7 NWLR (pt. 558) 422. Where it is established by clear evidence that a fundamental term of the contract is non-existent then such contract is null and void. See *Adebanjo v. Brown* (1990) 3 NWLR (pt. 14) 661. For a contract or an agreement to be beyond reproach, there must be in existence a concluded bargain which has finalized all essential conditions that are necessary to be settled leaving no vital terms or condition unsettled. However, whether the parties are consensus ad idem in the essential elements of a contract is a matter of fact which must be established by credible evidence. See *D' Silva v. Lister House Development* (1970) 1 A.E.R. 858. (p. 324 A)

Agency - Authority of the Agent

2. Suffice it to say that the two sums were offers and they were forwarded to the 1st defendant/respondent immediately. I pause here to observe that by that singular act, the 2nd defendant - the agent of the 1st

and 3rd defendants/respondents has shown that the actual authority it had was limited to looking for would-be buyers; and that it was under an obligation to forward the offers of such would be buyers to the principal (s) - in this case the 1st and 3rd defendants/respondents. The final decision as to who bought the said property did not lie with the agent - 2nd defendant/respondent but with the principals - the 1st and 3rd defendants/respondents. So if the 2nd defendant should conclude the sale agreement with a person without reference to or clearance from the disclosed principals such an agreement is null and void. (p. 330 B)

Sale - Nemo dat quod non habet

3. A proper evaluation of the printed evidence before the court below boils down to this that with effect from 3rd April, 1995 the issue of the sale of the property known as No. 50 Babs Animashaun Street, Surulere, Lagos became irreversibly settled in favour of the appellant. So, if the doctrine of Nemo Dat Quod Non Habet would have to be invoked it must be against the 4th plaintiff/respondent for there was nothing remaining in the said property to be passed to him by the former owners - the 1st and 3rd defendants/respondents. As for the 1st and 3rd respondents they are forever from 3rd April, 1995 prevented from reneging from the position they voluntarily created for themselves that is the issue that they have divested themselves of any legal or equitable interest in the said property. They are estopped from denying that issue. Indeed as between the 1st, 2nd and 3rd defendants/respondents on one side and the appellant on the other side, the issue is final. (p. 331 B)

Findings of trial court - Notices of appeal

4. The result of all I have been saying is that the conclusions of the learned trial Judge quoted supra is perverse as regards the printed evidence before him. The subsequent discontinuance of the notices of appeal lodged by 1st. 2nd and 3rd respondents against the judgment of the court below has no effect on the position they all jointly created before this case was instituted - that position is that the property has with effect from 3/4/95 passed legally to the appellant. (p. 331 H)

Contracts - Specific performance

5. A person who is seeking to enforce his right under a contractual agreement must show that he has fulfilled all the conditions precedent and that he has performed all those terms which ought to have been performed by him. As a corollary, a plaintiff in an action for specific performance of an agreement must fail if there is a default on his part to discharge his own obligations under that contract. This is so because in the eye of the law, he is in breach of his own portion of interdependent undertakings mutually agreed upon by him and the defendant as stipulated in the agreement, even, if he is guilty of delay in the performance of his own obligations. See (1) Coker v. Ajewole (1976) 9 & 10 S.C. 17 and (2) Australian Hardwoods Pty v. Comm. For Railways (1961) 1 A.E.R. 737. (p. 332 E)

Actions - Leave to defend

6. Having answered issues 1 and 2 in the brief of the 4th Respondent in the negative, it follows that his issue 3 which translates into whether the learned trial Judge was correct to have refused leave to defend must be answered in the negative; and I so do. Such a refusal order tantamounts to travesty of justice. It closed the door to seat of justice against the defendants. It must always be remembered that citizen's accessibility to courts is the hallmark of civilized societies operating under the rule of law. Any country that shuts the door of its court against individuals who may wish to vent real or imagined grievances against other individuals or against the state or its functionaries cannot be said to be operating under the rule of law. Such a refusal is denial of justice. The adage is that justice is to be denied to none; translated into Latin Maxim it is *Justitia Nemini Neganda Est*. (p. 333 B)

REPRESENTATION

H. A. Balogun (Mrs.) (with her, O. Idemudia and A. Odusote) - for the Appellant.

Ebun Sofunde, SAN, (with him, Kemi Pinheiro Y. A. Owolabi) for the 4th Respondent.

