

**SUPREME COURT OF NIGERIA**

25TH MAY, 2001. SC. 50/1996

**CORAM:- A. B. WALI, M. E. OGUNDARE, A. I. IGUH, A. I.  
KATSINA-ALU, A. O. EJIWUNMI, JJSC.**

1. INCAR NIGERIA PLC. .... 1ST APPELLANT  
2. TREVI FOUNDATION (NIG.) LTD ..... 2ND APPELLANT  
AND  
BOLEX ENTERPRISES (NIG.) ..... RESPONDENT

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**AGENCY** - *Action of agent without Authority - Will not bind the principal - Especially as the plaintiff was represented by a solicitor - And knew of the limits of the agents authority (H 7)*

**AGENCY** - *Documents - Interpretation - Of Exhibit A by the court - Gives no power to the firm - To sell the property to any party - Who furnished the purchase price (H 5)*

**AGENCY** - *Limit of Agency - Was clearly stipulated in Exhibit H - As only scouting for buyers - And communicating same to the company for its acceptance (H 4)*

**AGENCY** - *Purpose of agency - Exhibit H constituted the firm an agent of the company - To look for buyers for its property - Not for the purpose of concluding a contract of sale - Of the property in dispute (H 3)*

**APPEALS** - *Concurrent findings of lower courts - Are perverse and are set aside - And the order of specific performance set aside (H 8)*

**APPEALS** - *Preliminary objection - Against grounds of appeal - Are misconceived - And cannot nullify the grounds - Complained of (H 2)*

**APPEALS** - *Preliminary objection - New issues - If raised without leave of the court - Is incompetent and will be struck out (H 1)*

***EVIDENCE** - Credibility of PW1 - Was affected by his shameless lying - And the trial judge should not have believed him (H 6)*

### **FACTS**

The Plaintiff who is the present respondent brought this action against the 1st appellant called the company and the 2nd appellant at the trial court claiming amongst others for a declaration that he is the equitable owner of the disputed premises situate at plot 121/122 Trans Amadi Industrial Layout Port Harcourt Rivers State and order of specific performance against the 1st appellant.

The facts are that the company which owned landed property in Lagos, Ibadan and Port Harcourt desired to dispose of these property and so engaged a firm of estate surveyors per Exhibit H to scout for prospective buyers. The firm was able to find a purchaser for the property at Port Harcourt for 3.5 million Naira which offer was accepted by the company formally by a Board resolution per Exhibit A. However the prospective purchaser failed to honour the agreement and the firm continued to search for other buyers until the plaintiff indicated his interest. He applied to the firm to purchase the property at 4 million Naira and the firm instead of communicating to the company for its approval went ahead to offer the property to the plaintiff at 4 million Naira. The plaintiff paid and the firm forwarded the cheque to the company who rejected the 4 million and asked for a further N200,000.00. Although the plaintiff agreed to pay the extra N200,000.00, the company had by this time sold the property to the 2nd appellant for N4.25million and put the second appellant in possession.

Thus the plaintiff brought an action at the trial High Court which court gave judgment in his favour. The appeal against the judgment by the 1st and 2nd appellants was dismissed and they have further appealed to the Supreme Court.

### **ISSUES FOR DETERMINATION**

*“1. What is the true construction of exhibit A in the circumstances of this case alternatively does Exhibit A confer a mandate on Sumbo Onitiri & Co. (PW1’s firm) to offer and or accept any offer of the*

*property in dispute to any prospective buyer who is willing to purchase same at any price not below N 3.5million.*

*2. Whether or not the decision of the Court of Appeal shows a proper exercise of its appellate jurisdiction in the circumstances herein.*

*3. Whether even if there was a contract between the plaintiff and the 1<sup>st</sup> defendant (which is denied), such contract is void for contravention of the Land Use Act.”*

**HELD** (Unanimously allowing the appeal per lead judgment of **OGUNDARE JSC**)

***Preliminary objection - New issues***

1. On issue (iv), it is true that issue did not form the basis of the action at the trial court nor was it raised by either Appellant in the Court of Appeal. No leave has been sought nor obtained by the Appellants to raise a new issue before us. Therefore issue (iv) in the Appellant’s brief of 17/2/97 which is now Question 3 in their brief of 6/12/2000 is incompetent and will accordingly be struck out. (p. 1839 H)

***Preliminary objections against grounds***

2. In its brief of 20/2/98, the Plaintiff again raised a preliminary objection to the effect that grounds 1 – 5 in the Notice of appeal of the 2<sup>nd</sup> Appellant were not available to it as they related to part of the judgment of the Court of Appeal not affecting the 2<sup>nd</sup> Appellant and that the issue (2) formulated in 2<sup>nd</sup> Appellant’s brief of 11/6/97 predicated on grounds 6 and 7 was too general and could harbour in its trail complaints about orders not made against the 2<sup>nd</sup> Appellant. I have read grounds 1 – 5 in the 2<sup>nd</sup> Appellant’s Notice of appeal; they relate to Exhibit A and its effect on the contract said to exist between the Plaintiff and the Company over the disputed property, the existence of which contract is said to nullify the sale of the said property made by the Company to the 2<sup>nd</sup> Appellant. I cannot see how it can be said that the 2<sup>nd</sup> Appellant is not concerned with the existence of the alleged contract between the Plaintiff and the Company. I think grounds 1 – 5 are available to the 2<sup>nd</sup> Appellant. (p. 1840 A)

