

**SUPREME COURT OF NIGERIA**  
14TH DECEMBER, 2001. SC. 91/1995  
**CORAM:- A. G. KARIBI-WHYTE, M. E. OGUNDARE,**  
**S. U. ONU, S. O. UWAIFO, A. O. EJIWUNMI, JJSC.**

W.T.EJUNETAMI .....1ST DEFENDANT/APPELLANT  
AND  
MRS. BENEDICTA O. OLAIYA..... PLAINTIFF/RESPONDENT  
(Substituted by Order of Court)  
A. O. AKABA DEFENDANT/RESPONDENT

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***APPEALS** - Issue - Which was resolved against the appellant - That was not appealed against before the lower court - Cannot be pronounced upon by the Supreme Court (H1)*

***APPEALS** - Leave - To raise a new issue - Where fresh evidence will be required - Leave will not be granted (H3)*

***EQUITY** - Title - Priority - Belongs to a person with first equity - But his prior interest may be postponed - Upon proof of fraud (H7)*

***EVIDENCE** - Pleadings - Documents - Tendered for a different purpose - Were rightly considered by the Court - In finding delay against appellant that tendered them - And it is not even on ground of delay that the case tailed (H6)*

***LAND LAW** - Equitable interest - Possessor of prior equitable interest in land - Who later secured legal estate - Will retain the title - Unless shown to have acted inequitably (H5)*

***LAND LAW** - Sale - Judicial precedent - Balance of payment by person with equitable interest - Can be refused by the vendor – Ajoke’s case does not apply to support the contrary (H4)*

***LAND LAW** - Title - Fraud - Equitable interest - That was later*

*improved to a legal estate - Allegation of fraud was not established - To warrant setting aside the legal interest (H8)*

**PLEADINGS** - Extraneous matter of delay - Alleged to be wrongfully imported by the court - Is unfounded - As the court rightly considered documents tendered before it - And it is not even on ground of delay that the case failed (H 6)

**STATUTES** - interpretation - Contract for sale of land - Memorandum of sale - Should be in writing - And must be signed by the party charged therewith (H 2)

### **FACTS**

The 1st defendant/appellant was a tenant of the defendant/respondent (landlord), occupying his No. 38 Oba Akran Avenue Ikeja. The said property was sold by the landlord to the plaintiff/respondent who apart from the equitable interest he had also took steps and secured legal estate in respect of the property. Plaintiff filed ~ action to take possession of the property in dispute. Appellant filed a counter claim seeking to set aside plaintiffs registered deed of assignment. He sought to establish fraud, illegality and breach of contract against plaintiff and the landlord. This was based on the claim that he has a prior equitable title as the landlord had agreed to sell the property to him. Appellant alternatively claimed the sum of N150,000.00 being special and general damages for breach of contract.

The trial high court dismissed the plaintiffs claim and upheld the appellant's counter claim save the alternative claim for damages which was not considered. Plaintiff and the landlord appealed to the Court of Appeal which found in favour of the plaintiff. That court awarded the sum of N150,000.00 to appellant against the landlord only, being damages for breach of contract. Dissatisfied, appellant has now appealed to the Supreme Court.

### **ISSUES FOR DETERMINATION**

*“(1) Was the Court of Appeal right in holding that the*

*Plaintiff had an equity prior in time having regard to the pleadings of the parties and the evidence?*

*(2) The 1st Defendant/Appellant having satisfied the conditions prescribed by the Court of Appeal for acquiring a better right to call for the legal estate, was the Court of Appeal right in entering judgment for the plaintiff on the ground that the 1st Defendant/Respondent has been guilty of delay - a defence which was not raised in the pleadings of the adverse parties?*

*(3) Is the owner of a prior equitable interest not liable to be postponed to a subsequent equitable interest on account of fraud whether the same occurred before or after the acquisition of the prior equitable estate?”*

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

***Issue - Which was resolved against the appellant***

1. In the context of this appeal it must be restated that the learned trial judge clearly held that the Appellant failed to prove that there was an enforceable contract between him and the Defendant/Respondent. Now, as the Appellant before this court won before the trial court, it was the Plaintiff/Respondent who lost before the trial court that appealed to the court below. Obviously, he wouldn't have needed to appeal against a point that was resolved in his favour. And the present Appellant against whom that point was resolved should be the party who should have appealed to the Court below. That he did not do. The learned counsel for the Plaintiff/Respondent is undoubtedly right in his submission that having not appealed on this decision of the trial court, the court below had no opportunity to consider the decision of the trial court was right for the court below to arrive at its decision. It must be remembered that apart from matters which come under section 212 of the 1979 Constitution which relate to disputes between the Federation and a State or between States, the jurisdiction of the Supreme Court is wholly appellate. (p. 3500 C)

**Contract of sale of land - Memorandum**

2. Applying these principles to the provisions of section 5(2) of the Law Reform Contracts Law, it would seem to me quite clear that the ordinary meaning of its provisions with regard to the requirements of the note or memorandum in respect of a contract has to be in writing and which must be signed by the party charged therewith. It is of course not in doubt that where the contract has been drawn up between the party and executed properly, a note or memorandum of that contract would not be necessary. It is necessary also to note that the provisions under consideration is in pari materia with section 4 of the Statute of Frauds Act lit' of England. (p. 3502 C)

**Leave - To raise a new issue**

3. The learned counsel for the Respondent has argued very strongly in his brief that this is not the kind of case in which such leave ought to be granted to the Appellant. The premise of his supposition is that the Appellant would have to, in the circumstances of this case, call fresh evidence to which they would also need to call evidence in rebuttal. That submission is well taken. Having regard to the principle in Akpene v Barclays Bank of Nigeria (supra), I do not think that this is a proper case for which leave ought to be granted and I so hold. It follows from all that I have stated above, that the issue must be resolved against the Appellant and it is hereby so resolved. (p. 3504 A)

**Sale - Judicial precedent**

4. It is my respectful view that the case of Ajoke v. Oba & Anor (supra) is certainly no authority for the proposition that the vendor of a property cannot in any circumstances refuse to accept the payment of a buyer in complete the purchase price for the sale of property which the parties had agreed would be sold for a certain sum. The case in my view duly recognized the prior interest of the Plaintiff as against the second Defendant. And that as the second Defendant was aware of the interest of the plaintiff in the property, it is inequitable for him to be allowed to remain the owner of the property, which was conveyed to him by the 1st defendant. The plaintiff it was held had a better right to the legal estate.

Reverting to the instant appeal, I think the court below was right to have held that the decision in the Ajoke v. Oba & Anor case is not on all fours with the facts found in the instant appeal. (p. 3509 B)

**Possessor of prior equitable interest**

5. It is manifest from the above statement of the principle that an equitable mortgagee who has advanced his money without notice of a prior equitable mortgage may gain priority by getting in the legal estate unless the circumstances are such as to make it inequitable for him to do. Applying this principle to the case in hand, the plaintiff/Respondent was the possessor of an equitable interest in the property in dispute without notice of the subsequent equitable interest. The plaintiff/Respondent thereafter obtained legal estate. The legal estate he has so obtained remains with him unless it can be shown that the Plaintiff/Respondent acted inequitably in getting in the legal estate. (p. 3510 A)

**Pleadings - Extraneous matter of delay**

6. It is trite law that parties are bound by their pleadings. The letters, which as I have earlier stated were admitted in evidence during the trial. It is evidence from the pleadings that they were primarily tendered by the Appellant to prove his own equitable interest in the disputed property. Though the documents were pleaded and tendered primarily for this purpose, they became available, in any event, for full consideration by the court. A cursory reading of the exhibits portrayed the anxiety of the Defendant/Respondent that the Appellant should comply with his own side of the bargain. It is my humble view that the court below was right to have adverted to the various letters, Exhibit P-U to consider whether the Appellant had not been guilty of delay in concluding his own side of the transaction by paying the remaining sum agreed upon for the sale of the property in dispute. It follows from the observation made above that in the context of this appeal, the fact that the Appellant's case was not upheld by the Court of Appeal cannot be ascribed to the allegation of "Delay". That question in my view relates as already observed to the consideration given by the Court below to whether the

Appellant had established an equitable estate in the disputed property. I will therefore for all reasons given above resolve all the questions raised in respect of the issue against the Appellant. (p. 3511 A/H)

**Priority - Belongs to a person with first equity**

B 7. Therefore the answer to the question raised in the issue may be put thus:

C “It seems clear from the above rules that it is the general rule of equity that the person whose equity is attached to the property first will be entitled to priority over the other. It is also manifest that the owner of a prior equitable interest may be postponed if his conduct is inequitable.”

D It would appear also, that the person who is alleging the fraud has the burden of proving it. The general principle that I have stated above was considered and decided upon in the House of Lords of England in Taylor v Russel (supra). (p. 3514 A)

**Title - Fraud - Equitable interest**

E 8. Having regard to the above, it seems clear that the Court below duly considered the finding of fraud made against the Plaintiff/Respondent and that finding was rejected by the court below. The reason given for the view of the Court below suggests that, for an allegation of fraud to h  
F effective set aside the legal interest obtained by the plaintiff/Respondent there must be evidence that he connived or colluded with the Defendant /Respondent, to the detriment of the interest of the Appellant. It is my humble view that the conduct of the Plaintiff/Respondent ought not I have been held as fraudulent because he took steps to improve his equitable interest in the property by getting in the legal estate from the  
G Plaintiff/Respondent. The Appellant, who has the burden of proving that the conduct of the Plaintiff/Respondent was inequitable, has not been able to discharge this burden. (p. 3515 B)

**NOTABLE POINTS OF INTEREST**

H

**EJIWUNMI JSC**

**I. Principles governing interpretation of statutes**

On this point, I think it is desirable to remember some of the established principles governing the interpretation of the provision of a statute. They are:

- (1) that is the intention of the legislature that is being sought i.e. the intention of the “writer” of the document. B
- (2) that the intention is to be desired from the words of the Act alone and not from other Sources.
- (3) that the words used are to be given their “ordinary and natural sense” ie. The legislature is to be presumed not to have put a special C meaning on words.
- (4) that the court is not concerned with the result of its interpretation: it is not the court’s province to pronounce on the wisdom or otherwise of the Act but only to determine its meaning. (see Pearce, Statutory D Interpretation page 13). (p, 3501 H)

**OGUNDARE JSC**

**2. Question a/priority a/interest does not arise**

E With respect to their Lordships of the two courts below, the 1st Defendant having failed to prove the August 1975 contract he pleaded, could not he said to have any equity. It was never his case that the several letters F written to him by the 2nd Defendant constituted the contract between the two of them. I think the question of priority in equity does not arise in this case. Plaintiff had some equity by the 1976 contract F when he paid his deposit in February 1977, but 1st Defendant had none as he failed to prove the 1975 contract he relied on. (p. 3525 G)

**REPRESENTATION**

G Appellants not represented  
G.A. Adetola Kaseem for the Respondent.