CASES REFERRED TO

- Kaduna State v. Attah (1986) 4 NWLR (pt. 38) 785 at 794
 Lawal v. Union Bank of Nigeria Plc. (1995) 2 NWLR (pt. 378) 407
 B Martins v. Nicannar Foods Industry Ltd. (1988) 2 NWLR (pt. 74) 75 and
 Majekodunmi v. WAPCO Ltd. (1992) 1 NWLR (pt. 219) 564
 Osunrinde v. Ajamogun (1992) 6 NWLR (pt. 246) 156 and (3)
 Shuwa v. Chad Basin Development Authority (1991) 7 NWLR (pt. 205)
 550 at 561-562
 C Biyo v. Aku (1996) 1 NWLR (Pt.422) 1
 Biokun v. Light Machine Industry Ltd. (1986) 5 NWLR (Pt.39) 42 Anon
 Lodge Hotels Ltd. v. Mercantile Bank of Nigeria (1993) 3 NWLR (Pt.284)
 721 at 731
 D Opara v. S. (Nig.) Ltd. (1995) 4 NWLR (pt. 390) 440 and (3)
 Biokun v. Light Machine (1986) 5 NWLR (pt. 39) 42
 Adebajo v. Brown (1990) 3 NWLR (pt. 14) 661

E

LEAD JUDGMENT BY ADEREMI JCA

- In the court below, the plaintiff (hereinafter referred to as the
 4th Respondent) claimed against the four defendants therein named i.e
 F (1) Roy Ekong - as executor of the estate of late Major-General J. U.
 Ekong. (2) Caxton Nigeria Limited, (3) Mrs. Gudrun Helen Ekong and
 (4) Eng. Obidi N. Ezenwa jointly and severally as follows:-

- (1) *An order of special performance of the contract of sale of
 the property lying and being at Plot 50, Babs Animashaun Street, Surulere,
 G Lagos which contract was entered into between the plaintiff and the de-
 fendants on or about the 22nd day of March, 1995. And the plaintiff in
 part performance of the aforesaid contract on or about the 30th day of
 March, 1995 forwarded his cheque for the sum of N1. 1 million, notwith-
 H standing the above, the defendants refused and neglected to perform the
 contract.*

*2. An order of interlocutory injunction restraining the defen-
 dants from selling or otherwise disposing of the aforesaid property in*

breach of the agreement entered into with the plaintiff.

The first and second defendants were the original defendants. Mrs. Gudrun Ekong and Engineer Obidi N. Ezenwa were, by the order of the court below made on 17th October, 1995, joined as the 3rd and 4th defendants respectively; The 3rd defendant was so joined by reason of B the fact that she was the 2nd executor of the Estate of Late Major-General J. Ekong (Rtd) and the 4th defendant (Engineer Obidi Nwabueze Ezenwa) was made a party to the case on the ground that he was discovered to have purportedly bought the property the subject-matter of the C suit. The 1st, 2nd and 3rd defendants, are for the purpose of this appeal referred to as the 1st, 2nd and 3rd respondents while the 4th defendant (Engineer Obidi Nwabueze Ezenwa) is the 4th defendant/appellant.

The plaintiff/4th respondent by Summons on Notice dated 14th D February, 1996 moved the court below to enter judgment in his favour by granting an order for specific performance of the contract of sale of the said property in his favour. The court below, in a reserved ruling, granted the prayer of the 4th respondent as set out in the summons after appraising the affidavit and counter-affidavits filed by the parties. E

Aggrieved by the said ruling the 4th defendant/appellant (Engineer Obidi Nwabueze Ezenwa) filed a Notice of appeal which contains two original grounds of appeal and, with the leave of court, seven additional grounds of appeal were added. The record of proceedings in re F plete with notices of appeal against the said ruling filed on behalf of the first, second and third respondents - (Roy Ekong, Caxton Nigeria Limited and Mrs. Gudrun Ekong) but they were never pursued. Indeed, the second respondent - Caxton Nigeria Limited filed a Notice of withdrawal G of its own appeal; the first and second respondents abandoned their notice of appeal. So the only appeal subsisting is that of the 4th defendant/appellant (Eng. Ezenwa). In the brief of argument of the 4th defendant/appellant three issues were raised for determination and they are in the H following terms:-

1. Whether the learned trial Judge could make an order of specific performance of the contract for the sale of the land as prior to the said order and indeed the suit the 1st and 3rd Respondents had divested

themselves of their rights and title to same absolutely and in favour of the appellant herein.

2. Was the learned trial Judge right in holding that the 2nd Respondent had the apparent or ostensible authority to bind the 1st and 3rd Respondents in contract for the sale of the said property and therefore could enter into contract of sale of the property with the 4th Respondent on behalf of the 1st and 3rd Respondents.

3. Could the learned trial Judge from the evidence before him have held that there was a valid contract of sale of the said property between the 1st and 3rd Respondent of the one part and the 4th Respondent of the other part which contract was specific performance.

By way of preliminary objection, the 4th Respondent in his brief of argument raised the under-quoted issue for preliminary determination:-

"Is the appeal competent in law and in fact for determination as contained at page 10 of the appellant's brief of argument."

Three other issues raised up for determination in the said brief are in the following terms:-

1. Whether the lower court was right in holding that on the totality of the affidavit and documentary evidence before it there was in existence a valid and enforceable contract in writing between the 2nd and the 4th Respondents.

2. Whether the learned trial Judge was right in holding that the 2nd Respondent had the apparent or ostensible authority to bind the 1st and 3rd Respondents in contract for the sale of the property.