***Agency - Exhibit H***

3. It is not in dispute that the Company commissioned the Firm to look for buyers for its properties. Exhibit H is clear on this point and to that extent PW1's Firm was and remained an agent of the Company as long as its properties mentioned in Exhibit H remained unsold and not withdrawn from sale. The Firm however is not, on the basis of Exhibit H, an agent of the Company for the purpose of concluding a contract of sale of the property in dispute. (p. 1841 B)

***Agency - Limit***

4. Question 2 is the crucial question. The Plaintiff and PW1 relied on Exhibit A as giving the latter the mandate to sell. The Company's contention is that Exhibit A has no such effect and that the only mandate to PW1's Firm in Exhibit H was to look for buyers for the properties listed therein. There is no dispute as to the limit of the authority or mandate or agency given to PW1's Firm in Exhibit H. The agency was to look for buyers. And it was not even a sole agency for that matter; other estate management firms were equally involved. Each was to scout round for prospective buyers and communicate offers received to the Company for acceptance. It was only when the Company had accepted an offer communicated to it that a contract existed between the Company and the offeror. (p. 1841 C)

***Agency - Documents - Interpretation***

5. On the basis of Exhibit H PW1's Firm would have no authority to issue Exhibit B. His mandate would enjoin him to refer Plaintiff's letter of 2<sup>nd</sup> January 1991 to the Company for its acceptance or rejection of the offer contained in that letter. But PW1 testified to the effect that Exhibit A empowered him to issue Exhibit B. Did it? Construction of Exhibit A is a matter of law for the Court to decide. Exhibit A is clear and unambiguous. I have already quoted it in full in the earlier part of this judgment. I can find nothing in it empowering PW1's Firm to sell the property in dispute to any buyer of its choice who offered N3.5m.. I

think it was mischievous, if not fraudulent, of PW1 to claim that Exhibit A went beyond acceptance of an offer he communicated to the Company in October 1990. (p. 1841 H)

***Evidence - Credibility***

6. In the light of his evidence, could PW1 have honestly believed that Exhibit A was a blank mandate to him to sell to anyone who would offer N3.5million or above without further reference to the Company? I do not think so. PW1 is a fellow of the Nigerian Institute of Valuers and has been in practice for over 15 years as at April 1991 when he testified. B  
C

Strangely enough such an experienced estate agent did not mention Exhibit H in his evidence in chief as being the genesis of his relationship with the Company. He lied so unashamedly in his evidence that I am surprised the learned trial Judge ascribed credence to his evidence.... D  
This is an experienced estate agent who knew how he came by Exhibit A, still claiming that Exhibit A was a mandate to him to sell to anyone, his real mandate Exhibit H, notwithstanding. Why did PW1 behave the way he did in this case? Was it the lure of commission to be received on the transaction? I will rather not hazard a guess. (p. 1843 D/H E

***Agency - Action without Authority***

7. Having held that PW1's Firm was agent of the Company at all times relevant to this action, by virtue of Exhibit H would the Company be bound by Exhibit B written by the Firm to the Plaintiff and Plaintiff's acceptance of Exhibit B by Exhibit O? I rather not think so. Plaintiff knew all along of Exhibit H and must therefore have known that PW1's Firm had no mandate to write Exhibit B. Plaintiff was represented throughout negotiations with PW1's Firm by a solicitor, Mr. Ladi Ajose-Adeogun. PW1 had, however, testified that the Plaintiff was aware of the relationship his Firm had with the Company. (p. 1844 A/H F  
G

***Appeals - Concurrent findings***

8. On the evidence before the Court, both oral and documentary, it could not reasonably be found that PW1's Firm at any time had general author- H

ity to sell the property in dispute without reference first to the Company for its acceptance of a particular offer. The concurring finding of the two Courts below to the contrary is clearly perverse and will not be allowed to stand. That finding and other findings anchored on it are set  
 B aside. On the oral and documentary evidence adduced in this case there is nothing to suggest that the Firm had authority of the Company to make an offer as in Exhibit B for the sale of the property in dispute to anyone, the Respondent inclusive. The Firm's authority was to introduce buyers  
 C to the Company for the latter's consideration to accept or not. The Firm had no authority to contract on the Company's behalf. There is no evidence that Respondent's offer of 2<sup>nd</sup> January 1991 was ever communicated to the Company and accepted by the latter by board resolution. That being so, the Respondent has failed to prove that there was a valid  
 D contract of sale between it and the Company capable of being enforced by an order of specific performance. (p. 1845 A)

#### E **NOTABLE POINTS OF INTEREST**

##### **OGUNDARE JSC**

*1. A decision given or order made without evidence in support must be perverse*

F The injunctive order of the trial Court was not made until 24/4/91 restraining the 1<sup>st</sup> Appellant from putting the 2<sup>nd</sup> Appellant in occupation of the said property; an act that had been accomplished before the order was made. There was no shred of evidence that 1<sup>st</sup> Appellant in defiance of the order of court put the 2<sup>nd</sup> Appellant in occupation after 24/4/  
 G 91. Yet relief (E) was granted by the trial Court and affirmed by the Court below. Any decision given without evidence in support must be perverse. The grant of relief (E) is clearly perverse. (p. 1845 G)