**CASES REFERRED TO**

H Akpene v. Barclays Bank (1977) 1 S.C. 4  
Ogundare v. Ogunlowo (1997) 5 N.W.L.R.281 at 286  
Ikeanyi v. African Continental Bank Ltd (1997) 2 N.W.L.R. ,(Pt. 489)  
Burgess v. Cox (1951) Ch.D 383 at 388  
Fowler v. Bratt (1950) 2 K.B. 96 at 101

Bronik Motors Ltd. v. Wema Bank Ltd. (1983) 1 S.C.N.L.R. 296  
 Kalu v. Odili (1992) 5 N.W.L.R. (pt. 240) 130 at 164  
 Shonekan v. Smith (1964) A.N.L.R. 168, 173  
 Stool of Abinabina v. Chief Kojo Enyinadu (1953) AC 209 at 215  
 Humani Ajoke v. Oba & Anor. (1962) 1 All N.L.R. 73  
 Cole v. Folami (1956) 1 FS.C. 66  
 Robert Taylor & Anor v. Russel & Anor. (1892) A.c. 244  
 Cave v. Cave (1880) 15 Ch.D 639  
 Odogwu v. Odogwu (1990) 4 NWLR 224,234

C

**STATUTES REFERRED TO**

Law Reform (Contracts) Law of Lagos State S. 5(2)  
 Statutes of Fraud Act 1677 of England S. 4  
 Law of Property Act 1925 of England S. 40

D

**BOOK REFERRED TO**

Snell's Principles of Equity 27th ed. pp. 545 - 546, p.56

**LEAD JUDGMENT BY EJIWUNMI JSC**

E This appeal is against the judgment of the Lagos Division of the Court of Appeal. The action was commenced by B.O. Olaiya as the plaintiff. But after his death, this court ordered that the appeal be continued by the substitution of his wife, Mrs. B.O. Olaiya in place of her deceased husband.

F The events that culminated in this appeal commenced when the late B.O. Olaiya instituted proceedings by a writ of summons against the appellant to take possession of the whole dwelling house situate at No. 38 Oba Akran Avenue, Ikeja. This was followed by a statement of claim. Upon the receipt of these documents, the appellant then filed a counterclaim. And with the leave of court the appellant amended the original writ of summons and statement of claim. The appellant also  
 G with leave of court amended his pleadings. The case was eventually tried on the basis of the amended writ of summons and pleadings, which were amended and further amended by the parties. With the close of pleadings, the parties called evidence in support of their respective  
 H cases.

For the purposes of this judgment, the parties will be referred to

as the appellant, the plaintiff/respondent and the defendant/respondent respectively.

For the consideration of this appeal, I will set out first the claims and counterclaims of the appellant as follows:

## Paragraph 21

“(A) An order to set aside the purported deed of assignment B between A O. Akaba and B.O. Olaiya in respect of the property at No. 38 Oba Akran Avenue Ikeja dated 23/1/81 and registered as No. 95 at page 95 in Volume 1818 of the Lands Registry in the office at Lagos on the following grounds: C

- (a) fraud
- (b) illegality
- (c) breach of contract

(B) The plaintiff having got knowledge of the defendant's purchase of the property and improvements thereon, induced the vendor D Mr. Akaba to sell the property to him at a higher price and execute a deed of Assignment in his favour.

(C) And the 1st defendant/counterclaimant claims against the defendants special damages as follows: E

Renovation of Building	N10,000.00	
Erection of additional structures and offices	N25,000.00	
Concreting of the floor of the backyard as per paid invoice dated 20/12/78	N8,000.00	F
Filling of the front yard with earth & Granite levelling as per paid invoice dated 7/7/79	N5,000.00	
Wall fencing as per paid invoice dated 23/2/76	<u>N15,000.00</u>	
	N63,000.00	G
General damages for breach of contract	<u>N87,000.00</u>	

TOTAL N150,000.00

In the alternative, Paragraph 30 below: H

“The defendant/counterclaimant says that the purported assignment of the property to the plaintiff by Mr. Akaba is tainted with fraud, and illegality, and is therefore null and void and of no effect whatsoever. And that defendant/counterclaimant maintains that he

is the rightful and lawful assignee of the house subject matter of this action.”

The claims of the plaintiff/respondent as endorsed on the writ of summons are as follows:

B “The plaintiff is entitled to the possession of the whole of the dwelling house situate at No. 38 Oba Akran Avenue, Ikeja District of Lagos State, Nigeria which was let to the defendant by the plaintiffs predecessor-in-title from month to month under the rent of N150.00 which said tenancy was determined by notice to quit, given by the plaintiff C on the 24th day of March, 1981 which said notice expired on 30th April, 1981 and on the 28th day of May, 1981 the plaintiff did serve on the defendant a notice in writing of his intention to apply to recover possession of the said premises (a duplicate of which notice is hereto annexed) by serving the plaintiff personally and that notwithstanding the said notice, the said defendant refused and/or neglected to deliver D up possession of the said premises and still retains the same. The plaintiffs claim is for possession and N300.00 for arrears of rent for the months of March and April, 1981 and mesne profit at the rate of N150.00 per month, being at the rate of the rent of the said premises E from the 1st day of May, 1981 until possession is given up. And interest at the rate of 10% per annum from 1st March, 1981 until judgment and thereafter at the rate of 4% per annum until payment”.

From the pleadings and evidence led by the appellant, his case may be summarised thus:

F “It would appear from the evidence that in 1974, the appellant became the tenant of the defendant/respondent in the property owned by the defendant/respondent. In 1975, the appellant claimed that the defendant/respondent offered to sell the property to him for the sum of N50,000.00. It was also part of the agreement that payment for the property would G not be made until when the deed of assignment of the property is ready and the defendant/respondent retires from the civil service. The appellant also claimed that he promised that he would give employment to the defendant/respondent after his retirement. Defendant/respondent was duly employed by the appellant in 1978 after he retired from the Civil Service. Appellant then pleaded that pursuant to the offer made H to him for the purchase of the property, the defendant/respondent wrote several letters Exhibits P-U, to him. It would appear that as a result, the

appellant paid the sum of N15,000.00 to the defendant/respondent, in the presence of witnesses, towards the purchase of the property. At the time of that payment, appellant claimed that he promised the defendant/respondent that he would complete the payment of the outstanding sum of N35,000.00 in two installments. Appellant eventually claimed that he paid B the remaining sum of N35,000.00 with cheques in the sums of N5,000.00 and N30,000.00 and dated 4th December 1979 and 20th December 1979 respectively.”

From the evidence and pleadings of the plaintiff/respondent his case is that the defendant/respondent made an offer to him for the purchase of property in dispute in August 1976. The transaction concerning the purchase of the property was conducted via letters dated C 16th August 1976; 30th August 1976; 3rd September 1976; 26th November 1976. And that by an Agreement dated 14th November 1976, it was agreed that the property would be sold to the plaintiff/respondent D by the defendant/respondent. Later, a sublease, Exhibit G was executed in favour of the plaintiff/ respondent, pursuant to the earlier agreement between the plaintiff/ respondent and the defendant/respondent. The case presented by the defendant/respondent appears to be a complete E denial that he offered to sell the property to the appellant in 1975 or at any other time. He acknowledged that the appellant was his tenant, and further stated that the sum of N15,000.00 paid to him was to defray the obligations of the appellant as his tenant, Exhibits P-U. It was also in this connection that he wrote to the appellant. The defendant/respon- F dent did not admit that he received the cheques. But there is evidence on record that he did. The defendant/respondent was however very categorical that he had since 1976 agreed to sell the property

to the appellant. G

After hearing the addresses of learned counsel in the matter, the learned trial Judge delivered a reserved judgment dismissing all the claims of the plaintiff/respondent. At the end of the trial, the learned trial Judge upheld all the appellant’s counterclaims except the alternative claim for damages which was not considered in the course of the judgment. H

The following orders were then made

“(a) The plaintiff’s claim against the 1st defendant for arrears

*of rent having failed is dismissed.*

*(b) The plaintiff's claims for declaration as lawful assignee of the property and possession failed and also dismissed.*

*(c) The deed of assignment between Mr. A.O. Akaba and Chief B.O. Olaiya in respect of the property at 38, Oba Akran Avenue, Ikeja dated 23rd February 1981 and registered as No. 95 at Page 95 in Volume 1818 Lands Registry in the office at Lagos is hereby set aside.*

*(c) An order that on a date to be agreed by the parties and their counsel but not later than 15th May, 1985 the parties should meet in the office of the Deputy Chief Registrar, Ikeja, where the 1st defendant should issue and present to the 2nd defendant a bank certified cheque for N35,000.00 and at the same time on the same day a deed of assignment of the sublease of the property at 38, Oba Akran Avenue, Ikeja, should be executed by the plaintiff and the 2nd defendant, Chief B.a. Olaiya and Mr. A.O. Akaba respectively, in favour of the 1st defendant".*

As the plaintiff/respondent and defendant/respondent were not satisfied with the judgment and orders of the trial court, they appealed to the court below. The defendant/respondent who did not file a brief in furtherance of his appeal, later filed a motion in that court to withdraw his appeal. The court below accordingly had only the appeal of the plaintiff to consider, that appeal of the plaintiff/respondent to the court below was successful. The judgment of the trial Court, per Hotonu J., was set aside. In its place, judgment was entered for the plaintiff/respondent for possession of the property at 38 Oba Akran Avenue, Ikeja Lagos State with effect from sixty days from the date of the judgment. As it was adjudged that the plaintiff/respondent was entitled to arrears of rent for March and April 1981 at N150.00 per month, the order was made accordingly by the Court below. It was also ordered that plaintiff/respondent be entitled to mesne profits at N150.00 per month from May 1981 until possession is given up, as ordered by the plaintiff/respondent. The Court below also assented to the application made by appellant to vary the judgment by entering judgment against the defendant/respondent for N150,000.00 as damages for breach of contract. Judgment in the sum of N150,000.00 was accordingly made in favour of the appellant.

Following the dissatisfaction of the appellant with the judgment of the court below as it affected him, this appeal was filed against the

said judgment and the orders of the court below. Pursuant thereto, a notice of appeal with two grounds of appeal were filed. However additional grounds were filed, severally referred to as "Additional Grounds of appeal" and "Further Additional Grounds of Appeal". And in accordance with the Rules of Court, briefs of argument were filed and exchanged.