3. Whether in view of the answers to issues 1 and 2 above, the learned trial Judge was correct to have refused leave to defend?

All the above issues are very much interwoven. The bottom line of the entire case is which of the two sides i.e. 4th plaintiff/respondent (cyril Oluwatoyin Pinheiro) and the appellant (Engineer Obidi Nwabueze Ezenwa) validly purchased the property. The resolution of this is by a thorough evaluation of the printed evidence; that is the affidavit evidence of all the dramatic personae.

When the appeal came up before us for hearing on 27th May,

1999, Mrs. Balogun, learned counsel for the appellant referred to and adopted the appellant's brief filed on 16/4/98 and the appellant's reply brief. On the preliminary objection as to whether the appellant could validly, in law, assert a right contrary to that of his vendor as he has done in issues 2 and 3 having regard to the fact that 2nd, 3rd and 4th respondents have voluntarily chosen to discontinue their appeals by filing Notices of Discontinuances, learned counsel by way of emphasis, in her oral submission, submitted that any acceptance to be valid, in law, much conform with the offer citing A-G., Kaduna State & Ors. v. Attah & Ors. (1986) 4 NWLR (pt. 38) 785 at 794 and Lawal v. Union Bank of Nigeria Plc. (1995) 2 NWLR (pt. 378) 407 at 425. She finally urged that the appeal be allowed. B C

Mr. Sofunde SAN, learned counsel for the 4th Respondent (Cyril Oluwatoyin Pinheiro) referred to and relied on 4th Respondent's brief filed on 7/10/98 and the notice of preliminary objection filed on 6/1/99, the arguments thereon as contained on pages 8-10 of the 4th Respondent's brief; submitting by way of emphasis that the appellant not being a party to the contract cannot query the authority of the vendor's agent nor the validity of the sale much so as the vendor is not challenging it. He urged that the appeal be dismissed. D E

I feel called upon to set out arguments of both sides on the preliminary objection raised by the 4th respondent in his brief inviting the court to strike out grounds 1, 3, 4, 5, 6 and 7 of the additional grounds of appeal for reason of the fact that the appellant being a stranger to the transaction between the 4th Respondent and the 1st. 2nd and 4th Respondents has no locus standi to raise and canvass those issues that have been conceded by the 1st, 2nd and 3rd Respondents. In his brief the main contention of the 4th Respondent is that the appeals of the 1st, 2nd and 3rd Respondents filed against the judgment of the court below have abated by reason of the notices of discontinuance filed by them in respect of their appeals placing reliance on the decisions in (1) Martins v. Nicannar Foods Industry Ltd. (1988) 2 NWLR (pt. 74) 75 and (2) Majekodunmi v. WAPCO Ltd. (1992) 1 NWLR (pt. 219) 564. By the said notices of discontinuance the 1st, 2nd and 3rd. Respondents have F G H

submitted to the judgment of the court below and thus conceding the validity of the contract of sale of land between the 4th Respondent and themselves. The issue so conceded has thus become an issue estoppel binding on the parties and their privies. The appellant having derived his title from the 1st - 3rd respondents is estopped by force of law from alleging contrary facts to those conceded by his vendors; he further argued calling in aid (1) Jones v. Lewis (1919) 1 K.B. 328; (2) Osunrinde v. Ajamogun (1992) 6 NWLR (pt. 246) 156 and (3) Hiflow Farms Ind. v. Unibadan (1993) 4 NWLR (pt. 290) 719 at 738. Having regard to the reliefs sought and not being a party to the transaction, the appellant has no locus standi to raise those issues and while urging that the aforesaid grounds of appeal be dismissed he prayed in aid the case Shuwa v. Chad Basin Development Authority (1991) 7 NWLR (pt. 205) 550 at 561-562.

In reply to the preliminary issues the appellant argued in his brief that the 4th Respondent's offer for the purchase of the property was not accepted by the 2nd Respondent; the cheque issued by the Respondent was returned without same being presented. From the totality of the evidence before the court below there was nothing to suggest that an agreement for the sale of the property was concluded between the 4th Respondent.

I pause to say that the argument canvassed by both sides on what the 4th Respondent has termed preliminary objection are already well entrenched in the arguments proffered by them on the issues raised in the briefs. I think it is more tidy and very economical to take the various arguments on the issues seriatim and mere them, where possible, with those on the objection as set out above.

On issue I, the appellant, in his brief of argument contended that before the order of the court for specific performance, the property had already been sold by the accredited owners to the appellant and he referred to paragraph 2(i) of the affidavit to show cause sworn to by the 3rd Defendant/respondent through one Simon Otaba admitting the sale. The 3rd Defendant/respondent is the widow and a co-executor of the Estate of late Major-General J. U. Ekong. This assertion is authenticated by paragraph 2 (a) and (b) of the said affidavit. The 1st Respondent also

confirmed the sale of the property to the appellant in an affidavit to show cause. Both the 1st and 3rd respondents admitted in writing, through a letter dated 3/4/95, the sale of the property to the appellant. He finally argued on this issue, that having divested themselves of the ownership in the said property there was nothing remaining for the accredited owners to pass to the 4th plaintiff/respondent and citing Chitty on Contracts 21st Edition page 386 and Universal Vulcanizing Ltd. v. I.U.T.T.C. Ltd. & Ors. (1992) 3 N.S.C.C. 508; (1992) 9 NWLR (pt. 266) 388 he submitted that it was wrong in law for the court below to make an order for specific performance.