#### H **EJIWUNMI JSC**

*2. An agent cannot act above the powers given to him*

I think also that it is necessary to add that generally an agent cannot act beyond the powers given to him by his principal. This rule was aptly

stated in the case of Du BUSSCUE V. ALT (1878) 8 CHD (CA) 286 where at 310 per Thesiger LJ said:

*“The first contention raised a question which, as it appears to us, does not present any difficulty. As a general rule no doubt, the maxim “delegatus non potest delegare” applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third person.”*

It is also pertinent to refer to the 8<sup>th</sup> Edition of Chitty on Contracts (Specific Contracts) Vol. 2, where at para. 32 – 015, the learned authors of this work said:-

*“An agent employed by the vendor to find a purchaser is an agent in a limited sense only. He has authority to describe the property and make statements as to its value so as to bind its principal, but he has not implied authority to receive a pre-contract deposit on such terms as to make the prospective vendor liable and no power, without express authority, to conclude a contract for a lease or sale”. See MULLENS V. MILLER (1882) 22 Ch. D. 194; Sorrell v. Finch (1977) A.C. 728 at 753. (p. 1856 C)*

### 3. Rules governing estate agent and his principal - The vendor of land

The principles that govern an estate agent and his principal, the vendor for the sale or lease of land, that are deducible from the authorities referred to above may be put thus: an agent employed by a vendor to find a purchaser is an agent in a limited sense only. He has authority to describe the property and make statements as to its value so as to bind the principal, but he has no implied authority to receive a deposit and no power, without express authority, to conclude a contract to grant a lease or a contract for the sale. It is his duty to communicate to his principal the best offer received by him at any time before a binding contract for the sale of the property has been actually signed by the principal, unless, of course, he has been informed by his principal that such an offer is not acceptable. It must also be noted that when a vendor merely authorises a house agent so sell at a stated price he must not be taken to be authorising the agent to do more than agree the price with an intending purchaser.

The making of a contract is not part of an estate agents' business, and, although, on the facts of an individual case, the principal may authorise him to make a contract, such an authorisation is not lightly to be inferred from vague or ambiguous language. (p. 1856 F)

B

*4. Sale agent without principal's approval - Cannot confer equitable interest on purchaser nor bind the principal*

C However, can it be said that the respondent had obtained an equitable interest in the property? I do not think that the Respondent can lay claim to any equitable interest in the property. Upon the facts disclosed, it is clear that the Respondent paid the sum of N4 million to the firm of Sumbo Onitiri & Co. towards the purchase of the disputed property. But it is also manifest that the action of the firm of Sumbo Onitiri & Co., was in D excess of the authority allowed it by the 1<sup>st</sup> Appellant. Hence the purported agreement to sell the disputed property to the Respondents cannot bind the 1<sup>st</sup> Appellant so as to enable the Respondent to obtain any interest; legal or equitable in the disputed property. It follows that as the E Respondent is not in possession of any legal or equitable interest in the property, the Respondent cannot be beneficiary of the equitable order of specific performance. See SPRY on Equitable Remedies 2<sup>nd</sup> Edition at page 51. This is a classic example of where an agent tried to force the F sale of property against the wishes of the vendor, his principal. The matter is, in my view, made worse by the unproven claim of the agent that he had a mandate to conclude the deal without the knowledge or consent of his principal by virtue of a document Exhibit A, which was meant for an offer not connected with that which is under consideration G in this appeal. The erroneous interpretation of a contractual document or a clause therein cannot be construed by a party to such a contract as acknowledgment of the correctness of such interpretation by the other party. (p. 1858 G)

H

### **REPRESENTATION**

C. O. Joseph, SAN (Miss T. E. Ogbemi with him) for Defendants/Appellants.



O. Ayanlaja, SAN (B. O. Osiyale with him) for the Plaintiff/Respondent.

**CASES REFERRED TO**

Keen v. Mear (1920)2 Ch 574

Wragg v. Lovett (1948)2 ALL ER 968

B

Du Busscue v. Alt (1878)8 CHD (CA) 286

Mullens v. Miller (1882)n 22 Ch.D. 194

Sorrel v. Finch (1977) A.C. 728 at 753

Dunlop Rheumatic Tyre Co. v. Selfridge & Co. (1914-15) ALL E.R. 333

C

**LEAD JUDGMENT BY OGUNDARE JSC**

The facts of this case are rather simple. Unfortunately, however, the issues have been complicated not so much by the parties than by the two Courts below.

D

The 1<sup>st</sup> Appellant in this appeal (hereinafter is referred to as the Company) had three landed properties each situate in each of three major cities in the country, that is, Lagos, Ibadan and Port-Harcourt. The Company desired to dispose of the three properties and engaged some estate surveyors to look for buyers. Sumbo Onitiri & Co. Estate Surveyors and Valuers (hereinafter is referred to as the Firm) was one of the firms of estate surveyors and valuers commissioned by the Company to look for buyers. In Exhibit H dated 12<sup>th</sup> March 1990 addressed to the Firm, the Company wrote:

F

**“SALE OF PROPERTIES**

*This is to inform you that it is our intention to put the following properties on sale:*

1. Plot 121/122, Trans Amadi Industrial Layout, Port-Harcourt, Rivers State.

G

2. KM 10, Old Lagos Road, Ibadan, Oyo State.

3. 10A, Ijora Causeway, Ijora, Lagos State.

