

SUPREME COURT OF NIGERIA
5TH MAY, 2000. SC. 105/1997
CORAM:- S. M. A. BELGORE, S. U. ONU, O. ACHIKE,
U. A KALGO, E. O. AYOOLA, JJSC

ALHAJI USMAN DANTATA 1ST APPELLANT
MUKTAR AHMED MOHAMMED 2ND APPELLANT
AND
MOUKTAR MOHAMMED RESPONDENT

ACTIONS - *Declarations - Reasonable cause of action - What the Court should consider in order to determine - Whether the statement of claim has disclosed a reasonable cause of action*

ACTIONS - *Declaration - Discretionary remedy - Time to exercise a discretion whether to grant a declaration - Is upon a trial of the suit*

APPEALS - *Opinion - Gratuitous advice given by a court - Should hardly engender arguments on an appeal - And neither of the parties nor the court is obliged to feel bound in any way by such advice.*

APPEALS - *Supreme Court - Power - In an appropriate occasion as in the present case - The combined provisions of order 8 rules 2 & 12 of the Supreme Court Rules - Will be invoked notwithstanding that there was no cross appeal - To ensure the determination on the merits of the real question in controversy between the parties*

CONTRACTS - *Breach - Failure of consideration - Restitution - Where there is a claim for total failure of consideration - The innocent party is entitled to restitution*

CONTRACTS - *Breach - Rescission - What must be determined - Where it is alleged that there is a right to rescind for breach.*

CONTRACTS - Consideration - Complete failure of - When a complete failure of consideration in a contract occurs

CONTRACTS - Rescission - Consequence - Where there is a serious breach of contract - The innocent party who has elected to rescind de futuro the contract - Is released from further obligations under the contract

CONTRACTS - Rescission - Specific performance - An election that the contract is rescinded - Is inconsistent with a claim for specific performance of the contract

CONTRACTS - Rescission - Right to - Where one party has committed a serious breach of contract - The innocent party has a right to rescind the contract.

JUDGMENTS - Declaratory judgments - Cause of action - Claim for a declaration is itself a cause of action - And what would entitle a plaintiff to a declaration is a claim which the court is prepared to recognize

PLEADINGS - Contract - Breach - Reasonable cause of action - A pleading which contains averments that there has been a breach of contract - Sufficiently serious to justify a claim that the plaintiff is no more bound by the contract - Cannot be said not to disclose a reasonable cause of action

PRACTICE & PROCEDURE - Declaratory judgments - Cause of action - Claim for a declaration is itself a cause of action - And what would entitle a plaintiff to a declaration is a claim which the court is prepared to recognize

WORDS & PHRASES - Cause of action - What it means.

FACTS

In the High Court of Lagos State, the Plaintiff/respondent sued the defendants/appellants claiming for: (a) a declaration that he is the person entitled to the certificate of occupancy of the property in dispute; (b) a declaration that he is the person entitled to the property in dispute; (c) a declaration that the agreement dated 28th of November, 1980 between him (the plaintiff) and the 1st defendant is null and void and not binding on him as the 1st defendant has breached in a fundamental manner the provisions of the said agreement; (d) possession and (e) an order of perpetual injunction against the defendants. The case of the plaintiff as could be deduced from the statement of claim is that by an agreement made in writing between the plaintiff and the 1st defendant and signed on 28th November, 1980 the two parties agreed to exchange their respective properties. The plaintiff agreed to transfer "his title and ownership" in an undeveloped land situate at Ikoyi, Lagos (the property "in dispute") to the 1st defendant while the 1st defendant also agreed to transfer his "title and ownership" over his landed property situate at Sharada, Kano ("the Kano property"), consisting of four acres, two of which have been developed by the erection thereon of a factory and office building, to the plaintiff. Pursuant to the agreement, the plaintiff let the 1st defendant into possession of the property in dispute and gave the latter consent to mortgage the property in dispute to the International Bank for West Africa in order to enable the 1st defendant to raise money to develop it.

The 1st defendant developed the property by building a house on it, occupied the house for some years and thereafter leased it to the 2nd defendant. The 1st defendant, in breach of the agreement, failed to perform his own part of the agreement by not putting the plaintiff into possession of the Kano property, despite several demands by the plaintiff. The plaintiff alleged that the 1st defendant's actions are in bad faith. Hence the plaintiff sued the defendants claiming as aforesaid. The defendants filed their respective statements of defence. The 2nd defendant joined to his own defence a counter claim, by which he sought a declaration of the trial court that he was entitled to be registered as owner of the property in dispute or, in the alternative, that the plaintiff be ordered to execute an

assignment in his favour. At the close of the pleadings, the 1st defendant applied to the High Court for an order dismissing the plaintiff's case on the grounds that it disclosed no reasonable cause of action and that the reliefs sought by the plaintiff were "unobtainable in law." The learned trial judge dismissed the action as prayed. On appeal, the Court of Appeal, Lagos Division allowed the appeal to the extent that reliefs (a) and (b) were properly claimed as reasonable causes of action and that the action was not statute-barred but thereafter dismissed the other reliefs claimed. The defendants were dissatisfied and have now appealed to the Supreme Court raising one issue.

ISSUE FOR DETERMINATION

"Whether reliefs (a) and (b) sought by the plaintiff disclose reasonable cause of action in the sense that they are such that the court can grant against the 1st and 2nd defendants pursuant to the facts contained in the statement of claim."

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

Judgments - Declaratory judgment

1. It is clear that declaratory judgments are not to be regarded as auxiliary or consequential. For a person to be entitled to a declaration he must show the existence of a legal right, subsisting or in the future, and that the right is contested. Put another way, what would entitle a plaintiff to a declaration is a claim which the court is prepared to recognise and which, if validly made, it is prepared to give legal consequence to. A claim for a declaration is itself a cause of action created by the rule. (p. 1574 A)

Words & Phrases - Cause of action

2. In the words of Diplock L. J in Letang v. Cooper [1964] 2 All ER 929, 934, so often quoted in several judgments in this country as to have become part of our laws, the words "cause of action mean "simply a factual situation the existence of which entitles one person to obtain a remedy against another person." Bringing the words "cause of action"

to their ordinary English meaning level, Jacob, J., in Newport Association Football club and others v. Football Association of Wales Ltd [1995] 2 All ER 87 at 92 defined the words as meaning: "a cause for an action in the courts to determine a disputed matter." (p. 1574 E)

B

Declaration - Reasonable cause of action

3. Viewing the declarations sought as independent causes of action, in order to determine whether the statement of claim has disclosed a reasonable cause of action, what the court should consider are the contents of the statement of claim and not the extent to which one relief can co-exist with another. Having considered the contents of the statement of claim, deemed to have been admitted, the question is whether the cause of action has some chance of success, notwithstanding that it may be weak or not likely to succeed. (See Thomas and others v. Olufosoye (1986) 2 SC 325, 344.) (p. 1575 B)

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Declaration - Discretionary remedy

4. Although declaration is a discretionary remedy, the time to exercise a discretion whether to grant or refuse a declaration is upon a trial of the suit. The contention that the court below should have held that there was no reasonable cause of action because it would be inequitable to grant a declaration is for that reason misconceived. (p. 1575 F)

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Contracts - Rescission - Right to

5. Where one party has committed a serious breach of contract the innocent party has a right to rescind the contract. It has been said that the contract is in such circumstances rescinded de futuro. (See Halsbury's Laws of England. (4th edn.) Vol. 9(1), para. 989). (p. 1577 F)

G

Rescission - What must be determined

6. It has been said that in a case where it is alleged that B has the right to rescind for breach it must be determined (1) whether there has been a breach by A of a term of the contract or a mere misrepresentation; (2) whether the breach is sufficiently serious to justify rescission de futuro

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of the contract by B, as well as to claim for damages; and whether B has instead elected to affirm the contract. (See Halsbury's Laws of England, para. cited above). (p. 1577 G)

B Pleadings - Contract

7. A pleading which contains averments that there has been a breach of contract and that the breach is sufficiently serious to justify a claim that the plaintiff is no more bound by the contract cannot be said not to disclose a reasonable cause of action. (p. 1578 A)

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Rescission - Consequence

8. When there is a serious breach of contract, one of the consequences is that the innocent party who has elected to rescind de futuro the contract is released from further obligations under the contract. The law is put succinctly thus in Halsbury's (op. cit.) para. 1003. (p. 1578 B)

D

Failure of consideration - Restitution

E 9. It is clear that where a contract is avoided for breach, the innocent party is entitled to restitution where there is a claim of total failure of consideration. (p. 1579 A)

F Consideration - Complete failure of

10. As stated in Halsbury's (op. cit.) para 1129, "*a complete failure of consideration in a contract occurs where one of the contracting parties fails to receive the benefits or valuable consideration which springs from the root, and is the essence, of the contract.*" (p. 1579 B)

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Appeals - Opinion

H 11. A gratuitous advice given by a court should hardly engender arguments on an appeal. An opinion expressed by way of advice to the parties is not part of the reasons of the decision and has nothing to do with the merits of the decision. None of the parties is obliged to accept and act on the advice, worthy of respect and attention though it may be. The court itself, embarrassing as it may sometimes be if it may have to

depart from its own advice, does not need to feel bound in any way by such advice. (p. 1579 G)