Issue 1 formulated by the respondents is substantially the same as issue 1 formulated by the appellant save that the couching of their wordings is titled to boost the case of the appellant on one hand and the 4th respondent on the other hand. Let me quickly say that the case as it stands is a straight fight between the appellant and the 4th Respondent. Arguing the case of the 4th plaintiff/respondent through the brief it was contended that the contract relating to the sale of the property between the 4th plaintiff/respondent and the accredited owners has the essential attributes of a valid agreement placing reliance on the affidavit sworn to by the 4th plaintiff/respondent on 23/2/96 paragraphs 3,4,5,6,7 and 13 constitute offer and acceptance - Exhibits B (the letter) and C (the cheque) citing Biyo v. Aku (1996) 1 NWLR (Pt.422) 1 : Biokun v. Light Machine Industry Ltd. (1986) 5 NWLR (Pt.39) 42 and Anon Lodge Hotels Ltd.& Anor v. Mercantile Bank of Nigeria (1993) 3 NWLR (Pt.284) 721 at 731 . Reviewing the evidence before the court below it was contended by the respondents that the contract of Mr. Toyin Pinheiro (4th plaintiff/respondent) was concluded as at 3rd April, 1995 while that of the Mr. Ezenwa (the appellant) was sometimes after 16th April, 1995 when then accredited owners had divested themselves of the ownership in the said property in favour of the 4th respondent - the doctrine of Nemo Dat Quod Non Habet would therefore ban any subsequent sale of the same property by the 1st-3rd Respondents to the appellant it was contended while relying on Specific Performance by Jones & Goodluck 2nd Edition Page 208. Biyo's and Biokun's cases cited supra. A dismissal of the appeal

was urged on the court.

It is very elementary that for any contract to come into existence there must be an unmistakable and precise offer and an unconditional acceptance of the terms mutually agreed upon by the parties thereto. In other words, the parties must be in consensus ad idem as regards the terms and conditions, thereof. The parties must be seen to intend to create legal relations and the promise of each party, in a simple contract other than that under seal must be backed by consideration. Both sides must be clear as to what the more fundamental and crucial terms of the agreement connote for a legal contract to come into fruition. If the terms of the agreement are uncertain or vague as to defy ascertainment with reasonable degree of certainty there will be no valid contract capable of offering itself for enforceability in law. See (1) Pan Africa Bank Ltd. v. Ede (1998) 7 NWLR (pt. 558) 422 (2) Opara v. S. (Nig.) Ltd. (1995) 4 NWLR (pt. 390) 440 and (3) Biokun v. Light Machine (1986) 5 NWLR (pt. 39) 42. Where it is established by clear evidence that a fundamental term of the contract is non-existent then such contract is null and void. See Adebanjo v. Brown (1990) 3 NWLR (pt. 14) 661. For a contract or an agreement to be beyond reproach, there must be in existence a concluded bargain which has finalized all essential conditions that are necessary to be settled leaving no vital terms or condition unsettled. However, whether the parties are consensus ad diem in the essential elements of a contract is a matter of fact which must be established by credible evidence. See D' Silva v. Lister House Development (1970) 1 A.E.R. 858. Then what are the facts in the instant case which establish the existence of an enforceable contract in favour of the appellant or the 4th plaintiff/respondent; one which calls for invocation of an order of specific performance? In the affidavit sworn to by the plaintiff/respondent (Cyril Oluwatoyin in Pinheiro) in support of the summons dated 14th February 1996 and filed on 23rd February 1996 praying the court below to enter final judgment in his favour deposed that he and Mr. Femi Williams an Architect and an official of the 2nd defendant (Caxton Nigeria Lim-

ited) - the agent appointed to find a buyer for the property, met with him (4th Respondent) on 22nd March 1995 and agreed that he should pay N5.5 million for the property. They both agreed, he further deposed, that the said sum of N5.5. million be paid in installments on or before 30th May 1995. He claimed he made a deposit of N1. 1 million by bank draft B in favour of the 2nd defendant on 30th March, 1995. By his letter dated 11th April, 1995 (Exhibit D) attached to the said affidavit he informed the 2nd defendant/respondent that he would pay the balance of N4.4 million on or before 30th May, 1995. His cheque for N1.1 million was, according to him returned. Paragraph 21 and 22 of his affidavit which I reproduce hereunder explain in full the circumstances surrounding the return of the said cheque:- C

para 21

"That to my surprise and contrary to the agreement reached, Mr. D Femi williams on Tuesday 18th April, 1995 returned my cheque which had been in his custody for over 18 days, claiming the inability of the 1st and 2nd defendants to conclude on our earlier agreement."