Though the appellant was not represented by a counsel, the brief already filed for him was treated as argued in accordance with the Rules of this court. The learned counsel for the respondent who was present adopted and placed reliance upon the respondent's brief for the purposes of this appeal.

In the appellant's brief, his learned counsel, Chief G.O.K. Ajayi S.A.N. distilled from the grounds of appeal filed, the following issues for the determination of the appeal:-

*"(1) Was the Court of Appeal right in holding that the plaintiff had an equity prior in time having regard to the pleadings of the parties and the evidence?"*

*(2) The 1st defendant/appellant having satisfied the conditions prescribed by the Court of Appeal for acquiring a better right to call for the legal estate, was the Court of Appeal right in entering judgment for the plaintiff on the ground that the 1st defendant/respondent has been guilty of delay - a defence which was not raised in the pleadings of the adverse parties?"*

*(3) Is the owner of a prior equitable interest not liable to be postponed to a subsequent equitable interest on account of*

*fraud whether the same occurred before or after the acquisition of the prior equitable estate?"*

For the plaintiff/respondent, issues were also set down in the brief settled by learned counsel, G.A. Adetola-Kaseem, Esq. the issues are as follows:

*"Issue No.1: (Based on ground 5)*

*Whether the evidence offered by the 1st defendant/appellant that he had acquired an equitable interest in the subject property since 1975 was wrongly rejected by the trial court, and whether in the circumstances it was proper for the trial court to have invoked as he did the provision of subsection 5(2) of the Law Reform (Contracts) Law*

of Lagos State for rejecting the evidence.

Issue No.2: (Based on Ground 4)

Depending how issue No.1 is resolved, who between the plaintiff/respondent and the 1st defendant/appellant has the prior equitable interest in the property No. 38 Oba Akran Avenue, Ikeja.

Issue No.3: (Based on Ground 3) Whether the plaintiff could be said to be guilty of such fraud against the 1st defendant as to deprive him of the benefit of his prior equitable interest in the property in dispute.

Issue No.4: (Based on Ground 1)

Whether the mere delivery of cheques by the 1st defendant to the 2nd defendant without the latter acknowledging same, amount to payment under the law.

Issue No.5: (Based on Ground 2)

Whether it could be said, having regard to the tenor of its entire judgment that the Court of Appeal in fact based its decision on delay by the 1st defendant to pay the balance of the purchase price to the 2nd defendant, and if so, whether the Court of Appeal could be said to be right in doing so."

The issues set out above for the plaintiff/respondent, though framed with some exactitude with the grounds of appeal, yet in my view, the issues for the appellant appear to be more reflective of the grounds of appeal filed in this appeal.

I will therefore in the consideration of the merits of this appeal do so upon the issues as identified for the appellant in the appellant's brief. In the first issue, which is whether the Court of Appeal was right in holding that the defendant/respondent had an equity prior in time having regard to the pleadings of their parties and the evidence, with due regard to learned Senior Advocate, most of the argument in respect of this issue appear to be directed against the judgment of the learned trial Judge. The other part of the argument proffered in respect of this issue was submitted for the appellant at showing that the absence of a note or memorandum to satisfy section 5(2) of the Law Reform (Contracts) Law was not raised in either pleading. It is also argued for the appellant that section 5(2) of the Law Reform (Contracts) Law,

does not require that the contract itself must be in writing. All that it requires, as argued in the brief, is that "a note or memorandum of the agreement (which could therefore be oral and usually is, in cases where the section is pleaded)" should be produced at the trial. It is further submitted for the appellant that if the agreement itself is in writing, then section 5(2) would not arise or need to be raised as a defence. It was therefore argued for the appellant that the learned trial Judge was clearly wrong in rejecting the evidence of the appellant on the ground that a written agreement was not produced in evidence to prove the agreement. And it was therefore submitted for the appellant that the Court of Appeal fell into error by determining that the plaintiff/respondent did have priority in equity over the appellant with regard to the purchase of the property in dispute. The decision, it is argued was that because the Court of Appeal refused to accept the oral evidence of the appellant to the agreement made in 1975, therefore it is argued that the appellant is entitled to challenge that determination of the Court of Appeal. But, it is then argued for the appellant in the alternative, that if the court should hold that the Court of Appeal did not make a direct determination on the issue, with the resultant basis that the issue was not raised and considered in the court below. The appellant will, at the hearing of this appeal seek leave of Court to raise this issue which it is claimed, a pure point of law. And referred to Akpene v. Barclays Bank (1977) 1 S.C.47. Finally, it is submitted for the appellant that the appel-

lant had actually commenced the re-development and improvement of the disputed property as far back as 1976 (vide contractor's paid invoice dated 23rd February 1976, for N15,000.00 Exhibit Y). In the view of learned Senior Advocate for the appellant, this issue should be resolved in favour of the appellant. Responding to the contention made for the appellant, the first submission made for the plaintiff/respondent in the brief of the plaintiff/respondent is that no issue has arisen as to the relevance of subsection 5(2) of the Law Reform (Contracts) Law of Lagos State, from the decision of the Court of Appeal. It is conceded by learned counsel for the plaintiff/respondent that although the question of the applicability of subsection 5(2) of the Law Reform (Contracts) Law of Lagos State formed part of the basis of the decision of the trial court, the appellant did not appeal on the point to the Court



of Appeal. Therefore, the court below was deprived of the opportunity of considering the matter and reaching a decision thereon.

It is further submitted for the plaintiff/respondent that contrary to the appellant's submission, the question whether there existed an agreement between the appellant and the defendant/respondent for the sale of the property in dispute in August 1975 is not simply a matter of law. In other words, it is argued for the plaintiff/respondent that it is not whether subsection 5(2) of the Law Reform (Contracts) Law, applies or not, but also involves a substantial issue of fact, which is, whether in the light of the evidence before the trial court, could it in any case have found in favour of the appellant that there indeed existed an agreement between the appellant and the defendant/respondent to assign the property in dispute to the appellant in August 1975. These questions were not, it is argued for the plaintiff/respondent, not canvassed before the court below for that court to consider and also reach conclusions that could form the basis of a further appeal to this court. That opportunity has been lost. Therefore, learned counsel for the plaintiff/respondent humbly urges this court to refuse the appellant's application to re-open the issue in this appeal. In support of his prayer, he referred to the following cases:- *Ogundare v Ogunlowo* (1997) 6 NWLR (Pt. 509) 360; *Ikeanyi v African Continental Bank Ltd.* (1997) 2 NWLR

(Pt. 489); 509 at 517 (E-F); (1997) 2 S.C.N.J. 393 at 101.

I think it is convenient to consider first, whether it is open to the appellant to question the decision of the trial court in this appeal that the plaintiff/respondent had an equity prior in time to the appellant, having regard to the pleadings and the evidence. In order to answer this question, I think in this regard, that it is desirable to refer to the relevant portions of the judgment of the trial court. It is also necessary to advert to the evidence relevant to this question. In that regard the learned trial Judge reviewed it thus:

*"It is the case of the first defendant that as far back as 1975 the second defendant agreed to assign to him the unexpired terms of his sublease. On the other hand, the plaintiff's claim is that in 1976 he entered into negotiations with the second defendant for assignment of the sublease, which he eventually got. On his own part, the second*

*defendant denied any agreement to assign the property to the first defendant. He however confirmed that he has assigned the property to the plaintiff."*

This was followed with this apt observation by the learned trial Judge:

*"The main and the crucial issue that has to be decided in this case is whether there was any agreement between the second defendant and the plaintiff on one hand and the second defendant and first defendant on the other hand for the assignment of the property and who in law is really entitled to the assignment of the property."*

This was followed by a further review of the evidence led by the parties, and thereafter, the learned trial Judge said, as follows, at page 227 of the printed record.

*"Agreement to assign the property to the first defendant was pleaded in paragraphs 3 and 8 of statement of claim. There is however no evidence of the agreement in writing and the second defendant has denied making any such agreement."*

*Section 5(2) of the Law Reform (Contracts) Law of Lagos State of Nigeria, which applies to contract of sale of land, provides that "No contract to which this section applies shall be enforceable by action unless the contract or some memorandum or note in respect thereof is in writing and is signed by the party to be charged therewith or by some other person lawfully authorized by him. The onus is on the first defendant to prove by producing evidence in writing that in 1975 the second defendant agreed to assign the property to him since second defendant has denied such agreement. See Burgess v. Cox (1951) Ch. D 383; See also the dictum of Lord Evershed M.R. in Fowler v Bratt (1950) 2 K.B. 96 at 101. In the absence of any note or memorandum signed by the second defendant I am of the view that the first defendant has failed to prove that there was an enforceable contract between him and the second defendant in 1975 as regards assignment of the property"*.

**In the context of this appeal it must be restated that the learned trial Judge clearly held that the appellant failed to prove that there was an enforceable contract between him and the defendant/respondent. Now, as the appellant before this court won before the trial court, it was the plaintiff/respondent who lost before the trial court**

that appealed to the court below. Obviously, he wouldn't have needed to appeal against a point that was resolved in his favour. And the present appellant against whom that point was resolved should be the party who should have appealed to the court below. That he did not do. The learned counsel for the plaintiff/respondent is undoubtedly right in his submission B that having not appealed on this decision of the trial court, the court below had no opportunity to consider whether the decision of the trial court was right for the court below to arrive at its decision. It is, if an appeal was lodged against that decision to this court, which the issue now raised by the appellant could fall for determination in this C court. **It must be remembered that apart from matters which come under section 212 of the 1979 Constitution which relate to disputes between the Federation and a State or between States, the jurisdiction of the Supreme Court is wholly appellate.** This means that outside section 212 of the 1979 Constitution, the Supreme Court can D only adjudicate on a matter on which there has been a decision by the Court of Appeal followed by a proper appeal from that decision. See *Bronik Motors Ltd. v Wema Bank Ltd.* (1983) 1 SCNLR 296; *Attorney General, Bendel State & Ors v P.L.A. Aideyan* (1989) E 4 NWLR (Pt. 118) 646; *Kalu v Odili* (1992) 5 NWLR (Pt. 240) 130 at 164.

In the context of this appeal the trial court found that the plaintiff/respondent by virtue of the agreement reached with the defendant/ F respondent in November 1976 to assign the property in dispute, had a prior equitable interest over the appellant, whose equitable interest in the property was as found to arise and as found by the learned trial Judge, only on the 18th of October, 1978.