Rescission - Specific performance

12. An election that the contract is rescinded is inconsistent with a claim B for specific performance of the contract. The claim of the plaintiff being, in substance, the 1st defendant having committed a serious breach of the agreement, the contract was no more binding on him, a claim for specific performance could only be made in the alternative. To graft a claim for C specific performance on the statement of claim as at present formulated will lead to a situation in which the plaintiff is, at the same time, approbating (affirming that the contract subsisted and should be specifically performed) and reprobating (asserting it has been determined by serious breach and D restitution should be made.) (1580 B)

Appeals - Supreme Court

13. An unusual, but, I dare say, salutary feature of the arguments advanced by counsel for all the parties on this appeal, is that although there E has been no cross-appeal in relation to the opinion of the Court of Appeal that there was no cause of action in relation to reliefs (c), (d) and (e), arguments have been fully and extensively advanced for and against that conclusion. As has been seen, a consideration of those arguments has F occupied a considerable part of this judgment and it has been found that the Court of Appeal, as the High Court was, were wrong in the view they held in this regard. That error should not be left uncorrected. I think this is an appropriate occasion to invoke the combined provisions of Ord. 8 G rr. 2 & 12 of the Supreme Court Rules which will be very sparingly invoked, and make an order which the court below ought to have given or made "notwithstanding that no notice of appeal has been given in respect of any particular party to the proceedings in that court, (i.e. the court of first instance), or that any ground for allowing the appeal or for H affirming or varying the decision of the court is not specified in such a notice." It is just, to ensure the determination on the merits of the real question in controversy between the parties, that an order be made set-

ting aside the ruling of the High Court in its entirety. This has the effect of restoring all the reliefs claimed. (p. 1580 E)

NOTABLE POINTS OF INTEREST

B AYOOLA JSC

1. It is necessary to ensure that the machinery of justice is not turned to one of injustice

Notwithstanding that a few interesting legal issues arise from this appeal, a disturbing feature of the entire matter is that although the agreement which engendered these proceedings has been entered into about twenty years ago, yet the action instituted as far back as 1992 to determine the status of the agreement and the rights of the plaintiff to property which was his and which he claims still remained his, remained bogged down at the interlocutory stage with appeals! Care must be taken to ensure that what is supposed to be the machinery of justice should not be made to grind so slowly that persons who stand to profit by delay, will succeed in converting the machinery of justice to one of injustice. (p. 1573 E)

E

ONU JSC

2. Reasonable cause of action - What it means and how it is determined.

A reasonable cause of action has been defined to mean:-

F *"a cause of action which (when only the allegations in the Statement of Claim are considered) has some chance of success." Per Uwais, JSC as he then was, in Oshoboja v. Amuda (1992) 6 NWLR (Part 250) 690 at 702.*

G It is trite law that in the determination of a reasonable cause of action in the Statement of Claim only and the facts contained therein are deemed admitted. The admitted facts will then be examined to ascertain if they would entitle the plaintiff to the remedy sought See Shell B. Petroleum Development Co. v. Onasanya (1976) 6 S.C. 59. (p. 1585 A)

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ACHIKE JSC

3. Extension of issues beyond the complaint in the grounds of appeal should be discouraged

The appellate court, particularly the apex court, should roundly discourage undue and deliberate extension of issues to be agitated on appeal beyond the complaint encompassed in the grounds of appeal. (p. 1592 F)

4. *The Purpose of a declaratory relief*

Clearly, it must be borne in mind that the purpose of a declaratory relief sought from the court is essentially an equitable relief in which the plaintiff prays the court in exercise of its discretionary jurisdiction to pronounce or declare as existing state of affairs in law in his favour as may be discernible from the averments in the statement of claim. In the case on hand, it is incontestable that the plaintiff is currently - notwithstanding the nearly - 20 year-old agreement between the plaintiff and the 1st defendant - in possession and holder of the Certificate of Occupancy in respect of Plot C, Turnbull road, Lagos, and accordingly enjoys enforceable legal rights thereto entitling him to the declaration sought. (p. 1595 G)

5. *Where the law is virtually Powerless to Protect the down trodden weaker Party*

It would be recalled that the plaintiff had performed and therefore discharged his obligation under the parties' nearly 20 years agreement and the 1st defendant curiously is yet to play his part in the exchange of properties concluded by them. It is commonplace that the 1st defendant had since developed the land he received from the plaintiff in the exchange arrangement but engages in baseless, heartless and morally indefensible procedural depravity to deprive the plaintiff of his legal right under their apparent freely-concluded agreement by his tenacious refusal to let plaintiff into possession of his own property, a posture to be roundly deprecated because it smacks of injustice and leaves a sour taste in the mouth for the so-called gentleman in society to exhibit such unprecedented callousness with careless abandon. The position is the more disturbing in the face of the fact that the law is virtually powerless to intervene firmly in favour of the down-trodden weaker party. (p. 1597 D)

6. *Reliefs available to a plaintiff where there is a total failure of consideration*

Having said that much, the question remains, is the agreement between the parties void or binding to warrant the declaratory relief sought by the plaintiff? The answer must be in the negative. This is a simple contract of exchange of properties between the parties which has been executed by one party but yet to be executed by the other. Undoubtedly, the agreement is supported by consideration agreed to be reciprocated by each other. It is a simple and binding contract in law. By his failure to let the plaintiff into possession of the promised industrial property the 1st defendant is in breach of the agreement. This leaves the plaintiff with the first option to hold that the breach is a fundamental one which entitles him to treat the agreement as rescinded and further claim the return of his own land which he had let the 1st defendant into possession, where the circumstances permit, because it is manifest that this is a case of total failure of consideration. The plaintiff also has the second option of seeking specific performance of the contract i.e. for 1st defendant to let him into possession of his land, while also asking the court to be paid damages for the breach of contract as alleged, it will be strange, if not ridiculous for the court be invited to declare the parties' agreement null and void by mere reason that the 1st defendant is in breach in respect of his obligation. The court cannot accede to such declaratory relief for it goes against the justice of the case which ordinarily entitles the plaintiff to either the rescission of the contract or a claim for specific performance, and in either situation coupled with damages for the breach of the contract alleged. (p. 1597 G)

G KALGO JSC

7. *Rights of the Owner of a piece of land*

If a person has a legal right to a piece of land which he can properly claim as his own, then it follows that he has the right to possess it and keep off any trespasser from coming on to it. (p. 1600 D)

REPRESENTATION

Chief J. A. Badejo for the appellants.

Dantata v. Mohammed (2000) 5 KLR Ayoola JSC 1569
Chief (Dr.) B. Rhodes, S.A.N. (with him Emmanuel Okeke) for the respondent.

CASES REFERRED TO

Eastham v. Newcastle United Football Club Ltd. [1963] 3 All ER 139 at 153 B
Thomas v. Olufosoye (1986) 2 SC 325, 344.)
Egbe v. Adefarasin (1985) 1 NWLR (part 3) 549
Thomas v. Olufosoye (1986) 1 NWLR (Part 18) 689.
Bello v. Attorney-General of Oyo State (1986) 5 NWLR (Part 45) 828 at 876 C
Adimora v Ajufo (1988) 3 NWLR (Part 80) 1
Oshoboja v. Amuda (1992) 6 NWLR (Part 250) 690 at 702
Shell B. Petroleum Development Co. v. Onasanya (1976) 6 S.C. 59 D
Attorney-General of Bendel State v. A. G. Federation (1982) 3 NCLR. 1
Igbokwe v. Udobi (1992) 3 NWLR (Part 228) 214

STATUTE & RULES REFERRED TO

High Court of Lagos State (Civil Procedure) Rules; O.15 r. 1, and O. 22 r. 5
Supreme Court Rules, O. 8 rr 2 & 12 Supreme Court Act, S. 22 E

BOOKS REFERRED TO

Halsbury's Laws of England, (4th edn) Vol. 9(1), Paras. 989, 1003 and 1129.
Treitel's Law of Contract, 5th edn pp 772 - 773. F

LEAD JUDGMENT BY AYOOLA JSC

In the High Court of Lagos State, the respondent ("the plaintiff") G
sued the appellants ("the defendants") claiming as follows:-

"(a) A declaration that the plaintiff is the person entitled to certificate of occupancy dated 26th day of September, 1979 registered as No. 24 at page 24 in volume 1875 of the register of Deeds kept at the Lagos State land Registry, Lagos, Nigeria. H

(b) A declaration that the plaintiff is the person entitled to all that premises known as plot C Turnbull Road, Ikoyi now, 1 Jabita Close,

Ikoyi, Lagos.

(c) *A declaration that the agreement dated 28th of November, 1980 between the plaintiff and the 1st Defendant is null and void and not binding on the plaintiff as the 1st defendant has breached in a fundamental manner the provisions of the said agreement.*

(d) *Possession of the said premises.*

(e) *An order of perpetual injunction restraining the Defendants, their agents and or any person whosoever deriving authority from any said Defendant from dealing with and or interfering with the plaintiff's right in and over the aforesaid land and in any manner howsoever having the effect prejudicing and adversely affecting the rights of the plaintiff in the land."*

The facts as averred in the statement of claim are that by an agreement in writing made between the plaintiff and the 1st defendant and signed on 28th November, 1980 these two parties agreed to exchange their respective properties. The plaintiff agreed to transfer "his title and Ownership" in an undeveloped land situate at Ikoyi, Lagos ("the property") to the 1st defendant while the 1st defendant also agreed to transfer his "title and ownership" over his landed property situate at Sharada, Kano ("the Kano property"), consisting of four acres, two of which have been developed by the erection thereon of a factory and office building, to the plaintiff.