*You are hereby given instruction to look for prospective buyers for the Properties and communicate to us as soon as you get them.*

*Please note that similar instruction is given to other Estate Agents.*

*We shall advise you of the terms and conditions for the sale of the prop-*

1832 Incar Nig. PLC v. Bolex Enter. (2001) 5 KLR Ogundare JSC  
*erties when necessary”.*

In furtherance of the instruction given in the letter above, the Firm communicated to the Company the offers of a number of prospective buyers. It would appear the Company was not satisfied with these offers except one made by an unnamed buyer whose offer of N3.5m. for the Port-Harcourt property was acceptable to the Company. The Firm requested for a formal acceptance of this offer by a board resolution of the Company. Pursuant to this request the Company’s Board on 7th November 1990 resolved as in exhibit A. Exhibit A reads:

C       “SALE OF PROPERTY AT PLOT 121/122 TRANS AMADI INDUSTRIAL LAYOUT, PORT HARCOURT, RIVERS STATE  
*It was RESOLVED that the offer of N3.5 Million for the sale of Property at Plot 121/122 Trans Amadi Industrial Layout, Port-Harcourt, from D Sumbo Onitiri & Co., Estate Surveyor & Valuers, be accepted and that Management be authorised to endorse all Legal Transfer documents.”*

According to the evidence of PW1, Adesumbo Adeniyi Onitiri (undoubtedly the principal partner of the Firm), the arrangement with this prospective buyer fell through. PW1 testified at the trial of the action thus:

F       *“By the time I wrote Exhibit ‘N’ the highest offer I had was N3.5million. When I got the offer for N3.5million, I requested for the board’s resolution, from the defendant, in order to have a clear mandate. They gave the resolution which is tendered as Exh. ‘A’.*

G       *After Exhibit ‘A’ I asked the Company that made the offer to come and pay. They gave conditions that they are going to pay a deposit and after collecting the document from U.B.A. then they pay the balance. The Company that made the offer did not fulfil the condition.”*

H       Following the failure of that transaction the Firm looked unsuccessfully for other buyers until Plaintiff (who is Respondent in this appeal) came on the scene. For, continuing his evidence above, PW1 testified further:

*“We were receiving more offers. The Plaintiff came with an offer and I accepted their offer of N4,000,000.00; they paid.”*

It would appear that the Plaintiff made an offer in writing to the Firm on

2<sup>nd</sup> January, 1991. There is no averment in the pleadings nor was there evidence that this offer was ever communicated to the Company as was the practice with previous offers. Nor was there evidence that the Company, by board resolution, accepted Plaintiff's offer. What was pleaded, and proved, was that Plaintiff's offer was reacted to by the Firm, making B its own offer as per Exhibit B dated 4<sup>th</sup> January 1991 which reads:

"RE: SALE OF PLOT 121/122 TRANS AMADI INDUSTRIAL LAYOUT, PORT-HARCOURT

1. DESCRIPTION: A purpose built industrial premises developed with factory structures, office block and staff canteen all on 4.27 C acre site.

2. LOCATION: Plot 121/122 Trans Amadi Industrial Layout, Port Harcourt.

3. LETTABLE SPACE: Factory Structures – 1358sm; Warehouses D – 278sm; Office – 321sm; Canteen – 96sm; Gate House – 15sm.

4. TITLE: 99 years with 80 years unexpired

5. PRICE: N4m (Four Million Naira)

TERMS OF PAYMENT: A Certified Bank Cheque for N4m in E favour of INCAR NIGERIA PLC.

*Looking forward to your prompt response."*

The Plaintiff accepted the offer in Exhibit B on 28<sup>th</sup> January and sent to the Firm a cheque issued in the name of 'UNITED BANK FOR F AFRICA PLC.' The Firm acknowledged receipt of the cheque on the same date, that is, 28<sup>th</sup> January 1991 and on the same date wrote Exhibit C to the Company. Exhibit C reads:

"RE: PLOT 121/122 TRANS AMADI INDUSTRIAL LAYOUT, G PORT HARCOURT

*Further to our various discussions in respect of the above, please find enclosed our cheque for N4m. (Four million Naira) being the purchase price on the above property.*

*The buyers are Bolex Holdings Limited and will be grateful if H an official receipt is issued in favour of Bolex Holdings.*

*We wish to reiterate that we have been able to obtain a higher figure of N4million as opposed to the N3.5m the Board approved in its meeting of*

7<sup>th</sup> November, 1990 due to the upward trend of the economy and our relentless effort in seeing to the logical conclusion of the sale to your best interest.

We hope you will settle our fees of N250,000 (Two Hundred and Fifty Thousand Naira) inclusive of travelling and advertisement expenses soonest.”

Representatives of the Firm and the Company met and it would appear the purchase price of 4m was unacceptable to the Company who requested for additional N200,000.00. The Firm conveyed this development to the Plaintiff who agreed to pay N4.2m. as purchase price to the Company. In consequence, the Firm wrote Exhibit D to the Company. Exhibit D reads:

“RE: PLOT 121/122 TRANS AMADI INDUSTRIAL LAYOUT, PORT-HARCOURT”

Further to the meeting of Friday 1<sup>st</sup> February, 1991 in respect of the above between the Managing Director of Incar and Mr. Onitiri A. A., and the insistence of the Managing Director that Bolex Enterprises Nigeria Limited should increase their offer by N200,000.00.