Before I conclude on this issue, I do think that it is only right G to refer to the submission for the appellant with regard to section 5(2) of the Law Reform (Contracts) Law of Lagos State, which applies to contract of sale of land which provides that:

H *"No contract to which this section applies shall be enforceable by action unless the contract or some memorandum or note in respect thereof is in writing and is signed by the party to be charged therewith or by some other lawfully authorised by him."*

I have earlier referred to the part of the argument made for the appellant with regard to the above quoted provisions of section 5(2) of the Law Reform (Contracts) Law. But in view of the submission made in the appellant's brief with regard to the construction to be put on the provisions of the Law Reform (Contracts) Law quoted above, B it is in my view desirable that I should re-state the submission made in the said brief

*"Secondly, that section does not require that the contract itself must be in writing. All it requires is that a note or memorandum of the agreement (which could therefore be oral and usually is in cases where C the section is pleaded) should be produced at the trial. It is patent that if the agreement itself is in writing then section 5(2) would not arise or need to be raised as a defence."*

But for the plaintiff/respondent, the contention of learned D counsel as argued in the plaintiff/respondent's brief is plainly to the effect that such a note or memorandum must be in writing.

On this point, I think it is desirable to remember some of the established principles governing the interpretation of the provisions E of a statute. They are:

(1) that it is the intention of the legislature that is being sought i.e. the intention of the "writer" of the document.

(2) that that intention is to be desired from the words of the F Act alone and not from other sources.

(3) that the words used are to be given their "ordinary and natural sense" i.e., the legislature is to be presumed not to have put a special meaning on words.

(4) that the court is not concerned with the result of its interpretation: it is not the court's province to pronounce on the wisdom or G otherwise of the Act but only to determine its meaning. (See *Pearce*, *Statutory Interpretation* page 13).

**Applying these principles to the provisions of section 5(2) of the Law Reform Contracts Law, it would seem to me quite clear H that the ordinary meaning of its provisions with regard to the requirements of the note or memorandum in respect of a contract has to be in writing and which must be signed by the party charged therewith. It is of course not in doubt that where the contract has**

been drawn up between the parties and executed properly, a note or memorandum of that contract would not be necessary. It is necessary also to note that the provisions under consideration is in pari materia with section 4 of the Statute of Frauds Act 1677 of England which was re-enacted as section 40 of the Law of Property Act 1925. It follows therefore that the position of the English courts on the interpretation of its provisions ought to provide a useful guide in the circumstances.

On this point, may I refer to the case of Burgess v. Cox (1951) Ch.D 383 at 388 where the following observations were made:

*"The next defence is that there is no note or memorandum of the contract signed by or on behalf of the party to be charged, namely, the defendant, sufficient to satisfy s. 40 of the Law of Property Act, 1925." It is surprising at this date to find a new point arising out of this section, which together with its predecessor, s. 4 of the Statute of Frauds, has been under judicial fire for over two centuries. It is well known that the terms of the memorandum need not all be contained in one document, but may be spread over many ... There is no direct reference in one document to the*

*other, but it is now settled that this is not essential, and that references in a later document to an agreement may be explained by parol evidence; and if that evidence leads to another document containing the terms or the rest of the terms the memorandum is complete ... It has, however, been decided that if the reference in the later writing be not to a written agreement but only to terms agreed by parol, there is no enforceable contract."*

See also Fowler and Bratt (1950) 2 KB 96 at p.101. In this case, one of the questions that arose was whether two letters between the parties constituted a note or memorandum of contract as to bind the purchaser according to the principles of section 40 of the Law of Property Act, 1925. Lord Evershed M.R. on page 101 stated thus:

*"The general principle is thus stated, I think accurately, in William; on Vendor and Purchaser (4th ed.) vol. 1, Pp.20 and 21: Here we may notice that, when it is sought to "establish a contract by letters which have passed between "different parties, the court will take into consideration the "whole of the correspondence which has passed, and*

Ejuetami v. Olaiya (2001) 12 KLR Ejiwunmi JSC 3503  
*will "not necessarily draw the line at any particular letter or "letters, which might have afforded evidence of a contract "if considered apart from the rest."*

The last point I wish to touch in respect of this issue has to do with the submission made by learned counsel for the appellant that consideration be given to the question raised in this appeal in spite of the fact that there was no decision of the lower court in respect of the matters raised under this issue. The principle under which this court was invited to consider this question was the position of this court in the case of K. Akpene v Barclays Bank of Nig. Ltd & anor. (1977) 1 S.C. 47. In that case, this court in the judgment delivered by Obaseki JSC stated thus:

*"The general rule adopted in this court is that an appellant will not be allowed to raise on appeal a question which was not raised or tried or considered by the trial court (Shonekan v Smith (1964) ANLR 168-173) but where the question involves substantial points of law, substantive or procedural and it is plain that no further evidence could have been adduced which would affect the decision of them, the court will allow the question to be raised and the points taken (Shonekan and Smith)(supra) Stool of Abinabina v Chief Kojo Enyinadu (1953) AC 209 at 215 and prevent an obvious miscarriage of justice."*

**The learned counsel for the respondent has argued very strongly in his brief that this is not the kind of case in which such leave ought to be granted to the appellant. The premise of his submission is that the appellant would have to, in the circumstances of this case, call fresh evidence to which they would also need to call evidence in rebuttal. That submission is well taken. Having regard to the principle in Akpene v. Barclays Bank of Nigeria (supra), I do not think that this is a proper case for which leave ought to be granted and I so hold. It follows from all that I have stated above, that the issue must be resolved against the appellant, and it is hereby so resolved.**

The question raised by the 2nd issue, which now falls to be considered is, whether the Court of Appeal was right in entering judgment for the plaintiff/respondent on the ground that the appellant had been guilty of delay - a defence not raised by the pleadings of the adverse parties - with the appellant having satisfied the conditions prescribed

by the Court of Appeal for acquiring a better right to call for the legal estate.

The submissions made for the appellant in the appellant's brief in respect of this issue are two pronged. The first prong is against that part of the judgment of the court below where it was observed that the problem in the instant appeal is that it does not raise simpliciter a question of competing legalities or of competing equitable interest. Appellant's contention is that having regard to the facts of the case, and court below upon a proper view of the legal effect of the same, the appeal need not have gone against the appellant. This is more so where the court below inserted some qualifications for the appellant to secure a better right to the legal estate, were either satisfied or made unnecessary by relevant legal authorities.

The second prong of the submissions made for the appellant is that the Court of Appeal was in grave error in bringing in the issue of "Delay" as a factor, which disentitled the appellant to its judgment. In support of the submissions made for the appellant, reference was made

to Snell's Principle of Equity 27th Edition, and the case of Hunmuani Ajoke v Oba & Anor (1962) 1 All NLR 73. The argument of the defendant/respondent in response to the submissions made for the appellant may be summarised thus:- firstly, it is argued that the court below was right to have disagreed with the conclusion reached by the trial court in its interpretation and applicability of the decision in Hunmuani Ajoke 50 case (supra). It is also contended for the appellant that the submission made on the issue of delay for the appellant is misconceived and should be discountenanced. This is more so because the documents that were examined were tendered by the appellant as evidence of his contract for the purchase of the property in dispute. And in order to determine the competing claims of the appellant and the plaintiff/respondent it is only right that the documents each party relied upon to support their respective cases should be properly considered by the court.

I will now consider whether the appellant is right in his submission that he had established a better right to the property in dispute. Before I go further with the consideration of the argument for the appellant, I think it is only right to observe that the court below cannot

be faulted upon the observation made that the problem raised is simply a matter of priority.

However it seems clear from the argument in the appellant's brief that the real complaint of the appellant is that the lower court wrongly resolved the competing interests of the parties in the disputed property. In the resolution of whether the appellant's contention deserves to be upheld, I think it is desirable to refer, howbeit briefly, to some of the pertinent facts found by the court below. It is clear that the appellant was from 1974 a tenant of the defendant/respondent until he paid N15,000.00 in October 1978 as part payment of the N50,000.00 agreed upon orally for the assignment of the lease to him. Although the defendant/respondent claimed the N15,000.00 as rent, the learned trial Judge found against him on this point. It is common ground that the trial court therefore held that the equitable interest of the appellant arose from October 1978. On the other hand, it is also not in dispute that the plaintiff/respondent was granted an equitable interest in the same property in dispute, 38 Oba Akran Avenue in November 1976, by virtue of

Exhibits E-F.

Exhibit F reads in part thus:

*"Exhibit 'F' - Agreement dated 14/11/76*

*TEMPORARY AGREEMENT BETWEEN MR. A.O. AKABA AND CHIEF BEN O.OLAIYA It has been agreed between MR ALFRED O. AKABA of Bendel State Medical Stores, Benin City, owner of the premises situated at No 38 Oba Akran Avenue, Ikeja.....That the owner of the said property has agreed with his letter dated 11th October, 1976 that he will accept a deposit of N3,000.00 for the said property on signing this agreement. That once this amount is deposited, the owner will prepare all documents related to the sale of this property and the necessary transfer of ownership to follow coupled with all tenants vacating the said premises after which the balance of N40,000.00 will be paid by transfer."*

"Exhibit E" dated 26/11/76 is a letter with which the defendant/ respondent acknowledged the receipt of the plaintiff/respondent's cheque for the N3,000.00 and it further said:

*"I have paid this into my account and as soon as my banker*

*confirms payment, I shall sign and despatch to you the agreement you enclosed with the above mentioned cheque.”*

It is manifest from the evidence on record that the proceeds of the cheque for N3,000.00 was received by the defendant/respondent, who in turn signed Exhibit F. Thus the plaintiff/respondent obtained an equitable interest in the property in dispute in November 1976. In 1981 the property in dispute was conveyed to the plaintiff/respondent by the defendant/respondent.

In order to determine whether the decision of the trial court that the plaintiff/respondent was not entitled to be adjudged as the holder of legal estate in respect of the disputed property, the court below after referring to such authorities as *Cole v. Folami* (1956) 1 F.S.C. 66, said inter alia thus:

“... Only a purchaser for valuable consideration who obtains a legal estate at the time of his purchase without notice of a prior equitable right is entitled to priority in equity as well as at law. In

*such a case, equity follows the law, and where the equities are equal, the law also prevails. In law and equity also, a purchaser of an equitable interest without notice takes free from a prior equity if his purchase gave him the better right to a legal estate. In other words, assuming that the first defendant had no knowledge of the prior equity of the plaintiff when he paid his balance of N35,000.00 and the 2nd defendant accepted same the 1st defendant would have had a better right to the legal estate, unless there are circumstances which make it inequitable for him to do so.”*

No exception was taken to the summary of the law stated above with regard to how equitable interests are considered particularly where there are competing equitable interests in respect of the same property. Indeed, it was submitted for the appellant that the passage from the judgment of the court below tallies totally with what the trial court said at page 400 of the Record. Now, the case being made for the appellant is that the court below ought to have awarded judgment to the appellant in that the appellant fulfilled the qualifications inserted by the court below in the said passage of the judgment.