Pursuant to the agreement, the plaintiff let the 1st defendant into possession of the property and gave consent to the 1st defendant to mortgage the property to the International Bank for West Africa in order to enable the 1st defendant to raise money to develop it. Apparently, the 1st defendant the property by building a house on it, as it was further averred in the statement of claim that he occupied the house built on the property for a number of years before he leased it to the 2nd defendant. It was averred that the 1st defendant "has neglected to and refused" to yield up possession of the Kano property, notwithstanding that the plaintiff had made several demands on him to perform his own side of the bargain and the 1st defendant had always asked for more time to do so. The plaintiff, upon these facts, alleged in paragraph 18 of the statement of claim that the

"1st defendant (sic) actions are in bad faith and have completely breached the agreement entered to between the 1st defendant and the plaintiff on the 28th November, 1980 and rendered the agreement null and void and not binding on the plaintiff."

The defendants filed their respective statements of defence. The 2nd defendant sub-joined to his own defence a counter-claim which the plaintiff answered by filing a reply to defence and counter-claim. Although not pertinent to the issues on this appeal, by the counter-claim the 2nd defendant sought a declaration of the High Court that he was entitled to be registered as owner of the property or, in the alternative, that the plaintiff be ordered to execute an assignment in his favour.

At the close of pleadings, the 1st defendant applied to the High Court for an order dismissing the suit on the grounds that it disclosed no reasonable cause of action and that the reliefs sought by the plaintiff were "unobtainable in law". Akinsanya, J., before whom the matter came, granted the application and dismissed the action on March 11, 1994. She was of the view that if a breach of contract is alleged, nullification of the contract as claimed by the plaintiff by his relief (c) above, was not the appropriate relief to be sought. She regarded the order reliefs sought by the plaintiff, particularly the declaratory and injunctive reliefs, as "auxiliary reliefs" which, to my mind, is an apt way of describing a relief which merely supports the principal relief and cannot stand if the principal relief fails. In this case, she regarded relief (c) as the main relief and the others as merely supporting that relief and consequential to the grant of the main relief. She further held that, in my event, the action was statute-barred.

On the plaintiff's appeal to the Court of Appeal from the decision of the High Court, the two issues raised were whether the statement of claim disclosed a reasonable cause of action and whether the action was statute-barred.

The Court of Appeal allowed the appeal of the plaintiff to the extent only that the learned judge was wrong in holding that as regards reliefs (a) and (b) the statement of claim did not disclose a reasonable cause of action and that the action was statute-barred. In regard to the other reliefs sought the appeal was dismissed.

Uwaifo, JCA, as he then was, who delivered the leading judgment of the court of Appeal (with which Musdapher and Pats-Acholonu, JJCA, agreed) after referring to the facts pleaded, said:-

"I think in those circumstances which gave rise to litigation in an action brought by the plaintiff against the 1st defendant and any other person put in possession by the 1st defendant, the plaintiff can claim a declaration that he is the person entitled to a statutory right or certificate of occupancy of the property in Lagos, because that is a fact since he has not in law ceased to be the holder of the right of occupancy granted by the Governor to him over the land. He can claim a further declaration that he is the person entitled to the said land. Declaratory reliefs are meant to declare an existing state of affairs in law. It will be conceded that the other three reliefs sought cannot be supported by the facts in the statement of claim."

He was also of the view that the action was sustained by the declaratory reliefs sought and expressed an opinion that the plaintiff could amend his statement of claim to seek further reliefs of specific performance and damages. In a unanimous decision, the Court of Appeal allowed the appeal in part as earlier stated.

This appeal is taken by the defendants from the decision of the Court of Appeal. The only issue for determination in this appeal, as stated in the appellants' brief of argument, is: "Whether reliefs (a) and (b) sought by the plaintiff disclose reasonable cause of action in the sense that they are such that the court can grant against the 1st and 2nd defendants pursuant to the facts contained in the statement of claim."

Although there was only one issue for determination, arguments advanced by counsel on behalf of the defendants fall into three heads which can be summarised as follows: first, there was no reasonable cause of action disclosed because (a) the plaintiff averred that he let the 1st defendant into possession of the property pursuant to the agreement and that the latter had developed it; (b) the plaintiff has on his own showing admitted that he had transferred the property to the 1st defendant; (c) it would be inequitable to grant the declarations sought; secondly, since, as held by Akinsanya, J., reliefs (a) and (b) were merely ancillary to relief (c) in

regard to which the court below has held that a cause of action had not been disclosed, the court below should have held that the other reliefs which were merely consequential to that reliefs could not be granted; and, thirdly, the suggestion made that the plaintiff could amend his statement of claim specific performance is inconsistent with the opinion that reliefs (a) and (b) could sustain the action. B

Counsel for the plaintiff argued that a cause of action being "a combination of the facts which the law will accept as giving the plaintiff a substantive right to entitle him to the remedy sought," the statement of claim had disclosed a reasonable cause of action as it set out the plaintiff's legal right, the legal obligation of the defendants, the infringement by the defendants of those legal rights and the refusal of the 1st defendant to fulfil his legal obligations. It was argued that as the holder of the statutory right of occupancy in the property, the plaintiff is entitled to the declaration he sought. I earned counsel for the plaintiff submitted that a declaratory relief is an independent cause of action on its own. Substantial arguments were proffered to show that even as regards reliefs (c), (d) and (e) the statement of claim disclosed a reasonable cause of action. D E

Notwithstanding that a few interesting legal issues arise from this appeal, a disturbing feature of the entire matter is that although the agreement which engendered these proceedings has been entered into about twenty years ago, yet the action instituted as far back as 1992 to determine the status of the agreement and the rights of the plaintiff to property which was his and which he claims still remained his, remained bogged down at the interlocutory stage with appeals! Care must be taken to ensure that what is supposed to be the machinery of justice should not be made to grind so slowly that persons who stand to profit by delay, will succeed in converting the machinery of justice to one of injustice. F G

The jurisdiction of the High Court to grant declaratory reliefs is exercised pursuant to Ord. 22 r. 5 of the High Court of Lagos State (Civil Procedure) Rules ("the Rules") which provides that: H

"No action shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby and the court may make binding declarations of right whether any consequential relief is or could

be claimed or not."

From the provisions of this rule it is clear that declaratory judgments are not to be regarded as auxiliary or consequential. For a person to be entitled to a declaration he must show the existence of a legal right, subsisting or in the future, and that the right is contested. Put another way, what would entitle a plaintiff to a declaration is a claim which the court is prepared to recognise and which, if validly made, it is prepared to give legal consequence to. A claim for a declaration is itself a cause of action created by the rule. It was in this vein that in the persuasive authority of Eastham v. Newcastle United Football Club Ltd. [1963] 3 All ER 139 at 153 Wilberforce, J., said:

"In my judgment, the cases establish that even though there is no cause of action apart from the rule under which declaratory judgments may be given (which is R.S.C., Ord. 25, r. 5 [now Ord. 15 r. 16] and even though no consequential relief can be given, the court has ample power to grant a declaratory judgment."

R.S.C. Ord. 25 r. 5, referred to in the passage above, is similar to the Ord 22 r. 5 earlier quoted above. Rather than be an auxiliary relief, very often a declaration is itself a foundation for other reliefs.

In the words of Diplock L. J in Letang v. Cooper [1964] 2 All ER 929, 934, so often quoted in several judgments in this country as to have become part of our laws, the words "cause of action mean" simply a factual situation the existence of which entitles one person to obtain a remedy against another person." Bringing the words "cause of action" to their ordinary English meaning level, Jacob, J., in Newport Association Football club and others v. Football Association of Wales Ltd [1995] 2 All ER 87 at 92 defined the words as meaning: "a cause for an action in the courts to determine a disputed matter."

Ord 15 r. 1 of the Rules permits the joinder in one action, of several causes of action unless the Court or judge is of the view that the causes of action cannot be conveniently tried or disposed of together. It was, therefore, an error to have proceeded, as the trial judge had, apparently, done, as if all the causes of action in the suit must be dependent one

on the other, one being the principal, and the others being auxiliary. Learned counsel for the plaintiff was right when he submitted that the claim for declaration is an independent claim. Proceeding on that footing, the correct approach was to consider the declarations sought as if relief (c) had not been part of the claim. That, in effect, was the approach adopted by B the Court of Appeal. **Viewing the declarations sought as independent causes of action, in order to determine whether the statement of claim has disclosed a reasonable cause of action, what the court should consider are the contents of the statement of claim and not the extent to which one relief can co-exist with another. Having considered the contents of the statement of claim, deemed to have been admitted, the question is whether the cause of action has some chance of success, notwithstanding that it may be weak or not likely to succeed. (See Thomas and others v. Olufosoye (1986) 2 SC 325, 344.)** C D

In this case, the averments that the plaintiff had let the 1st defendant into possession of the property and that the latter had developed it cannot, by themselves, be seen as robbing the claim for the declarations sought of a chance of success. The argument that the plaintiff admitted E that he transferred the property to the 1st defendant is based on an error. What was averred is an agreement to assign and not an assignment. This case is clearly distinguishable from those cases in which, although the plaintiff averred that he had parted with title in the subject-matter of the F action, he, nevertheless, sought a declaration of title to the same. **Although declaration is a discretionary remedy, the time to exercise a discretion whether to grant or refuse a declaration is upon a trial of the suit. The contention that the court below should have held that there was no reasonable cause of action because it would be inequitable to grant a declaration is for that reason misconceived.** G

In the second branch of his argument, counsel on behalf of the defendants argued, in line with the opinion of the trial judge and in opposition to the view held by the Court of Appeal, that reasonable cause of H action could not have been disclosed in relation to the declarations while it was held not to be disclosed in regard to relief (c) earlier stated. Learned counsel further argued that having held that there was no cause of action

disclosed in regard to relief (c), the Court of Appeal was in error in, nevertheless holding that the two first reliefs could sustain the action. As earlier stated it is not the other claims made or reliefs sought by the plaintiff that have to be looked at in order to determine whether a cause of action has been disclosed in regard to the declaratory reliefs (a) and (b). Strenuous efforts were made by counsel on behalf of the defendants to justify the conclusions of the learned trial judge in regard to reliefs (c) (d) and (e).