I wish to confirm that Bolex Enterprises Nigeria Limited has now accepted to pay the N200,000.00. Thus making the sale price N4.2m.

We expect to have official receipt of the N4m. already paid and the balance will be paid on execution of the legal transfer documents.”

Meanwhile, the Company had received other offers in respect of the Port-Harcourt property, one of which was from the 2<sup>nd</sup> Appellant. The Company eventually sold the property to the 2<sup>nd</sup> Appellant for N4.25m - see Exhibit Z, and put the 2<sup>nd</sup> Appellant in possession.

Being aggrieved by this development the Plaintiff on 14/2/91 instituted the action leading to this appeal claiming against the Company:

“(a) An Order of specific performance against the Defendant compelling the Defendant to honour the contract of sale entered into by the parties for the sale of Plot 121/122 Trans Amadi Industrial Layout Port Harcourt Rivers State, which property is registered as No. 40 at page 40 in volume 20 of the Land Registry in the Office at Port Harcourt Rivers State and which Land is more particularly delineated on plan

number Port Harcourt 607 attached to a lease dated 23<sup>rd</sup> day of May, 1974.

(b) *An Order directing the defendant to execute in favour of the Plaintiff a Deed of Assignment of the residue of the term unexpired which term was granted to the defendant by a lease dated 23<sup>rd</sup> May, 1974.* B

(c) *An Order directing the defendant to assist and or provide all documentation necessary to enable the plaintiff obtain the Governor's consent to the Deed of Assignment."*

The writ was accompanied by a statement of claim and a motion for interlocutory injunction filed on the same date. C

Pleadings having been filed and exchanged the action proceeded to trial. In the course of the trial, the 2<sup>nd</sup> Appellant was, on the application of the Plaintiff, joined as 2<sup>nd</sup> Defendant in the action. The Plaintiff, with leave of Court amended the reliefs sought by it to read: D

"(A) *A declaration that the Plaintiff is the equitable owner of the premises known as Plot 121/122 Trans Amadi Industrial Layout Port Harcourt Rivers State, which property is registered as No. 40 at page 40 in Volume 20 of the Lands Registry in the Office at Port-Harcourt Rivers State and which Land is more particularly delineated on plan number P.H. 607 attached to a lease dated 23<sup>rd</sup> of May, 1974.* E

(B) *An order of specific performance against the 1<sup>st</sup> defendant compelling the 1<sup>st</sup> defendant to honour the contract of sale entered into by the plaintiff and the 1<sup>st</sup> defendant for the sale of plot 121/122 Trans Amadi industrial Layout Port Harcourt, Rivers State, which property is registered as No. 40 at page 40 in Volume 20 of the Lands Registry in the office at Port Harcourt, Rivers State and which land is more particularly delineated on plan number PH. 607 attached to a lease dated 23<sup>rd</sup> of May 1974.* F G

(C) *An Order directing the 1<sup>st</sup> defendant to execute in favour of the plaintiff a deed of Assignment of the residue of the term unexpired which term was granted to the 1<sup>st</sup> defendant by a lease dated 23<sup>rd</sup> of May 1974.* H

(D) *An Order directing the 1<sup>st</sup> defendant to assist and or provide all documentation necessary to enable the plaintiff obtain the Governor's*

*consent to the Deed of Assignment.*

(E) An Order directing the 2<sup>nd</sup> defendant to vacate the premises of the plaintiff to wit plot 121/122 Trans Amadi Industrial Layout Port Harcourt which the 2<sup>nd</sup> defendant now occupies in violation of an existing Court order dated 24th April 1991, which order restrains the 1<sup>st</sup> defendant from putting the 2<sup>nd</sup> defendant in occupation of the said premises.”

The Plaintiff and the Company, with leave of Court, amended their pleadings. The 2<sup>nd</sup> Appellant also filed its statement of defence. The trial proceeded to conclusion and learned counsel for the parties addressed the Court.

In a reserved judgment, the learned trial Judge found:-

“1. By Exhibit H, which is the genesis of this case the 1<sup>st</sup> defendant gave a mandate to Sumbo Onitiri & Co. to sell three of its properties namely plot 121/122 Trans Amadi Industrial Layout, Port Harcourt; KM 10 Old Lagos Road, Ibadan, Oyo State and 10A Ijora Causeway, Ijora, Lagos. This mandate for the PW1 to find prospective buyers was on the 12<sup>th</sup> March, 1990.”

2. “There is evidence that in October, 1990 PW1 introduced another purchaser. The PW1 did not indicate the name or person of the purchaser. The offer this time was for the sum of N3.5million. PW1 also requested for the Board’s Resolution accepting this offer for N3.5million. Following this offer the Board met and adopted the resolution dated 7<sup>th</sup> November, 1990 which is tendered as Exhibit A. It stated that the offer of N3.5million brought by the PW1’s firm be accepted.”

3. “It seems to me that it (Exhibit U) was not sent to the PW1 along with Exhibit A for if it was the mistake could not have been made. I quite agree with the PW1 that the resolution of the board when he phoned was sent across without any covering letter.” (brackets mine)

4. “It is therefore not correct that exhibit A was an acceptance made in relation to a specific offer. It was for offer of N3.5million made by a firm and the Board resolution to accept the offer.”