The 1st and 2nd defendants referred to in paragraph 21 are Roy Ekong E and Caxton Nigeria Ltd. respectively (the former an Executor of the Estate of Major-General Ekong and 1st Defendant/Respondent in this appeal and the latter being the agent appointed to find a buyer for the property). F

Para 22

"That I am reliably informed from my investigation that contrary to our agreement both the 1st and 2nd defendants had been looking for buyers who would pay sums higher than the agreed price." G

From his own admission, as evinced in paragraphs 21 and 22 reproduced supra, the 4th plaintiff/respondent knew that as at 18th April, 1995, there was no agreement between him and the owners with regards to the sale of the property.

On the other hand the defendant/appellant (Eng. Obidi Nwabueze H Ezenwa) in his affidavit to show cause sworn to on 30th November, 1995 against the application for an order of Specific Performance deposed to by him, he came to own the property paragraphs 15, 16, 17,

18, 19 and 20 which are germane are in the following terms:-

Para 15

"That by a letter Ref. SK/E/95/297 of 3/4/95. I instructed my bankers to issue their cheque for the sum of N6,210,000.00 (six million two hundred and ten thousand Naira) being the purchase price of the said property and the agency commission thereon."

Para 16

"That my said bankers issued their certified cheque on the same 3/4/95 in the said requested amount and I personally delivered the same to the 2nd defendant before noon on the same 3/4/95."

Suffice it to say that a copy of the said certified cheque was attached to the affidavit as exhibit "G2".

Para 17:

"That on or about 4/4/95, I held a meeting with the 2nd defendant and my solicitor to discuss the modalities of executing the transfer documents, draft copies of which were delivered to the 2nd defendant at the said meeting."

Para 18

"That further to the said meeting on 4/4/95 the 2nd defendant wrote to me a letter Ref. No, CX/AG/001/005 of 4/4/95 confirming the acceptance of my offer of 28/3/95."

Again a photocopy of the acceptance letter of 4/4/95 was attached to the said affidavit and marked as Exhibit "N". The relevant portion of the letter reads and I quote:-

"Further to our meeting of today's date Ezenwa/Onwuamaegba/Williams/Jaiyeola held at our offices we later called the assignor to confirm his invitation with regards to the sale of the above property. We are happy to confirm his acceptance of your offer of N6.0 million for the outright sale of the above property to the assignee namely Eng. Obidi Nwabueze Ezenwa. We have also faxed to him all the three documents handed over to us at the meeting....."

Para 19

"That on or about 16/4/95, the 2nd defendant informed me that the purchase price of the said property excluding agency commission had

changed to N6,675,000.00 and prevailed on me to consider the same."

Para 20

"That after due deliberations and consultation I accepted the new purchase price and paid the difference of N675,000.00"

In an attempt to debunk the assertion that the legal title in the property had passed unto the appellant, the 4th respondent in a further affidavit in support of the summons which he swore to on 23/2/96 deposed in paragraph 4(b) thus:-

"That I am aware as at the 3rd April, 1995 when my cheque for N1.1 million was received by the 2nd defendant the transaction between the 1st, 2nd and 3rd defendants were still inchoate and incomplete for the following reasons:-"

(i) Paragraphs 19 and 20 of his said affidavit clearly shows that an agreement as to purchase price consideration was still unsettled as at 16/4/95.

(ii) My counsel Kemi Pinheiro Esq. informs me and I verily believe him that failure to reach agreement as to purchase price negates the existence of a contract.

(iii) that paragraphs 25 and 27 of the said affidavit contradicts the earlier paragraphs 8, 9 and 10 as the 3rd defendant was aware of the interest of the plaintiff as early as 30/3/95 by self admission.

(iv) that I am informed by my counsel Kemi Pinheiro Esq. whom I verily believe that the 3rd defendant is not a BONA FIDE Purchaser for value without notice."

Curiously however, the 4th plaintiff/respondent deposed in paragraph 10 of the same affidavit thus:-

"That I am eager and willing to conclude the contract as agreed for a consideration of N5.5. million with payments as may be directed by this Honourable Court."