Counsel for the plaintiff argued to the contrary. He argued that even though the words "null and void" have been used in the claim and in the pleadings, the court should look at the substance of what was being claimed and permit an amendment, it need be. It was argued that on the averments in the statement of claim, there was a reasonable cause of action disclosed, even in regard to relief (c) which was for a declaration "that the agreement between the plaintiff and the 1st defendant is null and void and not binding on the plaintiff as the 1st Defendant has breached in a fundamental manner the provisions of the said agreement." It would appear that the High Court and the Court of appeal had fastened on the words "null and void" to hold that there was no reasonable cause of action disclosed in regard to relief (c). Were they right in that view? I do not think so.

Counsel for the defendants came nearest to the truth of the matter when he submitted that: "Although rescission is one of the remedies for breach of contract, it is not every breach of contract that entitles the Party aggrieved to rescind the contract." He rightly appreciated that, in substance, the plaintiffs claim in regard to relief (c) was one of rescission of the contract. The Kernel of his submission, however, is that: "A breach of Agreement can neither lead to frustration of the contract nor to its being rendered void or illegal." He further argued on the point thus: "The Obligation of the Appellant under the Agreement is to transfer ownership of the Property in Kano to the plaintiff. If he defaulted in fulfilling his own part of the obligation under the Agreement, certain legal consequences may follow but the act of default does not make the agreement incomplete, non-existing, null, and void or illegal. To be entitled to a relief annulling a

contract, the aggrieved Party must show either that he was induced to enter into the contract by fraud or committed a material error or that the contract is illegal." In so far as the learned counsel did not deny that rescission was a remedy available to the plaintiff, the submission does not advance the case of the defendants much. B

The plaintiff's case on his pleading, in a nutshell, is that, knowing the purpose for which he needed the Kano property which he agreed to exchange for the property, the 1st defendant had committed a serious breach of the agreement between the parties by failing to perform his side of the bargain. Bad faith on the part of the 1st defendant was alleged. It was averred in paragraph 18 of the statement of claim that as a result of the 1st defendant's complete breach of the agreement, the agreement had become "null and void and not binding in the plaintiff." What the two courts and counsel for the defendants seem to have found objectionable was the use of the words "null and void". Though the words may not be considered apt, for a contract which is being rescinded *de futuro*, definition of "rescission" in terms of nullity has sometimes been made in terms of nullity. See, for instance, under "rescission" in Black's Law Dictionary. D E

Be that as it may, notwithstanding the use of the words "null and void" in the claimed in the statement of claim, it is evident from the rest of the wording that the plaintiff's case was that he was no more bound by the contract by reason of the serious breach committed by the 1st defendant. He did not use the particular word "rescind", but that does not matter since the averments show clearly that the case put forward was that the contract has been rescinded. F

Where one party has committed a serious breach of contract the innocent party has a right to rescind the contract. It has been said that the contract is in such circumstances rescinded *de futuro*. (See Halsbury's Laws of England. (4th edn.) Vol. 9(1), para. 989) It has been said that in a case where it is alleged that B has the right to rescind for breach it must be determined (1) whether there has been a breach by A of a term of the contract or a mere misrepresentation; (2) whether the breach is sufficiently serious to justify rescission *de futuro* of the contract by B, as well as to claim for damages; and G H

whether B has instead elected to affirm the contract. (See Halsbury's Laws of England, para. cited above). It follows that a pleading which contains averments that there has been a breach of contract and that the breach is sufficiently serious to justify a claim that the plaintiff is no more bound by the contract cannot be said not to disclose a reasonable cause of action.

When there is a serious breach of contract, one of the consequences is that the innocent party who has elected to rescind de futuro the contract is released from further obligations under the contract. The law is put succinctly thus in Halsbury's (op. cit.) para. 1003, as follows:

"If the innocent party (B) can and does elect to rescind the contract de futuro following a breach by the other party (A), all the primary obligations of the parties under the contract which have not yet been performed are terminated Thus the innocent party is released from further liability to perform; and, for the 'primary' obligation of the defaulting party to perform, there is substituted by operation of law a 'secondary' obligation to pay damages for the loss resulting from failure to perform the primary obligation."

The High Court and the Court of Appeal had been comfortable with the conclusion that there was no cause of action disclosed in regard to reliefs (c), (d) and (e) because sufficient attention had not been paid: (1) to the real substance of the plaintiff's claim, which had led them to put more emphasis than is called for on the use of the words "null and void" as part of the formulation of the relief sought, and, consequently, (2) to the rights of the innocent party when he elects to rescind de futuro the contract and the extent of the restitutionary remedies available to him upon such rescission.

The law recognises the restitutionary remedies of an innocent party who has opted to rescind de futuro a contract by reason of the serious breach of the other party. I am content to adopt the statement of the law as contained in Treitel's Law of Contract, 5th edn, at pp. 772-773 thus:

"A party who has wholly or in part performed his side of the contract and not received the agreed counter-performance in full may

sometimes be entitled to restitution in respect of his own performance. Where this consists of a payment of money, the payor will simply seek to get it back; where it consists of some other benefit he will claim recompense (or a quantum meruit) in respect of it."

It is clear that where a contract is avoided for breach, the innocent party is entitled to restitution where there is a claim of total failure of consideration. As stated in Halsbury's (op. cit.) para 1129, "a complete failure of consideration in a contract occurs where one of the contracting parties fails to receive the benefits or valuable consideration which springs from the root, and is the essence, of the contract."

Enough, I believe, has been said to show that, viewed properly, the statement of claim in this case disclosed a reasonable cause of action in regard to all the reliefs sought. The declaratory reliefs (a) and (b) were sought as judicial confirmation of the title in the property which the plaintiff claimed still remained in him and has not been transferred to the defendant; relief (c), notwithstanding the inappropriate use of the words "null and void", which could have been deleted without damage to the plaintiff's case, was for a declaration that the contract was no longer binding by reason of serious breach by the 1st defendant; relief (d) is a restitutionary remedy following the rescission and upon total failure of consideration; and relief (e) is auxiliary to the first two declarations sought and was designed to be protective of the right to and title in the property which the plaintiff claimed was still vested in him.

One last, but rather inconsequential, aspect of the defendants' counsel's submission is that the suggestion of the court below that the plaintiff should amend his statement of claim to claim specific performance is inconsistent with the opinion that the declaratory reliefs (a) and (b) could sustain the action. **A gratuitous advice given by a court should hardly engender arguments on an appeal. An opinion expressed by way of advice to the parties is not part of the reasons of the decision and has nothing to do with the merits of the decision. None of the parties is obliged to accept and act on the advice, worthy of respect and attention though it may be. The court itself, embarrassing as it may some-**

times be if it may have to depart from its own advice, does not need to feel bound in any way by such advice. This appeal can be decided without any need to comment on the advice given by the court below as to whether or not the plaintiff could amend his statement of claim and what such amendment should consist of. Nothing needs be said beyond drawing attention to some aspects of the matter. **An election that the contract is rescinded is inconsistent with a claim for specific performance of the contract. The claim of the plaintiff being, in substance, the 1st defendant having committed a serious breach of the agreement, the contract was no more binding on him, a claim for specific performance could only be made in the alternative. To graft a claim for specific performance on the statement of claim as at present formulated will lead to a situation in which the plaintiff is, at the same time, approbating (affirming that the contract subsisted and should be specifically performed) and reprobating (asserting it has been determined by serious breach and restitution should be made.)** At the end of the day, it is for counsel to the plaintiff to know which option best suits his client's interest.