The first of such qualifications identified by the appellant is that the appellant had no knowledge of the prior equity of the plaintiff/respondent

when he paid his balance of N35,000.00. This was answered for the appellant in the appellant's brief that the appellant had no knowledge of the prior equity of the plaintiff/respondent. There is no dispute between the parties, it is not necessary to say more on this. The second qualification put forward by the appellant is that the defendant/respondent accepted the sum of N35,000.00 from the appellants. It is the contention of the appellant that the Court of Appeal seemed to have taken the mistaken view that this second condition with regard to the payment of N35,000.00 was not made by the appellant. It would appear that that contention was based on what was said in the court on the judgment applied by Awogu JCA said on page 400 of the record, It reads:

*“True, the 1st defendant tendered his balance and would have had a better right to the legal estate, but the 2nd defendant refused to perfect the title (in fact, returned the money) and rather took that of the plaintiff (whose equity was prior in time) and conveyed the property to him in payment.”*

Based upon this passage, the appellant is contending that the court below was wrong to have formed the view that the appellant did not pay the remaining balance of N35,000.00 required of him to complete the purchase of the disputed property. Appellant went on to argue that payment once offered, whether by cash or cheque does not matter even if the vendor refuses to accept what is offered or hereafter failed to forward the cheque for clearance or it is returned to the vendor later. The case of *Hunmuani Ajoke v Oba & Anor* (1962) 1 ALL NLR 73 was cited in support of this proposition.

In order to put in proper focus the appellant's contention, I think it is desirable to examine what was decided in the case of *Hunmuani Ajoke v Oba & Anor* (supra), this is germane to the questions under consideration. The basic facts of this case as relevant for our consideration are; that on the 21st January 1957, the first defendant Amusa Yesufu Oba, obtained judgment against the plaintiff for a declaration of title to, and possession of a piece of land on which she had erected a building. Thereafter negotiations took place between the two and on the 14th February 1957, they entered into a written agreement, Exhibit F, by which the first defendant agreed to sell the piece of land to the plaintiff for three hundred pounds sterling. One hundred pounds

sterling of the purchase money was paid the same day, payment being acknowledged in the agreement, and as regards the remainder the agreement provided:-

B *“the balance of two hundred pounds sterling to be paid in full on or before the 31st day of March, 1957. Otherwise the vendor shall be at liberty to sell the said property to any other intending purchaser and refund the part payment to the purchaser.”*

C Though there was conflict of evidence as to whether the balance was tendered before the 31st March, or at all. However, the learned trial Judge accepted the evidence of the plaintiff that the sum of two hundred pounds sterling had been tendered by the plaintiff to the first defendant before 31st March, 1957 and that the second defendant was aware of the tender and of the plaintiff's in the property. This decision was one of the issues raised on appeal to the Federal Supreme Court. D The court in the course of its judgment upheld the trial Judge's finding that the plaintiff had tendered the sum of two hundred pounds sterling to the first defendant before the 31st March 1957, and that the second defendant knew of her interest in the property. The court also set aside the conveyance made in favour of the 2nd defendant, and it was further ordered that he should join with the 1st defendant to convey the property to the plaintiff. E

F ***It is my respectful view that the case of Ajoke v. Oba & Anor (supra) is certainly no authority for the proposition that the vendor of a property cannot in any circumstances refuse to accept the payment of a vendor to complete the purchase price for the sale of property which the parties had agreed would be sold for a certain sum. The case in my view duly recognized the prior interest of the plaintiff as against the second defendant. And that as the second defendant was aware of the interest of the plaintiff in the property, it is inequitable for him to be allowed to remain the owner of the property, which was conveyed to him by the 1st defendant. The plaintiff it was held had a better right to the legal estate.*** G

H Reverting to the instant appeal, I think the court below was right to have held that the decision in the Ajoke v. Oba & Anor's case is not on all fours with the facts found in the instant appeal. Here, the plaintiff/respondent in this appeal is the person with prior

equity and with no knowledge of a later equity and therefore possessed a better right to the legal estate. Support is found for this view in Robert Taylor & Anor v. Russel & Anor (1892) A.c. 244, where Lord Macnaghten said at p. 259, thus:

B *“It is admitted that by this transaction Russell acquired the legal estate, and it is not disputed that an equitable mortgagee who has advanced his money without notice of a prior equitable mortgage may gain priority by getting in the legal estate unless the circumstances are such its to make it inequitable for him to do so, as would be the case, for example, if the legal estate were held upon express trusts or, C according to recent authorities, if it were vested in a satisfied mortgagee. The mere fact that the subsequent incumbrancer has notice of the prior incumbrance when he gets in the legal estate counts for nothing. “It is” as Lord 1 Hardwicke* D

says, “the very occasion which shews the necessity of it.” See also Cave v.Cave (1880) 15 Ch.D 639; Re Nisbet & Potts Contract (1900) 1 Ch.D 386.

E ***It is manifest from the above statement of the principle that an equitable mortgage who has advanced his money without notice of a prior equitable mortgage may gain priority by getting in the legal estate unless the circumstances are such as to make it inequitable for him to do. Applying this principle to the case in hand, the plaintiff/respondent was the possessor of an equitable interest in the property in dispute without notice of the subsequent equitable interest. The plaintiff/respondent thereafter obtained legal estate. The legal estate he has so obtained remains with him unless it can be shown that the plaintiff/respondent acted inequitably in getting in the legal estate.*** F G And also for the reasons earlier given with regard to the contention made for the appellant that a vendor cannot under any circumstances refuse to accept money paid in cash or cheque to complete the purchase price in respect of the property by a person with an equitable interest in the property, is stated far too widely than the H authorities permit. I will therefore reject that contention made for the appellant.

It has also been argued for the appellant that the court below fell into error by importing “Delay” as one of the reasons for not

upholding the case of the appellant, when the parties did not by their pleadings plead same. There is of course no doubt that the court below referred to letters written by the defendant/respondent to the appellant. These letters were clearly pleaded by the appellant in paragraph 14 of his further amended statement of defence and counter-claim. And he pleaded thus:

*“Par 14 - The defendant avers that Mr. Akaba wrote him several letters in connection with the transaction on this house now in dispute. The defendant will rely at the trial of this case on the letters dated*

*1. 1st July 1977*

*2. 26th July 1978*

*3. 4th October 1978*

*4. 2nd January 1979*

*5. 22nd May 1979*

*6. 30th July 1979.”*

**It is trite law that parties are bound by their pleadings.** See Odogwu v. Odogwu (1990) 4 NWLR (Pt. 243) 224, 234; Alhaji D.S. Adegbenro v. The Attorney General of the Federation (1962) 1 All NLR 431; George & Ors v. Dominion Flour Mills Ltd. (1965) 1 All NLR 71. **The letters, which as I have earlier stated were admitted in evidence during the trial. It is evident from the pleadings that they were primarily tendered by the appellant to prove his own equitable interest in the disputed property. Though the documents were pleaded and tendered primarily for this purpose, they became available, in any event, for full consideration by the court. A cursory reading of the exhibits portrayed the anxiety of the defendant/respondent that the appellant should comply with his own side of the bargain. It is my humble view that the court below was right to have adverted to the various letters, Exhibits P-U to consider whether the appellant had not been guilty of delay in concluding his own side of the transaction by paying the remaining sum agreed upon for the sale of the property in dispute.** It must be borne in mind that the court below was in the context of that judgment considering the appeal as between the appellant and defendant/respondent. This was done, in order to determine whether an order of specific performance

could be made against the defendant/respondent in respect of the disputed property. And it was for this reason that the court below referred to the case of Florence Coker v. Ajewole (1976) 9- 10 SC 17. But in the case under consideration an order of specific performance could not have been made as the view of the court below had already held and quite rightly that the property had been conveyed to the plaintiff/respondent. That order sought by the appellant was therefore rejected. However the court below went on to consider the claim of the appellant for N150,000.00 for general damages for breach of contract. The court below then upheld the claim against the defendant only and the sum of N150,000.00 was then awarded to the appellant. **It follows from the**

**observation made above that in the context of this appeal, the fact that the appellant’s case was not upheld by the Court of Appeal cannot be ascribed to the allegation of “Delay”. That question in my view relates as already observed to the consideration given by the court below to whether the appellant had established an equitable estate in the disputed property. I will therefore for all reasons given above resolve all the questions raised in respect of the issue against the appellant.**

With regard to the third issue raised by the appellant, the question posed is whether the owner of a prior equitable interest not liable to be postponed to a subsequent equitable on account of fraud, whether the same occurred before or after the acquisition of the prior equitable estate. The contention made for the appellant in respect of this issue was principally directed to the failure of the Court of Appeal to reverse the ranking of the prior equitable interest of the plaintiff/respondent over that of the appellant on the ground of fraud. The fraud of the plaintiff/respondent, according to the contention of the appellant must not be limited to the conduct of the plaintiff/respondent before the acquisition of his equitable interest in the property in 1977, but right to when he acquired the legal estate in respect of the disputed property in 1981. It was therefore argued that the court below completely misconstrued the evidence and the judgment of the trial court with regard to the fraud of the plaintiff/respondent with regard to the acquisition of the legal estate in respect of the property, when the Court at page 405 of the Record said:

*“No fraud arose with respect to the competing equitable interests of both the plaintiff and the 1st defendant, and nor is there a question of estoppel as the learned Judge sought to suggest at p.249. The issue was simply a matter of priority.”*

B Being of the view that by the above quoted passage from the judgment of the court below, that court wrongly dismissed the fraudulent conduct of plaintiff/respondent by what it said in that passage. It was therefore submitted for the appellant that by that decision, the court below is saying that no amount of fraud perpetrated by the plaintiff/  
C respondent between the acquisition of his equitable interest in the

property and the acquisition of his legal estate could defeat the legal estate which he only got in 1981. Whereas it was further argued that the appellant told the plaintiff/respondent of his interest in the property and that he had in fact purchased it in 1979.

D In support of his submission, reference was made to Snell’s Principles of Equity 27th Edition at pages 545-546; and to the case of Rafat v. Ellis (1954) 14 WACA 430. Responding, it was argued for the plaintiff/respondent that the court below did not misconstrue the  
E issue with regard to the allegation of fraud in its judgment. This court was invited to note that the legal estate was vested in the defendant/respondent throughout the period under consideration until he released it to the plaintiff/respondent in 1981. The court was then invited to  
F resolve this issue against the appellant.