In his narration through his affidavit to show cause dated 6/7/95 Mr. Femi Williams, and Architect and the Managing Director deposed that the 1st defendant/respondent (Roy Ekong) instructed the 2nd defendant to sell the property and pursuant to the instruction an advertisement was placed in the newspapers. The 4th plaintiff/respondent, he said had of-

ferred N5 million for the property and proposed instalmental payment, but the 1st defendant rejected both the offer and the proposal for the instalmental payment. That even when the plaintiff increased the offer to N5.5 million there was still no agreement oral or written between the plaintiff and his company (2nd defendant) for the sale of the property. Continuing the narration, he deposed that the appellant (Eng. Ezenwa) offered N6.0 million through his letter dated 28/3/95 photocopy of which was attached to his affidavit as Exhibit D that offer was accepted by the 2nd defendant subject to the consent of the 1st defendant.. He acknowledged the receipt of the appellant's cheque for N6.0 million as the purchase price at about 10 a.m. on 3/4/95. The 4th plaintiff/respondent sent his cheque for N1.1 million as a deposit for the property at 2 p.m. on 3/4/95. The 2nd defendant forwarded both offers to the 1st defendant, who accepted the appellant's offer subject to his willingness to pay an extra sum of N675,000.00. The appellant, according to him; paid the said sum of N675,000.00 following the 1st defendant instructing the 2nd defendant to reject the offer of the 4th plaintiff/respondent. Exhibited along with the said affidavit of Femi Williams is a photocopy of a letter dated 3rd April, 1995 written jointly by the 1st and 3rd defendants (Roy Ekong and Mrs. Gudrun Ekong) to a company by name Messrs. CC & M Nigeria Limited informing that company that the property had been sold. The letter is Ex. H and for a clear understanding of the case I shall hereunder reproduce the short contents of the letter, it reads:-

"Re: Sale of Plot 50 Animashaun Estate Extension, Surulere, Lagos.

We hereby inform you that we have divested and/or assigned our entire interest in the above property in favour of one Obidi Nwabueze Ezenwa C/o His Solicitors, Onwuamegbu, Onwuamegbu. 39, Campbell Street, Lagos.

with effect from the date of this letter. Suffice it to say that the letter (Ex. H) was dated 3/4/95 and it was jointly signed by the 1st and 3rd defendants/ respondent (Mrs. Gudrun Ekong) deposed in paragraph 2(i) thus:-

"That before the commencement of this action the Estate sold the premises to the 4th defendant for valuable consideration and title in

the premises has passed on to the 4th defendant subject to the consent of the Governor of Lagos State."

The above is the totality of the printed evidence adduced by both sides in the court below. In his ruling the court below held:-

"From the facts in the application the primary consideration is whether or not there is a valid contract made in the case? From the material placed before the court, it is my respectful view that Exhibits B and C which have not been repudiated constitute a final agreement in writing between parties for the sale of the property in issue. A reasonable man the position of the plaintiff should or ought to imply that the agreement had been sealed if after 18 days his cheque for N1. 1m has not been returned to him The affidavit evidence placed before the court by the defendant is pointing to the suggestion that both the cheques of the plaintiff and the 3rd defendant were received on the same day i.e. 3rd April, 1995. The affidavit to show cause against the application stated that the 1st defendant accepted the 3rd defendant's offer. If that is the true position, why did it take 2nd defendant 18 days to inform the plaintiff that they could not conclude with him (to use his words). The affidavit evidence to show cause against the application sound very much unreliable and frivolous. The fact is unassailable and the cheque for N1. 1m sent to the agents was with them for 18 days before it was returned to the applicant. The said cheque is dated 30th March, 1995, so when it was being said that the offer of 3rd defendant for the purchase of the house was purportedly accepted on the 3rd April, 1995, there was nothing left to purchase because of the transaction between plaintiff and 2nd defendant for the purchase of the house has been concluded on the 30th March, 1995."

With due respect to the learned trial Judge of the court below the above findings were not based on the affidavit and counter-affidavit evidence before him; or at least he failed to do a proper evaluation of the printed evidence. Although the 4th plaintiff/respondent said he and Femi Williams agreed on a purchase price of N5.5million and as a follow-up he made a deposit of N1.1million on 30/3/95, by his (4th plaintiff/respondent) letter dated 11/4/95 - Ex. D he informed the 2nd defendant/respon-

dent that the balance of N4.4 would be paid on or before 30th May 1995. As against his narration is that of Femi Williams to the effect that even when the 4th plaintiff/respondent offered. N5.5 millions there was still yet no agreement to sell the property to him. He went further in his deposition to say that to translate their intention to buy the property, the appellant forwarded his cheque for N6.0 million to the 2nd defendant at 10 am on 3/4/95 while the cheque of the 4th plaintiff/respondent for N1.1million reached the 2nd defendant at 2 pm. on 3/4/95. **Suffice it to say that the two sums were offers and they were forwarded to the 1st defendant/respondent immediately. I pause here to observe that by that singular act, the 2nd defendant - the agent of the 1st and 3rd defendants/respondents has shown that the actual authority it had was limited to looking for would be buyers; and that it was under an obligation to forward the offers of such would be buyers to the principal (s) - in this case the 1st and 3rd defendants/respondents. The final decision as to who bought the said property did not lie with the agent - 2nd defendant/respondent but with the principals - the 1st and 3rd defendants/respondents. So if the 2nd defendant should conclude the sale agreement with a person without reference to or clearance from the disclosed principals such an agreement is null and void.** In the case of Sorrell & Anor. Finch (1977) A.C. 728 a case cited in the appellant's brief Lord Russel delivering this opinion in the House of Lords (England) said at page 753.