An unusual, but, I dare say, salutary feature of the arguments advanced by counsel for all the parties on this appeal, is that although there has been no cross-appeal in relation to the opinion of the Court of Appeal that there was no cause of action in relation to reliefs (c), (d) and (e), arguments have been fully and extensively advanced for and against that conclusion. As has been seen, a consideration of those arguments has occupied a considerable part of this judgment and it has been found that the Court of Appeal, as the High Court was, were wrong in the view they held in this regard. That error should not be left uncorrected. I think this is an appropriate occasion to invoke the combined provisions of Ord. 8 rr. 2 & 12 of the Supreme Court Rules which will be very sparingly invoked, and make an order which the court below ought to have given or made "notwithstanding that no notice of appeal has been given in respect of any particular party to the proceedings in that court, (i.e. the court of first instance), or that any ground for allow-

ing the appeal or for affirming or varying the decision of the court is not specified in such a notice." It is just, to ensure the determination on the merits of the real question in controversy between the parties, that an order be made setting aside the ruling of the High Court in its entirety. This has the effect of restoring all the reliefs claimed. B

The result of all that has been said is that the appeal will be dismissed and the order of the Court of Appeal varied. But before I make an order, it is pertinent to express profound concern at the injustice that may be occasioned to the parties particularly to the plaintiff, should this case not be heard speedily and determined with utmost dispatch. As earlier said, and relying only on the averments in the statement of claim, the agreement between the parties was made in 1980. The plaintiff who agreed to exchange the property for the one in Kano for the purpose of being usefully employed in retirement, has given out possession of the property in part performance of his own side of the bargain without having anything in return from the 1st defendant for a period now spanning twenty years. Still relying on the plaintiff's pleading only, the result is that, if the averments in the statement of claim are true, for twenty years the 1st defendant had, in effect, treated the agreement as if it did not exist, holding on to the property as well as the Kano property. Whatever the defence of the defendants to the plaintiff's action may be, it is imperative in the interest of justice that this case be given the most accelerated hearing possible in the High Court of Lagos State. C D E F

For the reasons which I have given, I would dismiss the appeal. I vary the decision of the Court of Appeal only to the extent that the plaintiff's appeal to that court is allowed in its entirety, and not in part, and not subject to any such terms as indicated in the judgement of Uwaifo, JCA, as he then was, with which the other members of that court agreed. The respondent ("the plaintiff") is entitled to the costs of this appeal. I award N10,000.00 costs to the respondent. G H

BELGORE JSC

I read in advance the judgment prepared by my learned brother, Ayoola JSC with which I am in full agreement. There is little this Court can do more than what is contained in the judgment. But certainly the 1st appellant has taken an undue advantage of procedural defects of the Rules of Courts to protract this case and deny justice to respondent. He has by interlocutory appeals delayed hearing of the substantive case. He thus sits on the property, collecting rents, for about twenty years without fulfilling his own side of the contractual obligation to respondent. I only hope the Chief Judge of Lagos State will make arrangement for expeditious trial of the main suit so that justice will not be defeated by delay.

ONU JSC

This is an appeal against the judgment of the Court of Appeal, Lagos Division, which on July 15, 1997, reversed the decision of the High Court of Lagos State (Dolapo F. Akinsanya, J.) dated March 11, 1994, dismissing the Plaintiff/Respondent's suit against 1st Defendant/Appellant and 2nd Defendant/Appellant on the ground that it disclosed no reasonable cause of action and that it was statute-barred.

The cause of action giving rise to the appeal herein arose as a result of agreement sometime in 1980 between the plaintiff and 1st defendant wherein the plaintiff agreed to exchange his property situate at Plot C, Turnbull Road, Ikoyi, Lagos with that of the 1st Defendant's Industrial plot situate at sharada, Kano. Pursuant to the said Agreement, the plaintiff let the 1st Defendant into possession of his premises and gave his consent for the 1st Defendant to mortgage the said property to International Bank of West African Limited. The 1st defendant, as later transpired, developed the property which he occupied for sometime before leasing the premises to the 2nd Defendant as a tenant. However, the 1st Defendant refused to perform his own part of the Agreement by putting the plaintiff into possession of the property at Kano, inspite of the plaintiff's countless demands. After series of broken promises by the 1st Defendant, it became apparent to the plaintiff that 1st defendant had no intention of honouring the pact

made between them. This is how the suit giving-rise to the appeal herein originated with the plaintiff commencing same against the 1st and 2nd Defendants in April, 1992 for the following reliefs:-

"1. Declaration that the plaintiff is the person entitled to Certificate of Occupancy dated 26th day of September, 1979 registered as No. 24 at page 24 in volume 1875 of the Register of Deeds kept at the Lagos State Land Registry, Lagos Nigeria. B

2. Declaration that the plaintiff is the person entitled to all that Premises known as Plot C, Turnbull Road, Ikoyi, now Jabita Close. C

3. Declaration that the Agreement dated 28th November, 1980, BETWEEN plaintiff and the 1st Defendant is null and void and not binding on the plaintiff as the 1st Defendant has breached in a fundamental manner the provision of the said Agreement. D

4. Possession of the said premises. D

5. An order of perpetual injunction restraining the Defendants their agents and or any person whosoever deriving authority from any of the said Defendants from dealing with and or interfering with the plaintiff's right in and over the aforesaid land in any manner howsoever having the effect prejudicing and or adversely affecting the rights of the plaintiff in the said land. E

Pleadings were filed and exchanged but before trial was embarked upon, the learned counsel for the 1st Defendant brought a motion pursuant to Order 16 Rule 25; Order 22 Rules 2, 3 and 4 of the High Court of Lagos State (Civil Procedure) Rules 1972 and under the inherent jurisdiction for an order dismissing the plaintiff's claim on the grounds that:- F

(a) it disclosing no reasonable cause of action in that the reliefs sought are not such that the court can grant against the Defendants herein pursuant to the facts contained in the Statement of Claim. G

(b) the reliefs are in any event unobtainable under the law, and

(c) the action is an abuse of the process of court."

The learned trial Judge in a considered Ruling held inter alia thus:- H

"Having considered the objections raised by the 1st Defendant against the claim, I find them all founded.....

The combined effect of these rules can only lead to an order

dismissing the suit because once the action is statute-barred no purpose would be achieved to strike it out. I therefore make an order dismissing the plaintiff (sic) suit upon those grounds as endorsed on the motion of the 1st Defendant."

B Dissatisfied by this decision, the 1st Defendant appealed to the Court of Appeal (hereinafter referred to as the Court below) which allowed the plaintiff's appeal to the extent that reliefs (a) and (b) (ibid), were properly claimed as reasonable causes of action. Further, that the action should be tried on the merits before another Judge and with liberty to the parties to amend their respective pleadings to accord with the justice of the case.

The 1st Defendant was unhappy with this decision, whereof on his behalf, four grounds of appeal were filed attacking the decision. From them, the only single issue submitted as arising for our determination states:-

"Whether reliefs (a) and (b) sought by the plaintiff disclose reasonable cause of action in the sense that they are such that Court can grant against the 1st and 2nd Defendants pursuant to the facts contained in the Statement of Claim."

The first question one must answer if one was asked is what constitutes a cause of action and whether by the facts contained in the Statement of Claim in the instant case on appeal, a reasonable cause of action is disclosed. The term "cause of action" was judicially defined by this Court. Applying Read v Brown (1889) 22 Q.B.D. 128 at 131, per Lord Esher M. R. in Lasisi Fadare & Ors. v. Attorney-General of Oyo State (1982) 4 S.C. 1 at page 7, per Aniagolu, JSC as:-

"denoting every fact (though not every piece of evidence) which it would be necessary for the plaintiff to prove, if traversed, to support his right to the judgment of the Court."

See also Egbe v. Adefarasin (1985) 1 NWLR (part 3) 549 and Thomas v. Olufosoye (1986) 1 NWLR (Part 18) 689. As a matter of fact, any act on the part of the defendant which gives the plaintiff a cause of complaint is a cause of action. See Bello & 13 Others v. Attorney-General of Oyo State (1986) 5 NWLR (Part 45) 828 at 876 and Adimora v Ajufo (1988) 3 NWLR (Part 80) 1; in the latter case at p. 17 Oputa. JSC stated

as follows:-

"Thus the accrual of a cause of action is the event whereby a cause of action becomes complete so that the aggrieved party can begin and maintain his cause of action."

Similarly, a reasonable cause of action has been defined to mean:-

"a cause of action which (when only the allegations in the Statement of Claim are considered) has some chance of success." Per Uwais, JSC as he then was, in Oshoboja v. Amuda (1992) 6 NWLR (Part 250) 690 at 702.

It is trite law that in the determination of a reasonable cause of action in the Statement of Claim only and the facts contained therein are deemed admitted. The admitted facts will then be examined to ascertain if they would entitle the plaintiff to the remedy sought See Shell B. Petroleum Development Co. v. Onasanya (1976) 6 S.C. 59.

In the case in hand, I shall now relate the position of the law to the relief sought in the Statement of Claim by commencing with Reliefs (a) and (b) considered together.

The Reliefs set out by the plaintiff in his writ of Summons have earlier been copied out in (a) and (b) respectively. They represent his (plaintiff's) legal right vis-a-vis the 1st Defendant's obligation - the latter which culminate in his (Defendant's) flagrant refusal to fulfil his side of the transaction in relation to which the plaintiff had pleaded in paragraphs 4, 11, 12 and 13 of the said Statement of Claim as his root of title to the Plot situate at Plot C, Turnbull road, Ikoyi, Lagos (otherwise now known as Jabita Close, Ikoyi, Lagos) registered as No. 24 at page 24 volume 1875 of the Register of Deeds, Lagos, Lagos State Lands Registry, Alausa, Ikeja, Lagos. The Certificate of Occupancy being dated the 20th of September, 1979.