Before considering the arguments of counsel reviewed, the primary question raised in the issue would be dealt with first. This is with regard to this question, as to whether the holder of a prior equitable interest is not liable to be postponed to a subsequent equitable interest on account of fraud, whether the same occurred before or after the  
G acquisition of the prior equitable estate. In order to answer this question, reference would here be made to what the learned authors of the 17th edition of Snell’s Principles of Equity stated of the applicable rule at pages 45-46 thus:

H *“At law, as in equity, the basic rule is that estates and interest primarily rank in the order of creation. Qui prior est tempore potior est jure; he who is earlier in time is stronger in law Again, where there are two competing equitable interests, the general rule of equity is that*

*the person whose equity attached to the property first will be entitled to priority over the other. Where the equities are equal and neither claimant has the legal estate, the first in time prevails.”*

And at page 56 of the same publication, i.e. Snell’s Principles of Equity, there is the statement under the heading ‘Fraud, Estoppel  
B and Gross Negligence the following:

*“A person with a prima facie claim to priority for his interest may lose it through his own misconduct. The owner of a legal interest may be postponed to a subsequent equitable interest owing to his fraud, or by estoppel or through his gross negligence, and the owner of a prior  
C equitable interest may be postponed if his conduct is inequitable.”*

**Therefore the answer to the question raised in the issue may be put thus:**

*“It seems clear from the above rules that it is the general rule  
D of equity that the person whose equity is attached to the property first will be entitled to priority over the other. It is also manifest that the owner of a prior equitable interest may be postponed if his conduct is inequitable.”*

**It would appear also, that the person who is alleging the  
E fraud has the burden of proving it. The general principle that I have stated above was considered and decided upon in the House of Lords of England in Taylor v Russel (supra).** The relevant portion of the judgment of Lord Macnaghten has been reproduced above.  
F However for present purposes, I deem fit to quote that portion of his Lordship’s judgment where at page 245, he said:

*“It is therefore incumbent upon the appellants who were the  
G plaintiffs in the action to show that Russel acted inequitably in getting in the legal estate or that there is some which prevents him from availing himself of its protection.”*

It follows therefore that in the instant appeal, the appellant has the burden of proving the fraud alleged against the plaintiff/  
H respondent to prevent him from getting the legal estate on the basis of his prior equitable interest in the property. Though the appellant raised the alleged fraud in the trial court and was accepted, that finding was rejected by the court below. In this context, the court below at page 401 of the printed record said, inter alia, thus:

*“True, fraud might well have altered the circumstances, but*



*the fraud pleaded was not knowledge of the 1st defendant's equitable interest in the assignment (being at the time a tenant), but knowledge that later the plaintiff knew of improvements in the said property by the 1st defendant who also told him that he had purchased the property, as of December 1979, when the 1st defendant tendered the N35,000.00 which the 2nd defendant did not accept. In the first instance, I believe that if the equitable (sic) are equal and the plaintiff got to know of a later equity trying to supplant his, he was as a matter of prudence, entitled to alter the position of the later equity with a right to the legal estate, by completing his own position and thereby becoming the first to obtain a conveyance and a legal estate."*

**Having regard to the above, it seems clear that the court below duly, considered the finding of fraud made against the plaintiff/respondent, and that finding was rejected by the court below. The reason given for the view of the court below suggests that, for an allegation of fraud to be effective to set aside the legal interest obtained by the plaintiff/respondent, there must be evidence that he connived or colluded with the defendant/respondent, to the detriment of the interest of the appellant. It is my humble view that the conduct of the plaintiff/respondent ought not to have been held as fraudulent because he took steps to improve his equitable interest in the property by getting in the legal estate from the plaintiff/respondent. The appellant, who has the burden of proving that the conduct of the plaintiff/respondent was inequitable, has not been able to discharge this burden.** The case of Rafat v. Ellis (supra) which was brought to our attention by the appellant and which I have read is not apposite having regard to the facts of this case. I need not comment any further on it.

In the result and for all the reasons I have given in the course of this judgment, I am clearly of the view that this appeal lacks merit. It is therefore dismissed by me. The appellant's success in the court below against the 2nd defendant/respondent remains undisturbed, as the 2nd defendant/respondent has not filed any appeal against that order.

### KARIBI- WHYTE JSC

I have had the privilege of reading the judgment of my learned brother Ejiwunmi JSC in this appeal. I agree that the appeal be dismissed. I also will and hereby dismiss the appeal. I abide by the costs awarded in the leading judgment.

### OGUNDARE JSC

The property situate at 38, Oba Akran Avenue Ikeja District of Lagos State once belonged to A. O. Akaba, the 2nd defendant in these proceedings. Mr. Akaba who had a leasehold title over the land, in September, 1974, let the property to W. T. Ejuetami, the 1st defendant. Sometime in August 1975 Akaba agreed orally to sell the property to Ejuetami but no payment passed from the latter to the former. In November 1976, Akaba agreed in writing to assign the remainder of his leasehold interest to the said property (hereinafter is referred to as the property in dispute) to Chief B. O. Olaiya, the plaintiff in these proceedings. The plaintiff paid a part of the agreed purchase price to Akaba, the 2nd defendant in February, 1977. A deed of assignment dated 23rd February 1981 and assented to by the Governor of Lagos State, was executed by the 2nd defendant in favour of the plaintiff, on the latter paying the balance of the purchase price.

Meanwhile, 1st defendant/who was all along a tenant of the 2nd defendant and to whom the latter had agreed orally to sell the property in dispute remained in possession of the said property, paying rent to the 2nd defendant. In October 1978, the 1st defendant made a part payment of N15,000.00 to 2nd defendant for the purchase of the property in dispute, leaving a balance of N35,000.00 which the former paid to the latter by cheques in two instalments of N5,000.00 and N30,000.00 in December 1979. The 2nd defendant referred to cash the cheques and returned them to the 1st defendant. Consequently upon his making the first payment of N15,000.00 the 1st defendant on his initiative made improvements to the property thus enhancing its value.

On his purchase of the property from the 2nd defendant, the plaintiff wrote to the 1st defendant asking him to pay future rents to

plaintiff as the new landlord. When the 1st defendant would not pay, plaintiff, through his solicitor, gave notice to the 1st defendant to quit the premises. And when the latter would not quit, he instituted the action leading to this appeal claiming as per his amended writ of summons:

B “... possession and N300.00 for arrears of rents for the months of March and April, 1981 and mesne profits at the rate of N150,00 per month, being at the rate of the rent of the said premises from the 1st day of May, 1981 until possession is given up. And interest at the rate of 10% per annum from 1st March 1981 until judgment and thereafter at C the rate of 4% per annum until payment. A declaration that the plaintiff is the lawful Assignee of the sublease in respect of No. 38 Oba Akran Avenue, Ikeja Lagos and registered as No. 95 at page 95 in Volume 1818 of the Lands Registry, Lagos.”

D The 1st defendant in paragraph 21 of his Further Amended Statement of defence and counter-claim, counter-claimed against the plaintiff and the 2nd defendant (as defendants to the counter-claim) as hereunder:

“21. The defendant/counterclaimant repeats paragraphs, 1 to 20 of the statement of defence and further claims as follows:

E A. An order to set aside the purported Deed of Assignment between Mr. A. O. Akaba and B. O. Olaiya in respect of the property at No. 38 Oba Akran Avenue Ikeja dated 23/1/81 and registered as No. 95 at page 95 in volume 1818 of the Land Registry in the Office at Lagos on the following grounds:

- F (a) fraud  
(b) Illegality  
(c) Breach of Contract  
PARTICULARS OF FRAUD

G (i) The plaintiff having got knowledge of the defendant's purchase of the property and improvements thereon, induced the vendor Mr. Akaba to sell the property to him at a higher price and execute a Deed of Assignment in his favour:

(ii) The vendor, Mr. Akaba, kept the original N15,000 paid to him by the defendant/ counterclaimant in his pocket and returned at a later hour the two cheques for N35,000 balance for no justified reason.

H (iii) The plaintiff knowing fully well, the expenses of the defendant on the property, went ahead with a purported transfer in 1981 and now claims the house with all the improvements thereon which have

enhanced the value of the property considerably.

(iv) The vendor, Mr. Akaba never presented the two cheques for N35,000 to the Bank in Benin City for payment, before he returned them to the defendant as unpaid.

(v) The plaintiff made the alleged purchase in bad faith, having got the previous knowledge of the defendant/counterclaimant interest B in the property.

B. An order for specific performance of the oral agreement to assign the remainder of the lease of 39 Oba Akran Avenue Ikeja to the defendant counter-claimant on payment of the balance of N35,000 to C the vendor through the court. Or in the alternative - claim for N150,000 damages against the defendants to counterclaim for breach of contract, and to enable the defendant/counterclaimant to purchase a similar property in the vicinity.” (italics mine)

He gave the particulars of damages as follows: D

“And the 1st defendant counterclaimant claims against the defendants special damages as follows:

Renovation of Building .....	N10,000.00	
Erection of additional structures and offices .....	N25,000.00	E
Concreting of the floor of the backyard		
as per paid invoice dated 20/12/78 .....	N8,000.00	
Filing (sic) of the front yard with earth		
& granite levelling as per paid invoice dated 7/7/79.....	N5,000.00	
F Wall fencing as per paid invoicedated 2312/76 .....	N15,000.00	F
	N63000.00	
General damages for breach of contract.	N87,000.00	
Total.	N150,000.00	

He claimed, in the alternative, thus: G

“The defendant/counterclaimant says that the purported assignment of the property to the plaintiff by Mr. Akaba is tainted with fraud, and illegality, and is therefore null and void and of no effect whatsoever. And that defendant/counterclaimant maintains that he is the rightful and lawful assignee of the house subject matter of this H action”

The three parties filed and exchanged their respective pleadings and, by leave of court, amended same. The action eventually went to trial at the conclusion of which, the learned trial Judge (Hotonu, J)

dismissed the plaintiff's case and found for the 1st defendant on his counter-claim. The learned Judge adjudged as follows:

*"My judgment will therefore be as follows:*

*(a) The plaintiff's claim against the first defendant for arrears of rent having failed is dismissed;*

*(b) The plaintiff's claims for declaration as lawful assignee of the property and possession failed and also dismissed;*

*(c) The deed of assignment between Mr. A. O. Akaba and Chief B. O. Olaiya in respect of the property at 38, Oba Akran Avenue, Ikeja dated 23rd February, 1981 and registered as No. 95 at Page 96 in Volume 1818 Lands Registry in the Office at Lagos is hereby set aside.*