5. “I find as a fact that the PW1’s firm having been given the mandate as in Exhibit A to sell the property and accept the sum of 3.5million

*that the PW1 received the increased offer of N4 million which he accepted on behalf of the 1<sup>st</sup> defendant who had mandated him to accept N3.5million on their behalf having thus accepted on the 1<sup>st</sup> defendant's behalf the sum of N4 million as opposed to the N3.5million the property was then sold on that date of acceptance by PW1.*

6. *"It is clear that the PW1 thus had mandate as in Exhibit A to sell the property at N3.5million. This mandate was never terminated and had not been withdrawn."*

7. *"As at the 28<sup>th</sup> January, 1991 when the plaintiff issued the cheque and the 1st defendant received Exhibits C, F & T the contract was completed and concluded."*

8. *"I am satisfied that Mr. J. O. Emmanuel is both a director in the 1<sup>st</sup> defendant's company and also the 2<sup>nd</sup> defendant's company and in fact the Chairman."*

9. *"Thus from the evidence before the court and the documentary evidence Sumbo Onitiri & Co. was an agent of the 1<sup>st</sup> defendant by virtue of Exhibits A & H."*

10. *"Exhibit A thus is a direct instruction to Sumbo Onitiri & Co. to sell the property in dispute at a reserved price of N3.5million. Exhibit A also directed the management to accept same once it is sold at N3.5million from Sumbo Onitiri & Co."*

On these findings of fact, among others, the learned trial Judge found for the Plaintiff and entered judgment in his favour. He found that "the plaintiff has in fact established its case in relation to reliefs two and three of the claims before the court against the 1<sup>st</sup> defendant", and adjudged that "the plaintiff therefore will be entitled to judgment sought on those two reliefs..." He also adjudged that the Plaintiff's claim in respect of the first relief succeeded and decreed specific performance against the Company. The other reliefs claimed by Plaintiff were equally granted.

Quite naturally, the Company and the 2<sup>nd</sup> Appellant being dissatisfied with the judgment of the trial Court appealed to the Court of Appeal. In the lead judgment of Onalaja JCA with which Okezie and Rowland, JJCA expressed consent, the findings of the trial Court were affirmed, particularly the finding that there was a concluded sale of the property in

dispute on 28<sup>th</sup> January 1991. The two Defendants each has now further appealed to this Court.

Pursuant to the rules of this Court, the two Appellants and the Plaintiff/Respondent filed and exchanged their respective briefs of argument. For the purpose of this appeal, the two Appellants relied on their amended joint brief of argument filed on 6/12/2000 and a reply brief filed on 10/12/98. The Plaintiff relied on two briefs filed on its behalf on 29/4/97 and 20/2/98. Learned leading counsel for the parties proffered oral arguments at the oral hearing of the appeal.

Mr. Joseph, SAN, learned leading counsel for the two Defendants/Appellants opined that the main issue in this appeal was the construction of Exhibit A. He referred to part of the evidence of Adesumbo Onitiri (PW1) and submitted that the Court was not bound to accept the witness's construction of Exhibit A that it gave him (witness) power to sell the disputed property to anyone who offered N3.5m. or above. Counsel submitted that on its true construction Exhibit A did not confer power on PW1 to sell. Learned counsel argued that PW1 knew the limit of his authority. He submitted that, on the evidence of PW3 (Mr. Ajose-Adeogun), solicitor to the Plaintiff, Plaintiff too was aware of the limit of the authority of PW1. He submitted that Exhibit H regulated the relationship between the Company and the firm. Learned Senior Advocate urged the Court to allow the appeals, set aside the judgements of the two Courts below and dismiss Plaintiff's claims.

Mr. Ayanlaja, SAN learned leading counsel for the Plaintiff opined that the main issue for determination was the nature of the authority given to the Firm by the Company as discernible from Exhibits H and A. He submitted that the two documents must be construed together in order to determine the limit of the authority given by the Company to the Firm in respect of the disputed property. Counsel urged the Court to take into consideration the circumstances of the dealing between the Company and the Firm. Learned counsel conceded it, and rather candidly too, I venture to say, that the mandate in Exhibit H was for the Firm to find buyers for the properties named therein for the approval of the Company and that the mandate was not for the Firm alone as there were other



firms equally commissioned. Learned counsel also conceded that the ultimate voice as to sale was that of the Company. Counsel referred to Exhibit A and argued that it gave power to the Firm to sell the property in dispute. He urged the Court to dismiss the appeals of the Appellants.