These facts are deemed to have been admitted by the Defendants for the purpose of demurrer proceedings. Since the plaintiff is still the holder of the certificate of Occupancy of the said land and therefore has an enforceable legal right, that right entitles him to a declaration in law bearing in mind the reliefs are meant to declare an existing state of affairs in law. The declaration sought by the plaintiff against the Defendants is

therefore clearly for the determination of questions as to the plaintiff's civil rights and obligations. It is also a civil proceeding in which the existence of a legal right falls for determination. See Attorney-General of Bendel State v. A. G. Federation & Ors. (1982) 3 NCLR. 1. From the foregoing, it can be seen that the plaintiff's claim does not only have "some chance of success" following what Uwais, CJN said in Oshoboja v. Amuda (supra), the plaintiff's Certificate of Occupancy remains valid and that it also gives him the right to claim a declaration that he is the person entitled to the said land.

As a declaratory relief is independent and a separate cause of action on its own in that it is the law that the jurisdiction of the Court to make a declaration is not confined to cases where a plaintiff has a complete and subsisting cause of action but may also be employed in all cases where the plaintiff conceives he has a right. See the dictum of Karibi-Whyte, JSC in Adigun v. Attorney-general of Oyo State (1987) 1 NWLR (Part 53) 678 at 741, where the learned Justice said:-

"..... I think it is in our jurisprudence quite elementary that our High court has always had the jurisdiction to make a declaration in all cases where the plaintiff conceives he has a right even if there is no completely and subsisting cause of action....."

See also Igbokwe v. Udobi (1992) 3 NWLR (Part 228) 214, where Oguntade, JCA relying heavily on the dictum of Bankes, L. J. in Guarantee Trust Company of New York v. Hannay & Company (1951) 2 K. B. 536 at 572 stated as follows:-

".....It is the person therefore who is seeking? Is alleged to exist, whose application to the Court is not to be defeated because he applies merely for a declaratory judgment or order and whose application for a declaration of his right is not to be refused merely because he cannot establish a legal cause of action....."

I am of the firm view that reliefs (a) and (b) being declaratory in nature are competent and the Court ought not to dismiss the claim even if claim, as it were, discloses no reasonable cause of action.

I will next consider relief (c), which was attacked as disclosing no reasonable cause of action. It is sufficient to say in respect of this relief

that since what the plaintiff claimed is:-

" a declaration that the agreement dated 28th of November, 1980 between the plaintiff and the 1st defendant is null and void and not binding on the plaintiff as the 1st Defendant has breached in a fundamental manner the provisions of the said agreement."

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I take the view that since the facts disclosed in paragraphs 4-20 of the Statement of Claim, particularly paragraphs 16 and 18 which are facts constituting the bad and fraudulent acts of the 1st Defendant, they (Defendants) cannot be heard to contend that illegality and fraud not having been pleaded, there are no facts to support the relief sought. I need only set out herein the two paragraphs to exemplify how fallacious their contention is, to wit:

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"16. The plaintiff made several demands on the 1st Defendant to live up to their agreement but that the Defendant always come (sic) up with one excuse or another and always ask for more time to live up to his own side of the agreement."

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18. The 1st Defendant actions are in bad faith and have completely breached the agreement entered into between the 1st Defendant and the plaintiff on the 28th of November, 1980, and rendered the agreement null and void and not binding on the plaintiff."

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In essence, 1st Defendant persistently promised to put the plaintiff into possession of the property at sharada Kano, after he had taken possession of the plaintiff's property in Ikoyi, Lagos but deliberately declined to fulfil his obligation.

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It is accordingly discernible from the foregoing that the allegation is that the 1st defendant took possession of the plaintiff's property under false pretences while manifesting no demonstration of an intention of ever fulfilling his own side of the contract, thus displaying palpable imputation of fraud.

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Since the relief sought by the plaintiff is a declaration, I humbly adopt my conclusions I arrived at in reliefs (a) and (b) *ibid* for issue (c) herein. Furthermore, as the prayer for a declaration presupposes that the plaintiff has some rights concomitant with the relief sought, the maxim "ubi jus ibi remedium" - where there is a right there is a remedy - has

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sway here. See also the case of Bello & Ors. v. Oyo State (supra) and Thomas v. Olufosoye (1986) 1 NWLR (Part 18) 669; of the latter case Oputa, JSC said:

"The broad general principle of law is contained in the old Latin

B maxim:

"Ubi jus ibi remedium. Jus here signifies the legal authority to do or demand something and Remedium here means the right of action, or the means given by law for the recovery or the declaration or assertion of that right. In other words, the maxim presupposes that wherever the law gives a right, it also gives remedy, that remedy must be founded on a legal right." (Underlining is for emphasis.) See also Bello & 13 ors. v. A. G. Oyo State (1986) 5 NWLR (Part 45) 828.

Applying the above to the instant case, it is in my view clear that the plaintiff does indeed have a right to the relief sought. This is the more so as the issue raised in these reliefs is the Agreement purportedly entered into by the parties, the basis of which the Defendants are seeking to alienate his (plaintiff's) right to his property at Turnbull Road (now Jabita Close). Indeed, I hold the firm view that the plaintiff is entitled to some remedy although not nullification. See Egbuche v. Idigo 11 NLR. 140. Clearly, there are other remedies open to him in the event of a breach of contract e.g. rescission of the contract or specific performance while being careful not to be time-barred. See Odusoga v. Rickets (1997) 7 NWLR (Part 511) 1 at 16-17. By a long line of decided cases, it has been established particularly in Eronini v. Iheuko (1989) 2 NWLR (Part 101) 46 at 60-61, that declaratory judgments being equitable remedies are discretionary remedies which should be exercised judicially and judiciously.

In the instant case, the plaintiff, in my view, is entitled to the declaratory reliefs sought both in law and in equity.

Reliefs (d) and (e):

The above reliefs relate to possession and perpetual injunction which in a claim for declaration, are known and called ancillary reliefs. Even though the writer of the leading judgment in the instant appeal (Uwaifo, JCA as he then was) had held that:-

"It will be conceded that the other three reliefs sought cannot be supported by the facts in the Statement of Claim. It can therefore be successfully raised in a preliminary way that there is no cause of action disclosed in respect of them."

It being quite elementary that a claim for possession presupposes the existence of a valid title (already clearly established in the instant case to be radically vested in the plaintiff) and not the other way round, the argument by learned Counsel for the 1st Defendant which appears to have missed the point when in his Brief of Argument at page 8 he proffered that "if the plaintiff cannot claim possession of the premises, he cannot also claim that he is entitled to the same premises." Then his argument becomes non-sequitor. As I had occasion to observe in Are v. Ipaye (1986) 3 NWLR (Part 29) 419 at 427 in the Court of Appeal.

"It was incumbent on the 1st and 2nd Defendants (only the 2nd Defendant was left to defend the action) to prove that radical title in Are became vested in them. This is because building of permanent houses, shops, mosques and churches would, in my view, not be enough in the themselves to confer title on a person in possession" - leaving an inference that he is no more than a trespasser on the land."

Be that as it may, this issue of ownership of re-possession of the property is, in my view, a triable issue upon which the court ought to adjudicate and decide the rights of the parties. See Uwaifo v. Attorney-General of Bendel State (1982) 7 S.C. 124.

It is for the reasons I have given above and the more elaborate ones proffered by my learned brother Ayoola, JSC, a preview of which I had had in his leading judgment, that I too dismiss this appeal. I make the same consequential orders inclusive of those relating to costs as couched in the leading judgment.

ACHIKE JSC

I have had a preview of the leading judgment of my learned brother, Ayoola, JSC with which I am in full agreement.

By a written agreement between the plaintiff and the 1st defen-

dant dated 28th November, 1980 the parties agreed to exchange their respective properties, to wit, the plaintiff's undeveloped property situate at Plot C, Turnbull Road, Ikoyi, Lagos for the 1st defendant's property situate at industrial plot at Sharaa, Kano and consisting of fours acres, half of which had been developed by the 1st defendant's factory built thereon. Pursuant to the said agreement, the plaintiff let and put the 1st defendant into possession of his property, and also gave him consent to mortgage the said property to International Bank of West Africa Ltd which would assist the 1st defendant to raise money for the development of the said property. 1st defendant in fact developed the property by erecting a house there on, occupied it for some years and thereafter leased it to the 2nd defendant. Strangely, the 1st defendant, in breach of the agreement, failed to perform his own part of the agreement by putting the plaintiff into possession of his own property, despite several demands by the plaintiff. Consequent to this statement, the plaintiff instituted this action and claimed as follows:

"(a) Declaration that the plaintiff is the person entitled to certificate of occupancy dated 26th day of September, 1979 register as No. 24 at page 24 in volume 1875 of the Register of Deeds kept at the Lagos State Land Registry Lagos Nigeria.

(b) Declaration that the plaintiff is the person entitled to all that premises known as Plot C Turnbull Road, Ikoyi now Jabita Close.

(c) Declaration that the agreement dated 28th November, 1980 BETWEEN plaintiff and the 1st defendant is null and void and not binding on the plaintiff as the 1st defendant has breached in a fundamental manner the provision of the said agreement.

(d) Possession of the said Premises.

(e) An order perpetual injunction restraining the defendants their agents and or any person whosoever deriving authority from any of the said defendants from dealing with and or interfering with the plaintiff's right in and over the aforesaid land in any manner howsoever having the effect prejudicing and or adversely affecting the rights of the plaintiff in the land."

In reply to the plaintiff's statement of claim, the defendants re-

spectively filed and served their statements of defence. It is however important to note that the 2nd defendant additionally filed a counter-claim to his statement of defence seeking a declaration of the trial court that he is entitled to be registered as owner of the property situate at Plot C, Turnbull Road, Ikoyi Lagos.