*(d) An order that on a date to be agreed by the parties and their counsel but not later than 15th May, 1985 the parties should meet in the office of the Deputy Chief Registrar, Ikeja, where the first defendant should issue and present to the second defendant a bank certified cheque for N35,000.00 and at the same time on the same day a deed of assignment of the sublease of the property at 38, Oba Akran Avenue, Ikeja, should be executed by the plaintiff and the second defendant, Chief B. O. Olaiya and Mr. A. O. Akaba respectively in favour of the first defendant, Mr. W. T. Ejuetami. It is also ordered that record in the Land Registry should be rectified accordingly."*

Being dissatisfied with this judgment both the plaintiff and the 2nd defendant appealed to the Court of Appeal which in a unanimous decision, allowed the appeal of the plaintiff and dismissed that of the 2nd defendant but varied the judgment of the trial court in respect of the 2nd defendant. The Court, per Awogu JCA, adjudged:

*"In the circumstances, the appeal of the plaintiff/appellant succeeds, and the judgment of Rotonu J. dated 2nd of May, 1985, is hereby set aside. In its place, judgment is hereby entered for the plaintiff/appellant for possession of the property at 38, Oba Akran Avenue, Ikeja, Lagos State, with effect from sixty days from today, when the 1st defendant/appellant must give up the possession. The plaintiff/appellant is also entitled to the arrears of rent for March and April, 1981, at N150.00 per month and thereafter to mesne profits at N150.00 per month from May 1981 until possession is given up, as ordered, by the 1st defendant/appellant. This might have been the end of the judgment but for the notice to vary the judgment by entering judgment*

*for N150,000.00 against the 2nd defendant/appellant as damages for breach of contract. As stated earlier, the 2nd defendant/appellant withdrew his appeal, with knowledge of this finding against him but with respect to which the learned Judge did not enter judgment for the 1st defendant. In the circumstances the judgment of Hotonu J. dated 2nd May, 1985, is hereby varied, and judgment is hereby entered against the 2nd defendant, and in favour of the 1st defendant, in the sum of N150,000.00 being damages for breach of contract. The cost of this appeal is assessed at N600.00 in favour of the plaintiff/appellant and against the 1st defendant/respondent. The 1st defendant/respondent is hereby also awarded N60.00 as the cost of this appeal, against the 2nd defendant/appellant. The appeal of the 2nd defendant/appellant is hereby dismissed but with no order as to costs."*

The 1st defendant has now appealed to this court against the judgment of the Court of Appeal. The 2nd defendant did not appeal and did not take part in the proceedings in this court. Both the plaintiff and the 1st defendant filed and exchanged their respective briefs of arguments. In the appellant's brief, the 1st defendant posed three questions as calling for determination in this appeal, to wit:

*"1. Was the Court of Appeal right in holding that the plaintiff had an equity prior in time having regard to the pleadings of the parties and the evidence?"*

*2. The 1st defendant/appellant having satisfied the conditions prescribed by the Court of Appeal for acquiring a better right to call for the legal estate, was the Court of Appeal right in entering judgment for the plaintiff on the ground that the 1st defendant/respondent had been guilty of delay - a defence which was not raised in the pleadings of the adverse parties?"*

*3. Is the owner of a prior equitable interest not liable to be postponed to a subsequent equitable interest on account of fraud whether the same occurred before or after the acquisition of the prior equitable estate?"*

For his part the plaintiff in his respondent's brief raised five questions as arising from the grounds of appeal. These are:

*"Issue No.1: (Based on Ground 5)*

*Whether the evidence offered by the 1st defendant/appellant that he had acquired an equitable interest in the subject property since*

1975 was wrongly rejected by the trial court, and whether in the circumstances it was proper for the trial court to have invoked as he did the provision of sub-section 5(2) of the Law Reform (Contracts) Law of Lagos State for rejecting the evidence.

Issue No.2: (Based on Ground 4)

B Depending upon how issue No.1 is resolved, who between the plaintiff/respondent and the 1st defendant/appellant has the prior equitable and legal interest in the property No. 38 Oba Akran Avenue, Ikeja.

Issue No.3: (Based on Ground 3)

C Whether the plaintiff could be said to be guilty of such fraud against the 1st defendant as to deprive him of the benefit of his prior equitable interest in the property in dispute.

Issue No 4. (Based on Ground 1)

D Whether the mere delivery of cheques by the 1st defendant to the 2nd defendant without the latter acknowledging same amount to payment under the law.

Issue No 5: (Based on Ground 2)

E Whether it could be said, having regard to the tenor of its entire judgment that the Court of Appeal in fact based its decision on delay by the 1st defendant to pay the balance of the purchase price to the 2nd defendant, and if so, whether the Court of Appeal could be said to be right in doing so."

F As these latter questions are subsumed in the three questions formulated by the 1st defendant, I shall, in my consideration of this appeal adopt the questions raised by the 1st appellant.

#### QUESTION 1- Priority in Equity:

G The 1st defendant, in his further amended statement of defence and counter-claim pleaded, inter alia, as follows:

3. The defendant avers that he was a tenant of Mr. A. O. Akaba in respect of the house, now in dispute from September 1974 to September 1978. And in August 1975, through the influence of his cousin, Mr. A. O. Akaba agreed to sell the remainder of his interest in the house to the defendant for N50,000.00 payment to be made when H Akaba get (sic) his deeds of lease on the land and retires from Service.

XXXXXXXXXX

6. The defendant avers that on the 18th day of October 1978, he went to Mr. Akaba in Benin City and paid him N15,000 (Fifteen thousand Naira) as part-payment of the agreed purchase price of the house. And that the ceremony took place in the presence of some members of the family who blessed the transaction with Cola and Wine (Mr. AO. Akaba is a cousin to the defendant). B

7. The defendant avers that it was equally agreed between him and Mr. A. O. Akaba that the balance of N35,000 be paid as soon as business improves because Mr. Akaba too is now part of the business of the company for which the house is being used. C

8. The defendant with specific reference to paragraph 7 of the statement of claim avers that the plaintiff has no interest in the house subject matter of this suit, because the original lessees has assigned the remainder of his interest therein to the defendant by agreement in 1975 for valuable consideration. D

9. The defendant avers that Mr. Akaba had no more interest in the property but in the proceeds of the assignment since 1975, and as such could not have assigned to the plaintiff in 1981 as "Nemo Dat Non Quad Habet." (Italics mine) E

Testifying at the trial in support of the above averments, the 1st defendant said:

"As from September, 1974, I was a tenant in the house. In August 1975 Mr. A O. Akaba offered to sell the house to me for N50,000.00. He agreed that payment could be made when he got his deed of lease in respect of the house and retired from service. I told Mr. Akaba that I wanted to use the house as the head office of my company. For offering to sell the house to me I promised to offer him employment in my company when he retired from civil service. He agreed. I was paying N100 a month as a tenant in the house. F G

In September, 1974 I issued a cheque for N3,600.00 to Mr. A O. Akaba to cover rent for three years in respect of the house. In 1977 September, I issued to Mr. Akaba another cheque for N1,000.00 as rent for 10 months ending in July 1978. Mr. Akaba said that the rent should be increased from N100.00 to N150.00 a month. I agreed and after July 1978 I started to pay rent at N150.00 per month. H

On resumption of his evidence on a subsequent date, the wit-

ness further said:

*"After Mr. Akaba offered the property to me for sale in 1975, I carried out (in 1976) concrete fencing of the property. It cost me N5,000.00. The work now (sic) done by a contractor called Mr. Adeyemi. He is a building contractor. I paid him N15,000.00 for concrete B fencing."* (italics mine)

The learned trial Judge, in relation to the claim of the 1st defendant that he entered into an agreement with the 2nd defendant in August 1975 for the sale of the property in dispute to him, found:

*"Agreement to assign the property to the first defendant was C pleaded in paragraphs 3 and 8 of statement of (counter) claim. There is however no evidence of the agreement in writing and the second defendant has denied making any such agreement."*

*Section 5(2) of the Law Reform (Contracts) Law of Lagos State of Nigeria which applies to contract of sale of land provides that -*

*'No contract to which this section applies shall be enforceable D by action unless the contract or some memorandum or note in respect thereof is in writing and is signed by the party to be charged therewith or by some others lawfully authorised by him.'*

*The section of the law reproduced above incorporates section E 4 of the Statute of Fraud 1677 of the Parliament of England.*

*The onus is on the first defendant to prove by producing evidence in writing that in 1975 the second defendant agreed to assign the property to him since second defendant has denied such agreement.*

*F See Burgess v. Cox (1951) Ch. D. 383. See also the dictum of Lord Evershed M.R. in Fowler v. Bratt (1950) 2 KB 96 at*

*page 101. In the absence of any note or memorandum signed by the second defendant I am of the view that the first defendant has failed G to prove that there was an enforceable contract between him and the second defendant in 1975 as regards assignment of the property."* (words in italics and bracket, mine)

There has been no appeal against this finding which, in my respectful view, put an end to the case of the 1st defendant for any relief. His counter-claim ought to have been dismissed as all his reliefs H are predicated on the unenforceable oral contract of August 1975.

It is now argued, on behalf of the 1st defendant, that this finding

was wrong in that the Statute of Frauds or the Law Reform (Contracts) Law was not pleaded by the other parties as a special defence. It is argued that the 1st defendant is entitled to challenge, in this appeal, that finding of the learned trial Judge since the Court of Appeal had determined that the plaintiff had priority in equity. In the alternative, this court is requested to grant leave to the 1st defendant to challenge, B in this appeal, that finding of the trial court.

With respect, I think it is too late for the 1st defendant to now seek to challenge the finding of the trial court that he failed to prove the August 1975 contract he pleaded. The appeal now before us is against C the judgment of the Court of Appeal and not against that of the trial court. Since the 1st defendant has not appealed against that finding of the trial court, he is not entitled to be heard on the issue see: *Odife v. Aniemeka (1992) 7 NWLR (Pt.251) 25*; *Military Administrator of Benue State & Ors. v. Ulegede (2001) 7 NWLR (Pt.741) 194,222.* D

The trial court, notwithstanding its finding that the August 1975 contract the plaintiff relied on, was not proved went ahead to find a contract proved based on the several letters the 2nd defendant wrote to the 1st defendant from 1978 onwards. If a contract of sale of E the property in dispute could be inferred from these letters, it would be that such a contract came into being only from 1978. 1st defendant paid his deposit in October 1978. This is the line of reasoning of the learned trial Judge when he found:

*"Looking at together the documents exhibits P - U, I am of the F view that they constitute notes and memoranda of contract that bind the first and the second defendants in accordance with section 5(2) of the Law Reform (Contracts) Law of Lagos State reproduced above. There was a contract between the first and the second defendants to assign G the property when the latter received on 18th October, 1978 N15,000.00 as part payment for the assignment."*

It is in evidence that plaintiff's contract to purchase the property was in 1976. He paid his deposit of N3,000.00 in February 1977.