In their joint brief of argument filed on 6/12/2000, the Appellants B formulated three questions calling for determination in this appeal, to wit:

“1. *What is the true construction of exhibit A in the circumstances of this case alternatively does Exhibit A confer a mandate on Sumbo Onitiri & Co. (PW1’s firm) to offer and or accept any offer of the property in dispute to any prospective buyer who is willing to purchase same at any price not below N 3.5million.* C

2. *Whether or not the decision of the Court of Appeal shows a proper exercise of its appellate jurisdiction in the circumstances herein.*

3. *Whether even if there was a contract between the plaintiff and the 1<sup>st</sup> defendant (which is denied), such contract is void for contravention of the Land Use Act.” D*

As stated earlier in this judgment the Plaintiff relied on two briefs dated 29/4/97 and 20/2/98 respectively which briefs were in reply to earlier briefs filed by the Appellants which earlier briefs the Appellants no longer rely on. In the brief dated 29/4/97, the Plaintiff raised objection to two issues raised by the Appellants in their joint brief of 17/2/97 (now discarded). The two issues were: E

“(i) *What is the effect of the phrase “Subject to contract” contained in Onitiri’s letter of offer dated 4.1.91 (Exhibit B) of communication between the plaintiff and the 1<sup>st</sup> defendant.” F*

(iv) *“Whether even if there was a contract between the Plaintiff and the 1<sup>st</sup> defendant, such contract is void for contravention of the Land Use Act.” G*

Issues (i) is not now one of the issues formulated by the Appellants in their brief of 6/12/2000. No useful purpose will, therefore, be served by considering the objection to the said issue (1). **On issue (iv), it is true that issue did not form the basis of the action at the trial court nor was it raised by either Appellant in the Court of Appeal. No leave has been sought nor obtained by the Appellants to raise a new issue** H

before us. Therefore issue (iv) in the Appellant's brief of 17/2/97 which is now Question 3 in their brief of 6/12/2000 is incompetent and will accordingly be struck out.

**In its** brief of 20/2/98, the Plaintiff again raised a preliminary objection to the effect that grounds 1 – 5 in the Notice of appeal of the 2<sup>nd</sup> Appellant were not available to it as they related to part of the judgment of the Court of Appeal not affecting the 2<sup>nd</sup> Appellant and that the issue (2) formulated in 2<sup>nd</sup> Appellant's brief of 11/6/97 predicated on grounds 6 and 7 was too general and could harbour in its trail complaints about orders not made against the 2<sup>nd</sup> Appellant. I have read grounds 1 – 5 in the 2<sup>nd</sup> Appellant's Notice of appeal; they relate to Exhibit A and its effect on the contract said to exist between the Plaintiff and the Company over the disputed property, the existence of which contract is said to nullify the sale of the said property made by the Company to the 2<sup>nd</sup> Appellant. I cannot see how it can be said that the 2<sup>nd</sup> Appellant is not concerned with the existence of the alleged contract between the Plaintiff and the Company. I think grounds 1 – 5 are available to the 2<sup>nd</sup> Appellant.

As Issue (2) in the 2<sup>nd</sup> Appellant's brief of 11/6/97 is no longer before us, no useful purpose will be served by considering the objection to it. I overrule the objections of the Plaintiff contained in its brief of 20/2/98.

I now return to the appeals on hand. I agree with learned Senior Advocates appearing for both parties that the main question arising in these appeals is whether the two Courts below were in right in holding that on the basis of Exhibit A, the Firm had an agency to sell the property in dispute on behalf of the Company. Indeed, that all along was the issue arising in the case. The learned trial Judge rightly, in my humble view, put the questions to be determined as follows:

*1. Whether Sumbo Onitiri & Co. was still the agent of the 1<sup>st</sup> defendant as by the 29<sup>th</sup> January, 1991.*

*2. If they were, had they any authority to sell this property in dispute, i.e. Does their mandate include accepting offers made on behalf*

*of their principal;*

3. *Was there any binding contract between the plaintiff and the 1<sup>st</sup> defendant.”*

It is the resolution of these questions, particularly 2 and 3 that determines the dispute between the parties, having regard to the pleadings of the parties and the evidence adduced at the trial. B

**It is not in dispute that the Company commissioned the Firm to look for buyers for its properties.** Exhibit H is clear on this point and to that extent PW1's Firm was and remained an agent of the Company as long as its properties mentioned in Exhibit H remained unsold and not withdrawn from sale. The Firm however is not, on the basis of Exhibit H, an agent of the Company for the purpose of concluding a contract of sale of the property in dispute. C

**Question 2** is the crucial question. The Plaintiff and PW1 D relied on Exhibit A as giving the latter the mandate to sell. The Company's contention is that Exhibit A has no such effect and that the only mandate to PW1's Firm in Exhibit H was to look for buyers for the properties listed therein. There is no dispute as to the limit E of the authority or mandate or agency given to PW1's Firm in Exhibit H. The agency was to look for buyers. And it was not even a sole agency for that matter; other estate management firms were equally involved. Each was to scout round for prospective buyers F and communicate offers received to the Company for acceptance. It was only when the Company had accepted an offer communicated to it that a contract existed between the Company and the offeror. This clearly was also PW1's understanding of Exhibit H as borne out by Exhibits L, and N and the evidence of PW1 where he said: G

*“All the offers received so far I was communicating to the General Manager of the defendant Company. This is one of the letters I wrote concerning one of the offers I got. Ajose-Adeogun seeks to tender it. Chief Akerele does not object, admitted and marked Exhibit ‘N’ ”.* H