After parties had exchanged pleadings, and before the trial commenced, the 1st defendant by a motion, brought pursuant to Order 16 Rule 25 and Order 22 Rules 2,3, & 4 of the High court of Lagos High Court (Civil Procedure) Rules 1972 and under inherent jurisdiction prayed for an order dismissing plaintiff's case on the ground that it disclosed no reasonable cause of action and the reliefs sought were unobtainable at law. The learned trial judge dismissed the action as prayed. On appeal, the court of Appeal allowed the appeal to the extent that reliefs (a) and (b) were properly claimed as reasonable causes of action and that the action was not statute-barred but thereafter dismissed the other reliefs claimed.

The 1st defendants was dissatisfied; he has appealed to this Court on four grounds of appeal from which he postulated in his brief just one issue for determination, to wit,

"Whether reliefs (a) and (b) sought by the plaintiff disclose reasonable cause of action in the sense that they are such that the Court can grant against the 1st and 2nd Defendants pursuant to the facts contained in the Statement of Claim."

For the plaintiff his learned counsel identified one issue for determination. This is :

"Whether the plaintiff's claim as formulated in the statement of claim disclose any reasonable cause of action."

Clearly, the two sets of issues for determination cannot be rights: the 1st defendant's set is narrow and limited to appeal in respect of reliefs (a) and (b) whilst the plaintiff's set is wide and encompasses all the five reliefs sought by him. He is not the appellant and so he has no right to stretch the scope of the appeal filed by the 1st defendant. By the rules of Court and practice, the issue or issues for determination, are imperatively circumscribed or limited by the grounds of appeal. It is the law that any issue for determination not encompassed in the grounds of appeal is in-

competent and should either be struck out or discountenanced. A close examination of the two sets of issues manifestly shows that while the 1st defendant/appellant restricts the issue for determination to whether reliefs (a) and (b) disclose reasonable cause of action as warranted by the
B four grounds of appeal on which his monolithic issue is predicated, the plaintiff/respondent has formulated his issue for determination so expansively that it extends additionally to whether reliefs (c), (d) and (e) also disclose reasonable cause of action. This is rather bizzare because reliefs
C (c), (d) and (e) are not covered by any of the grounds of appeal, and it is undisputed that plaintiff/respondent has not filed a cross-appeal. No doubt, it seems to me that plaintiff/respondent predicated his lone but wide issue for determination on the arguments proffered by the 1st defendant/appellant in his brief which unwittingly and unduly overlapped
D reliefs (c), (d) and (e). This cannot be right nor should it be tolerated. As we had already stated, issues for determination must be predicated on the grounds of appeal. For avoidance of doubt, 1st defendant/appellant and in line with what I have been saying above, clearly limits the reliefs
E sought from this Court to setting aside the decision of the lower court in relation to reliefs (a) and (b) and reiterates this stance in the appeal as lucidly set out in paragraph 3,19 at p 9 of his brief. It is therefore clear to me that to also decide on whether reliefs (c), (d) and (e) establish dis-
F close reasonable cause of action is uncalled for and clearly outside the scope of the grounds of appeal. The appellate court, particularly the apex court, should roundly discourage undue and deliberate extension of issues to be agitated on appeal beyond the complaint encompassed in the grounds of appeal.

G Be that as it may, the kernel of this appeal for our consideration is what constitutes a cause of action and thereafter, apply that explanation of a cause of action to the averments in the plaintiff's statement of claim to then decide whether or not a cause of action has been made out.
H There is no gainsaying the fact that the courts are familiar with the phrase "cause of action". The question, what is a cause of action, generally, but not invariably, arises when the court is confronted with the determination whether or not a plaintiff's claim or defendant's counter-

claim is statute-barred. The term has exercised the courts but nevertheless has been variously defined judicially. I would content myself with three such definitions. First Oputa, JSC, referring to Cooke v Gill (1873). 8 C. P. 107 and Read v Brown (1888) 22 Q.B.D. 128 at p. 131, per Lord Esher, M. R., in the case of Adimora v. Ajufo (1988) 6 SCNJ. 127 at 30-31 offered a classic definition as

".....(consisting) of every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court."

Uwais. JSC (as he then was) in Egbue v Araka (1988) 7 SCN N. J 190 at 201 described the phrase as

"the fact or combination of facts which gave rise to a right to sue."

A fairly-recent definition of the phrase has been offered by Jacob, J in Newport Association Football Club and ors v. Football Association of Wales Ltd (1945) 2 All E.R. 87 at 92 as

"a cause for an action in the courts to determine a disputed matter."

See also Egbe v. Adefarasin (1985) 1 NWLR (pt. 3) 519, Bello v. A-G of Oyo State (1986) 5 NWLR (Pt. 45) 828 at 876, Thomas v. Olufosoye (1986) 1 NWLR (Pt. 18) 669, Akilu v Fawehinmi (No. 2) (1989) 2 NWLR (Pt. 102) 122, Shell B. P. Petroleum Development Company of Nigeria Ltd v Onasanya (1976) 6 SC. 59 and Sanda v Kukawa Local Government & anor (1995) 2 NWLR (Pt. 174) 379 at 390.

The above definitions of the phrase "cause of action" are reasonably lucid to afford intelligible understanding of the term which to my mind comprises the averment of averments in the plaintiff's statement of claim that disclose his right to institute an action for a wrongful act alleged. In the instant case, I shall examine the facts averred in the statement of claim to determine whether they can sustain the various reliefs claimed by the plaintiff. Of course, by the single issue for determination identified by the 1st defendant/appellant, our inquiry is limited to whether a cause of action arose in respect of reliefs (a) and (b).

Appellant's learned counsel submitted that reliefs (a) and (b), in

order to succeed, the plaintiff must establish that he is not only entitled in law but also in equity to the property which he has in his statement of claim averred that he has voluntarily transferred to 1st defendant. Thus he relied on Okafor Egbuche & anor v. Chief Idigo & anor 11 NLR 140 where the appellate court dismissed the declaration awarded by the Onitsha Provincial Court as "the plaintiff's ancestors having by agreement in 1888 divested themselves of all right or title competent to them had no longer any right or title to the land and their claim for a declaration of title should have been refused." The court accordingly dismissed the plaintiff's claim for declaration of title. A further and similar reliance was placed on Egbunike & anor v Muonweokwu (1961) 1 ANLR 48 wherein, inter alia, it was held by the Federal Supreme Court that a declaratory judgment being discretionary it must be shown that the circumstances of a case warrant making the grant in the plaintiff's favour.

Appellant's counsel submits that relying on the statement of claim, the plaintiff is not entitled to reliefs (a) & (b) but could only be entitled to specific performance of the contract and/or damages for breach and this is more so when a 3rd part's interest has arisen. Finally, counsel submits that reliefs (a) & (b) are not sustainable as they disclose no reasonable cause of action.

Plaintiff's learned counsel submits that the plaintiff, as holder of the statutory right of occupancy in the property exchanged with the 1st defendant has had his legal rights in respect thereto unfripped by his protracted delay and refusal by the 1st defendant to effect the agreed exchange. This counsel contends, has created a cause of action in plaintiff's favour for the reliefs (a) & (b) sought by reason of the wrongful act of the 1st defendant, notwithstanding the plaintiff's averment in his statement of claim. Furthermore, counsel submits that a declaratory relief is an independent and separate cause of action on its own and the jurisdiction of the court to make a declaration is not confined to cases where a plaintiff has a complete and subsisting cause of action but may also be evoked in all cases where the plaintiff conceives he has a right. He calls in aid the dictum of Karibi-Whyte, JSC in Adigun v A. G. Oyo State (1987) 1 NWLR (Pt. 53) 678. Counsel also relies on the dictum of Oguntade, JCA in Igbokwe v. Udobi

(1992) 3 NWLR (Pt. 228) 214, relying on the dictum of Bankes L. J in Guaranty Trust Company of New York v Hannay & Company. (1915) 2 K. B. 536 at 572 in saying that a declaration of one's right can be claimed merely by a person for a declaratory relief.

Accordingly, learned counsel urges the court to dismiss the appeal and hold that reliefs (a) and (b) being declaratory in nature are competent and ought to be granted even if the other reliefs claimed by the plaintiff disclose no reasonable cause of action.

Finally, counsel also refers to the useful cases cited and relied on by 1st defendant's counsel, to wit, Egbuche v Idigo 11 NLR 140 to buttress his contention that plaintiff was entitled in both equity and in law to the declaratory reliefs sought because this case was distinguishable from the case under reference in that notwithstanding the averment in the statement of claim that plaintiff's landed property had been vested in 1st defendant, in fact there was no such divesting of the plaintiff because there was no transfer to the 1st defendant as the plaintiff still retained possession of his certificate of occupancy. Counsel accordingly urged us to dismiss the appeal.