The learned trial Judge found that- H

*"The position is that with the documents Exhibits A - E coupled with agreement Exhibit F the plaintiff has as far back as February, 1977 entered into agreement with second defendant for assignment of the property having made a deposit of N3,000.00. This agreement*

*assumed its full legal force on 23rd February, 1981 when Exhibit G was executed."*

It is, therefore, not surprising that the Court of Appeal referred to the plaintiff as having "prior equity". It is noteworthy to observe that the learned trial Judge too came to the same conclusion when he observed:

B *"Where the equities are equal, the first in time shall prevail and where there is equal equity the law shall prevail. In the case in hand, the plaintiff equitable interest in the property obtained in February, 1977 prevails over that of the first defendant obtained in October, 1978."*

C He, however, deviated from this conclusion when he added: *"But when the first defendant paid to the second defendant N30,000.00 on 20th December, 1979, he has completed his own part of the bargain. In my view he has from that day virtually become the legal assignee of the property because he was entitled to a decree of specific performance against the second defendant."*

D With respect to their Lordships of the two courts below, the 1st defendant having failed to prove the August 1975 contract he pleaded, could not be said to have any equity. It was never his case that the several letters written to him by the 2nd defendant constituted the contract E between the two of them. I think the question of priority in equity does not arise in this case, plaintiff had some equity by the 1976 contract when he paid his deposit in February 1977, but 1st defendant had none as he failed to prove the 1975 contract he relied on. Even if one is to be over generous to the 1st defendant and find in his favour, as the F learned trial Judge did, that the letters to him from the 2nd defendant constituted a contract to purchase the property in dispute and, therefore, raised an equity in his favour, the Court of Appeal would be right in its conclusion that plaintiff's equity which arose in 1977 had priority over that of the 1st defendant.

G This disposes of Question 1. And as Question 2 is inextricably linked with Question 1, both based on the erroneous existence of a contract of sale between the 1st and 2nd defendants, no useful purpose will be achieved by considering it. It is enough to say that I resolve it against the 1st defendant.

#### H QUESTION - Fraud

H What is the fraud 1st defendant alleged against plaintiff? It is to be found in paragraphs 12 & 13 of the further amended statement

of defence and counter claim where 1st defendant pleaded -

*"12. The defendant avers that, the plaintiff is his friend, and that he always visited him in the premises. And that on one of such visits to him on the premises in 1979, he saw the additional and new development made by the defendant. And the defendant told the plaintiff in the presence of Mr. Oku and other members of the staff that he has bought the remainder of Akaba's lease and that he was no more a tenant of Akaba."*

*13. The defendant and the plaintiff then went round the premises, during which the plaintiff asked from the defendant how much he has spent on the improvement, and the defendant gave a rough idea of his expenses thus far. And the plaintiff praised the defendant for such a wise step taken."*

And in paragraph 21 quoted earlier in this judgment he gave the particulars of fraud. The learned trial Judge found that the plaintiff acted fraudulently when after seeing the improvements 1st defendant made to the property in dispute to the tune of N63,000.00 allowed the 2nd defendant to execute sublease of the property in his (plaintiff's) favour in 1981 for the sum of N43,000.00. The learned Judge held that plaintiff had notice of 1st defendant's interest in the property on 22nd December 1979. The learned Judge concluded that plaintiff's fraud vitiated his transaction with the 2nd defendant. The trial Judge relied, for his conclusion, on *Hunmuani Ajoke v. Amusa Yesufu Oba & Anor* (1962) 1 All NLR 73.

The Court of Appeal held to the contrary. In his lead judgment, with which Ademola JCA and Babalakin JCA as he then was, concurred, Awogu JCA observed:

*"... only a purchaser for valuable consideration who obtains a legal estate at the time of his purchase without a notice of a prior equitable right is entitled to priority in equity as well as at law. In such a case, equity follows the law, and where the equities are equal, the law also prevails. In law and equity also, a purchaser of an equitable interest without notice takes free from a prior equity if his purchase gave him the better right to a legal estate. In other words, assuming that the first defendant had no knowledge of the prior equity of the plaintiff when he paid his balance of N35,000.00 and the 2nd defendant accepted same, the 1st defendant would have had a better right to the*

legal estate, unless there are circumstances which make it inequitable for him to do so. This is perhaps the nearest to the case of *Hunmuani Ajoke v. Oba & Anor.* (1962) 1 All NLR 73. In the present appeal, what we have is the exception, namely, that where the equities are equal, the law prevails. True, the first defendant tendered his balance and would have had a better right to the legal estate, but the 2nd defendant refused to perfect the title (in fact, returned the money) and rather took that of the plaintiff (whose equity is prior in time) and conveyed the property to him as per Exhibit G. Therefore, the learned Judge was, in my opinion, in error; when he said at page 247:

‘In the case in hand, the plaintiff’s equitable interest in the property obtained in February 1977 prevails over that of the 1st defendant obtained in October 1978. But when the 1st defendant paid to the 2nd defendant N30,000.00 on 20th December 1979, he has completed his own part of the bargain. In my view, he has from that day virtually become the legal assignee of the property because he was entitled to a decree of specific performance against the 2nd defendant. ‘ This may well be true as against the 2nd defendant, but in the instant appeal, this is not necessarily so, as the situation in *Ajoke* (supra) does not apply here. To my mind, the position here is more like that in *Herbert Taylor & Anor. v. Russell & Anor* (1892) A.C. 244, ..... In other words, here is a plaintiff with prior equity and knowing nothing of a later equity with a better right to the legal estate, proceeded to complete his own payment as per Exhibit F and thereby obtained a conveyance as per Exhibit G, being used to set aside the conveyance on grounds of fraud. True, fraud might well have altered the circumstances, but the fraud pleaded was not knowledge of the 1st defendant’s equitable interest in the assignment (being at the time a tenant), but knowledge that later the plaintiff knew of improvements in the said property by the 1st defendant who also told him that he had purchased the property, as of December 1979, when the 1st defendant tendered the N35,000.00 which the 2nd defendant did not accept. In the first instance, I believe that if the equities (sic) are equal and the plaintiff got to know of a later equity trying to supplant his, he was as a matter of prudence, entitled to alter the position of the later equity with a better right to the legal estate, by completing his own position and thereby becoming the first to obtain a conveyance and a legal estate. Again, it is a matter of the equities being equal and the first in time

prevailing but where the equities are equal, the law prevails.”

I agree with the Court of Appeal that the instant case is not on all fours with *AJOKE*. This is so because, unlike in *AJOKE* it was the plaintiff here who had the prior equity and not the 1st defendant. It would be wrong, therefore, to suggest that plaintiff’s deed of assignment is vitiated by any fraud arising out of his alleged knowledge of 1st defendant’s interest in the property in dispute. I agree with Awogu JCA when he said:

“With respect, the 1st defendant cannot stand in the same position as the plaintiff in *AJOKE* (supra), because the equitable interest of the 1st defendant in the instant appeal was subsequent to that of the plaintiff and even if the plaintiff herein influenced the rejection of the N35,000.00 tendered by the 1st defendant, he was entitled to do so in protection of his prior equity.”

It is argued on behalf of the 1st defendant that-

“It is therefore, respectfully submitted that the Court of Appeal was clearly wrong in placing an arbitrary bar, unsupported by authority, upon the full operation of the court’s equity jurisdiction as a court of conscience in its full amplitude, and to exclude it merely because the party complained had a prior equity. As has been pointed out the court of Equity has always acted against the holder of a legal estate who misconducts himself to the prejudice of another, by say, by standing by, and saying nothing whilst another expends money on the property in the erroneous belief that he is owner. How much less a holder of an equitable interest who watched whilst another spent an additional sum of N63,000.00 but for which he in fact paid N30,000.00 - See Exhibit G at page 260 line 19!

At the risk of being repetitive the appellant says that the learned trial Judge had found that the plaintiff had known the property since before 1974 when his brother vacated it as tenant and the 1st defendant took it over. The learned trial Judge also held (and it was common ground that plaintiff and 1st defendant were friends and the plaintiff visited him on the premises) that plaintiff knew of the developments to the property (the plaintiff and the 2nd defendant accepted this fact also but contended that the developments were illegal) and it was after being told that the 1st defendant had paid in full in 1979 that he then went and paid the full purchase price of N30,000.00 for the same

*property in 1981.”*

It is not, however, 1st defendant’s case that the plaintiff induced or encouraged him into making improvements on the property. And being a tenant in possession, it would not be unreasonable to expect him to make the property more habitable for his use. Nor would I think that the knowledge, without more, that 1st defendant had paid the full purchase price would make it fraudulent for the plaintiff to pay the balance of his purchase price. It might be that the vendor (2nd defendant) had informed him that he (vendor) refused to accept 1st defendant’s cheques. To attribute fraud to the plaintiff would, in my respectful view, be more than was pleaded by the 1st defendant, moreso that plaintiff had prior equity over the property in dispute. The improvements 1st defendant carried out on the property were done for his own benefit and at his own risk as he had not, by then, become the legal owner of the property nor had he even paid any deposit on the property to the 2nd defendant. A more prudent man would have first paid off the purchase price and obtain a deed of assignment in his favour before carrying out any improvement.

From all I have been saying, I must resolve question 3 against the 1st defendant. All the issues canvassed having been resolved against him, it follows that his appeal must fail.

It is for the reasons stated herein that I, like my learned brother Ejiwunmi JSC, too dismiss this appeal with N10,000.00 costs to the plaintiff/respondent.

#### ONU JSC

Having been privileged to read before now the judgment of my learned brother Ejiwunmi, JSC just delivered, I agree with him that the appeal lacks merit and ought therefore to fail.

I adopt the same as mine and nothing further to add thereto.

#### UWAIFO JSC

I read in advance the judgment of my learned brother

**Ejiwunmi J.S.C. and agree with him that the appeal fails.**

**The N150,000.00 damages awarded by the court below in favour of the 1st defendant/appellant against the 2nd defendant for breach of contract is all that he really deserves. The plaintiff acquired a prior equity in the property in question, which the 2nd defendant sold to him after he (2nd defendant) breached his earlier agreement with the 1st defendant/appellant. Therefore, when the plaintiff subsequently had a deed of conveyance executed in his favour with the consent of the Governor, he acquired a valid legal title to the property.**

**I, too, dismiss the appeal with N10,000.00 costs in favour of the plaintiff/respondent.**



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