"An estate agent, despite the style, is an independent person engaged on a commission basis to find and introduce a willing purchaser. He is not the agent of the vendor to contract on his behalf his actions are attributable to the vendor only in a limited case as for example the making of representations as to the conditions of the property. In my opinion an estate agent has neither actual (implied) nor ostensible apparent authority to ask for or receive a pre-contract deposit as agent for the vendor."

A disclosed principal, in law, is not bound by any act of his agent which is outside the agent's implied or apparent authority unless the principal in fact authorized the agent to do the particular act. See Universal Vulcaniz-

ing (Nig.) Ltd. v. I.U.T.T.C. (1992) 9 NWLR (pt. 266) 388. As a proof that the authority of the 2nd defendant/respondent was limited to finding would-be buyers and forwarding all necessary information to its principals is Ex. H a letter dated 3/4/95 jointly signed by the 1st and 3rd defendants/respondent - the principals saying in clear terms that they - (1st and 3rd respondents) have divested themselves of any legal or equitable interest in the said property in favour of the appellant with effect from 3/4/95. **A proper evaluation of the printed evidence before the court below boils down to this that with effect from 3rd April, 1995 the issue of the sale of the property known as No. 50 Babs Animashaun Street, Surulere, Lagos became irreversibly settled in favour of the appellant. So, if the doctrine of Nemo Dat Quod Non Habet would have to be invoked it must be against the 4th plaintiff/respondent for there was nothing remaining in the said property to be passed to him by the former owners - the 1st and 3rd defendants/respondents. As for the 1st and 3rd respondents they are forever from 3rd April, 1995 prevented from reneging from the position they voluntarily created for themselves that is the issue that they have divested themselves of any legal or equitable interest in the said property. They are estopped from denying that issue. Indeed as between the 1st, 2nd and 3rd defendants/respondents on one side and the appellant on the other side, the issue is final.** See *Osunrinde & Ors. v. Ajamogun & Ors.* (1992) 6 NWLR (pt. 246) 156. To deny that they have sold the property to the appellant, the 1st and 3rd Respondents would be blowing hot and cold. And the law does not permit a man to "blow hot and cold" with reference to the same transaction or insist, at different times on the truth of each of two conflicting allegations according to the prompting of his private interest. See (1) *Odu'a Investment Co. Ltd. v. Talabi* (1991) 1 NWLR (pt. 170) 761 and (2) *Ladega v. Durosimi* (1978) 3 S.C. 91. This principle finds expression in the Latin Maxim *Allegans Contraria Non Est Audiendus*. **The result of all I have been saying is that the conclusions of the learned trial Judge quoted supra is perverse as regards the printed evidence before him. The subsequent discontinuance of the notices of**

appeal lodged by 1st. 2nd and 3rd respondents against the judgment of the court below has no effect on the position they all jointly created before this case was instituted - that position is that the property has with effect from 3/4/95 passed legally to the appellant.

B From what I have said above it is my respectful view that the appellant can validly put up issues 2 and 3 for determination, as he has done. The preliminary objection together with the question it is said to encompass as stated in the 4th plaintiff/respondent's brief of argument is therefore dismissed as lacking in substance.

C Again from what I have reviewed above, issue 2 of appellant must be answered in the negative. From the 2nd defendant's narration it is beyond any doubt that, though an agent, it lacked apparent or ostensible authority to bind the principals - 1st and 3rd respondents in contract
D of the sale of the property. The final authority rested with the 1st and 3rd Respondents. This also answers issue 2 formulated by the 4th plaintiff/respondent - the answer is negative. I shall answer issues 1 and 3 in the appellant's brief and issue 1 in the 4th plaintiffs/respondent's brief together.
E They raise the validity of the order of specific performance made by the court below. The 3rd issue in the 4th plaintiff/respondent's brief shall thereafter be answered. **A person who is seeking to enforce his right under a contractual agreement must show that he has fulfilled all the conditions precedent and that he has performed all those terms which ought to have been performed by him. As a corollary, a plaintiff in an action for specific performance of an agreement must fail if there is a default on his part to discharge his own obligations under that contract. This is so because in the eye
F of the law, he is in breach of his own portion of interdependent undertakings mutually agreed upon by him and the defendant as stipulated in the agreement, even, if he is guilty of delay in the performance of his own obligations. See (1) Coker v. Ajewole (1976) H 9 & 10 S.C. 17 and (2) Australian Hardwoods Pty v. Comm. For Railways (1961) 1 A.E.R. 737.**