I have examined the plaintiff's statement of claim with particular reference to reliefs (a) and (b). Furthermore, by the procedure adopted by 1st defendant our consideration of this appeal, as earlier observed, is confined to the averments in the statement of claim, which for the purpose of the dispute between the parties are deemed to be true and admitted by the 1st defendant. Plaintiff's property involved in the aforesaid contract of exchange with 1st defendant, i.e. Plot C, Turnbull road, Jabita close, Ikoyi, Lagos, was duly registered as No. 24 at p. 24 Volume 1875 of the Register of Deeds, Lagos Lands Registry Lagos. This was subsequently followed by the issuance of the Certificate of Occupancy dated 20th September, 1979 in favour of the plaintiff. Clearly, it must be borne in mind that the purpose of a declaratory relief sought from the court is essentially an equitable relief in which the plaintiff prays the court in exercise of its discretionary jurisdiction to pronounce or declare as existing state of affairs in law in his favour as may be discernible from the averments in the statement of claim. In the case on hand, it is incontest-

able that the plaintiff is currently - notwithstanding the nearly - 20 year-old agreement between the plaintiff and the 1st defendant - in possession and holder of the Certificate of Occupancy in respect of Plot C, Turnbull road, Lagos, and accordingly enjoys enforceable legal rights thereto entitling him to the declaration sought. And on the legal authorities adumbrated above, plaintiff's declaratory reliefs under (a) and (b) are quite separate and independent of the other three reliefs claimed by him in the sense that failure of those other three reliefs as giving reasonable cause of action cannot, in any way affect plaintiff's claim for declaratory reliefs under (a) and (b).

Perhaps, it is pertinent to further emphasise and illustrate the separateness and independence of declaratory reliefs vis-a-vis other substantive reliefs which are often claimed in the same action. Now let us refer to Order 22 Rule 5 of the High Court of Lagos State (Civil Procedure).

Rules 5 provides that

"No action shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby and the court may make binding declarations of right whether any consequential relief is or could be claimed or not."

In the light of the separateness between a declaratory relief and other consequential reliefs that may be claimed in the same action, it is necessary to emphasise and reiterated that the other claims sought by the plaintiff ought not to be taken into consideration for the determination whether or not the declaratory reliefs sought by the plaintiff are sustainable or not.

Both counsel adverted to the authority of Egbuche v Idigbo (supra) in support of their respective but divergent contention on the effect of plaintiff's purported averment that he (plaintiff) had transferred his property under the agreement to the 1st defendant. If Egbuche v Idigbo is closely examined it will be found to be distinguishable from the facts of the case under review. In Egbuche v Idigbo the plaintiffs fully divested themselves of title to the property in dispute and so, it became obvious that thereafter they had no legal right whatsoever to the claim for declaration of title to the said land and therefore the declaration claimed by them was rightly refused. In the present appeal, however, the plaintiff

still retains the certificate of occupancy granted to him in 1979. In effect, the agreement between the plaintiff and 1st defendant was clearly one for agreement to assign and not an assignment as such. I am therefore clearly of opinion the Egbuche v. Idigo is totally irrelevant in the instant case.

In the result, I am clearly of the view that the lower court was in error to have held that reliefs (a) and (b) which are declaratory reliefs did not disclose a reasonable cause of action.

Before concluding this appeal, I deem it necessary to say a word, albeit, cursorily with regard to relief (c). The relief seeks

"A declaration that the agreement dated 28th of November, 1980 between the plaintiff and the 1st defendant is null and void and not binding on the plaintiff as the 1st Defendant has breached in a fundamental manner the provisions of the said agreement."

It would be recalled that the plaintiff had performed and therefore discharged his obligation under the parties' nearly 20 years agreement and the 1st defendant curiously is yet to play his part in the exchange of properties concluded by them. It is commonplace that the 1st defendant had since developed the land he received from the plaintiff in the exchange arrangement but engages in baseless, heartless and morally indefensible procedural depravity to deprive the plaintiff of his legal right under their apparent freely-concluded agreement by his tenacious refusal to let plaintiff into possession of his own property, a posture to be roundly deprecated because it smacks of injustice and leaves a sour taste in the mouth for the so-called gentleman in society to exhibit such unprecedented callousness with careless abandon. The position is the more disturbing in the face of the fact that the law is virtually powerless to intervene firmly in favour of the down-trodden weaker party.

Having said that much, the question remains, is the agreement between the parties void or binding to warrant the declaratory relief sought by the plaintiff? The answer must be in the negative. This is a simple contract of exchange of properties between the parties which has been executed by one party but yet to be executed by the other. Undoubtedly, the agreement is supported by consideration agreed to be reciprocated by

each other. It is a simple and binding contract in law. By his failure to let the plaintiff into possession of the promised industrial property the 1st defendant is in breach of the agreement. This leaves the plaintiff with the first option to hold that the breach is a fundamental one which entitles him to treat the agreement as rescinded and further claim the return of his own land which he had let the 1st defendant into possession, where the circumstances permit, because it is manifest that this is a case of total failure of consideration. The plaintiff also has the second option of seeking specific performance of the contract i.e. for 1st defendant to let him into possession of his land, while also asking the court to be paid damages for the breach of contract as alleged, it will be strange, if not ridiculous for the court be invited to declare the parties' agreement null and void by mere reason that the 1st defendant is in breach in respect of his obligation. The court cannot accede to such declaratory relief for it goes against the justice of the case which ordinarily entitles the plaintiff to either the rescission of the contract or a claim for specific performance, and in either situation coupled with damages for the breach of the contract alleged.

What I have tried to say above in respect of relief (c) only goes to show that if relief (c) is properly recouched the fact of breach of contract alleged would make the declaratory relief sought sustainable.

For the reasons earlier given by me in this appeal in relation to the parties' sets of issues for determination, it is manifest that all that has been said herein about relief (c), no matter how benevolent the court may be disposed to hold, is outside 1st respondent's set of issue for determination.

Nevertheless, by reason of what I had earlier observed about the injustice meted out to the plaintiff, this court - as apex Court - ought to invoke the plenitude of its judicial power, in the interest of justice and thereby promote justice in all the circumstances of this case, more so as counsel's submissions outside the narrow confines of the issue for determination have clearly justified. Unquestionably, after a futile period of nearly 20 years of the agreement between the parties, wherein the plaintiff is completely disenchanted and yet the 1st defendant has been enjoying the

best of the two worlds, as it were, - retains his Kano property and yet had fully developed plaintiff's Lagos property - it is needful for this Court to invoke its general power under section 22 of the Supreme Court Act to ensure that the real question in controversy between the parties is judicially addressed and redressed with despatch.

For all I have said, this appeal deserves to fail and it is accordingly dismissed. I abide by the consequential orders made in the leading judgment, including the orders as to costs.

KALGO JSC

I have had a preview of the judgment of my learned brother Ayoola JSC and I am in agreement with him that there is no merit in the appeal. I fully endorse the reasoning and conclusions reached therein which I adopt as mine and dismiss this appeal as lacking in merit.

The only issue for determination in this appeal is whether reliefs (a) and (b) of the Plaintiff/Respondent's statement of claim disclose reasonable cause of action and can be granted by the trial court having regard to the facts contained in the statement of claim.

"Cause of action" has been legally defined to mean a fact or combination of facts which when proved would entitle a plaintiff to a remedy against a defendant. See Bello v. A. G. Oyo State (1986) 5 NWLR (pt. 45) 828; Egbe v Adefarasin (1987) 1 NWLR (pt. 47) 20; Adimora v. Ajufo (1988) 3 NWLR (pt. 80) 1; Akilu v Fawehinmi (No. 2) (1989) 2 NWLR (pt. 102) 122; Joachimson v. Swiss Bank Corporation (1921) 3 KB 110 at 128. And a "reasonable cause of action" has also been defined to mean a cause of action which (when only the allegations in the statement of claim are considered) has some chance of success. See Thomas v Olufosoye (1986) 1 NWLR (pt. 18) 669. Egbue v Araka (1988) 3 NWLR (pt. 84) 598; Drummond-Jackson v British Medical Association & Ors (1970) 1 WLR 688 at 696.

In determining the cause of action or a reasonable cause of action, it is irrelevant to consider the weakness of the plaintiff's claim; what is important is to examine the averments in the statement of claim and see if

they disclose some cause of action or raise some questions fit to be decided by the court. Therefore in this appeal, the contention of the learned counsel for the appellant's that the plaintiff/respondent did not claim the relief of specific performance or damages for breach, cannot in my view, defeat the action having regard to the totality of the averments in the statement of claim. I have read the contents of the statement of claim filed by the plaintiff/respondent in this action, and I am satisfied that they disclosed reasonable cause of action taken as a whole.

I agree with the Court of Appeal that reliefs (a) and (b) in paragraph 21 of the statement of claim constituted declaratory reliefs meant to declare the legal state of affairs between the parties. Therefore since the legal right to the land in dispute is at the time of filing the action, in the hands of the plaintiff/respondent, it necessarily follows that reliefs (c), (d) and (e) must also be available to the plaintiff/respondent. See Thomas v Olufosoye (supra). If a person has a legal right to a piece of land which he can properly claim as his own, then it follows that he has the right to possess it and keep off any trespasser from coming on to it. It is for this reason that I agree with Ayoola JSC that reliefs (c), (d) and (e) in paragraph 21 of the statement of claim are also available to the plaintiff/respondent, even though there was no cross-appeal on same having regard to the provisions of Section 22 of the Supreme Court act and 0.12, rules 2 and 5 of the Supreme Court Rules 1985 as amended.

For the above reasons and the more detailed ones set out in the leading judgment of Ayoola JSC, I find no merit in this appeal and I hereby dismiss it. I abide by the consequential orders made therein including the order as to costs.

H