G In the instance case I have after evaluating the printed evidence found that there was no agreement between the 4th plaintiff on one side

and the 1st and 3rd defendants/respondents on the other side. I have also held that the 2nd defendant/respondent, an agent cannot bind the vendors. It therefore follows that the claim of the 4th plaintiff/respondent ought to have been refused. Issues 1 and 3 in the appellant's brief are therefore answered in the negative. Similarly, my answer to issue 1 in the 4th plaintiff/respondent's brief is in the negative. **Having answered issues 1 and 2 in the brief of the 4th Respondent in the negative, it follows that his issue 3 which translates into whether the learned trial Judge was correct to have refused leave to defend must be answered in the negative; and I so do. Such a refusal order tantamounts to travesty of justice. It closed the door to seat of justice against the defendants. It must always be remembered that citizen's accessibility to courts is the hallmark of civilized societies operating under the rule of law. Any country that shuts the door of its court against individuals who may wish to vent real or imagined grievances against other individuals or against the state or its functionaries cannot be said to be operating under the rule of law. Such a refusal is denial of justice. The adage is that justice is to be denied to none; translated into Latin Maxim it is *Justitia Nemini Neganda Est*.**

In the light of all that has been said above, this appeal is adjudged to be meritorious. It is accordingly allowed. The ruling delivered by the court below on the 27th February 1997 is hereby set aside together with the consequential orders. The case is remitted to the High Court of Lagos State for trial on merit before another Judge. There shall be N3,000.00 in favour of the appellant but against the 4th plaintiff/respondent.

OGUNTADE JCA

It seems to me that the key to the solution to the simple issue raised in this appeal is the determination of the extent of the authority granted by the 1st defendant to the 2nd defendant for the sale of the

property at Plot 50, Babs Animashaun St. Surulere, Lagos which is the subject-matter of this dispute.

The lower court in the ruling appealed against relied on paragraph 10 of the affidavit of the 2nd defendant to reach the conclusion that 2nd defendant had authority to sell the property. The said paragraph 10 of the 2nd defendant's affidavit reads:-

"That the 1st defendant instructed the 2nd defendant to sell the property and pursuant to this the property was duly advertised in the Vanguard Newspaper (Copies of the newspaper are attached and marked Exhibits B and B1."

On the basis of the above paragraph, the lower court reasoned thus:-

"From this position it is my candid opinion that there' isn't any conflict in the affidavits as to whether 2nd defendant was or not instructed to sell the property. The agents themselves have sworn on oath to the fact that they were instructed to sell the property. The impression however is being created in the case that the sale to the 3rd defendant/respondent is valid, while that of the applicant is invalid. That cannot be so. It is either that the 2 sales are valid or both are invalid in law."

With profound respect to the learned judge, I think he completely failed to grasp the essential issue relevant to a fair determination of the dispute. In a contract of sale, a vital element is the agreement between seller and buyer on the price of the article or property being sold. Whilst, it was made manifest that the 2nd defendant had the instruction of the 1st defendant to sell the property, there was no shred of evidence that the 1st defendant had agreed that the property be sold at a particular price. The approach of the lower court would appear to convey that the 2nd defendant had a mandate to sell the property at all events and for whatever price. That approach was not borne out by the evidence before the learned judge. In this connection, I wish to call to mind paragraphs 7 and 8 of the affidavit in support of the motion which reads:-

"7. That as a follow up to my discussion with the officials of the 2nd defendant, I immediately telephoned the 1st defendant to confirm if it was true that the 2nd defendant had instruction to sell the property.

The 1st defendant did confirm same.

8. *That I repeated my earlier offer of N5m to the 1st defendant and he then told me he would consider same after he must have discussed with the 2nd defendant."*

The above paragraphs are eye-opening. They show conclusively that the 1st defendant had reserved to himself the right to decide what price to sell the property for after he would have discussed with the 2nd defendant. It also reveals that the authority of the 2nd defendant to sell the property was subject to the approval by 1st defendant of the price offered by the intending buyer.

It is therefore not correct to equate the position of the plaintiff/4th respondent with that of the appellant. It just happened that the 1st defendant elected to accept the price offered by the appellant whilst rejecting that by the plaintiff/4th respondent. It seems to me that the position would have been different if the 1st defendant had communicated to the plaintiff/respondent that he was willing to accept Five Million Naira as purchase price such that one could conclude that the seller and buyer were ad idem on the selling price.

There is no doubt that the circumstances of this case must be painful to the plaintiff/respondent. He had lived in the same property. He had been very near owning it. He had also expended some money to carry out some improvements on the property. But the case falls to be decided on the hard facts upon which it was fought and the relevant principles of law.

It is for these reasons that I agree with the lead judgment of my learned brother Aderemi, J.C.A. I would also award costs as in the lead judgment.

GALADIMA JCA

I have had the advantage of a preview of the judgment of my learned brother ADEREMI, J.C.A. in this appeal. I agree entirely that the appeal is meritorious and it should be allowed. Accordingly, the ruling

336 Ezenwa v. Ekong (2000) 2 KLR Galadima JCA
delivered by the court below is hereby set aside together with the consequential orders. The case is remitted to the High Court of Lagos State for trial on merit before another judge, I abide by N3,000 cost in favour of the Appellant against the 4th Plaintiff/Respondent.

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