**On the** basis of Exhibit H, PW1's Firm would have no authority to issue Exhibit B. His mandate would enjoin him to refer Plaintiff's letter of 2<sup>nd</sup> January 1991 to the Company for its accep-

tance or rejection of the offer contained in that letter. But PW1 testified to the effect that Exhibit A empowered him to issue Exhibit B. Did it? Construction of Exhibit A is a matter of law for the Court to decide. Exhibit A is clear and unambiguous. I have already quoted it in full in the earlier part of this judgment. I can find nothing in it empowering PW1's Firm to sell the property in dispute to any buyer of its choice who offered N3.5m.. I think it was mischievous, if not fraudulent, of PW1 to claim that Exhibit A went beyond acceptance of an offer he communicated to the Company in October 1990. Hear what he said in evidence which, for ease of reference, I will quote here again:

*"By the time I wrote Exhibit 'N' the highest offer I had was 3.5 million. When I got the offer for N3.5 million, I requested for the board's resolution, from the defendant, in order to have a clear mandate. They gave the resolution which is tendered as Exh. 'A'*

*After Exhibit 'A' I asked the Company that made the offer to come and pay. They gave conditions that they are going to pay a deposit and after collecting the document from U.B.A. then they pay the balance. The Company that made the offer did not fulfil the condition."*

Again, under cross-examination, he testified:

*"Q.: - Look at Exhibit H. That is the letter of instruction of defendant to you for the disposal of the property.*

*A.: - Yes*

*Q.: - Read the whole of Exhibit H. The instruction there is for you to communicate to them any time you have prospective buyers.*

*A.: - Yes*

*Q.: Each time you had a buyer you communicated to the defendant.*

*A.: - Yes.*

*Q.: Your letter Exhibit M is one of such communications.*

*A.: - Yes It is for inspection*

*Q.: - Also Exhibits L, N and also the letter of 3/12/90*

*A.: - Exhibit L is correct, Exh. N is also correct. The 3/12/90 was written also by me to defendant.*

*Chief Akerele seeks to tender the letter of 3<sup>rd</sup> December, 1990. Mr. Ajose-Adeogun does not object. It is admitted and marked Exhibit 'P'.*

*Q.: Look at Exhibit N. second paragraph was that resolution sent to you.*

*A.: - It was sent*

B

*Q.: - You got another buyer who was prepared to pay N3.5 million.*

*A.: - Yes.*

*Q.: - You also requested for Board of Director's resolution. Look at Exhibit A.*

C

*A.: - Yes*

*Q.: - That resolution was passed for you to receive N3.5million from Teericon a particular Company that offered N3.5million.*

*A.: - No. It was for me to receive N3.5million from whoever that can pay that N3.5million."*

D

**In the light of his evidence, could PW1 have honestly believed that Exhibit A was a blank mandate to him to sell to anyone who would offer N3.5million or above without further reference to the Company? I do not think so. PW1 is a fellow of the Nigerian Institute of Valuers and has been in practice for over 15 years as at April 1991 when he testified.**

E

**Strangely enough such an experienced estate agent did not mention Exhibit H in his evidence in chief as being the genesis of his relationship with the Company. He lied so unashamedly in his evidence that I am surprised the learned trial Judge ascribed credence to his evidence. One must be gullible indeed to believe him when to a question by counsel in cross-examination:**

F

G

*"Q.: - Exhibit A has nothing to do with the plaintiff" he answered:*

*Ans.: - that is the mandate. It has nothing to do with the plaintiff. It is the mandate to sale (sic)"*

H

**This is an experienced estate agent who knew how he came by Exhibit A, still claiming that Exhibit A was a mandate to him to sell to anyone, his real mandate Exhibit H, notwithstanding. Why did PW1**

behave the way he did in this case? Was it the lure of commission to be received on the transaction? I will rather not hazard a guess.

**Having held that PW1's Firm was agent of the Company at all times relevant to this action, by virtue of Exhibit H would the Company be bound by Exhibit B written by the Firm to the Plaintiff and Plaintiff's acceptance of Exhibit B by Exhibit O? I rather not think so. Plaintiff knew all along of Exhibit H and must therefore have known that PW1's Firm had no mandate to write Exhibit B. Plaintiff was represented throughout negotiations with PW1's Firm by a solicitor, Mr. Ladi Ajose-Adeogun who in his evidence as PW3 testified thus:**

*"Q.: Apart from the Newspaper publication you also satisfied yourself with Exh. H.*

*D A.: - This is one of the documents that persuaded me to know that Sumbo Onitiri was not a fake.*

*Q.: - With the Newspaper publication and Exh. H you were aware of the relationship between Sumbo Onitiri and the 1<sup>st</sup> Defendant.*

*E A.: - Yes, it suggests their relationship.*

*Q.: - You must have also seen the original of this document Exhibit A.*

*A.: - I have not seen the original of Exh. A."*

*F PW3 made a turn around when he testified further thus:*

*"Q.: - You know as a legal practitioner that you have to call for the instrument appointing the agency.*

*A.: - yes.*

*Q.: - You called for Exhibit H and you saw it.*

*G A.: - To be fair I have never seen Exhibit H before but until today. I had seen exhibit A before.*

*Q.: - It was Exhibit A that motivated you to go on.*

*A.: - It was not only Exhibit A.*

*H Q.: - You did not call for instrument appointing the agent.*

*A.: - He showed me proof and because of the publications in Newspaper and other things."*

**PW1 had, however, testified that the Plaintiff was aware of the re-**

lationship his Firm had with the Company.

On the evidence before the Court, both oral and documentary, it could not reasonably be found that PW1's Firm at any time had general authority to sell the property in dispute without reference first to the Company for its acceptance of a particular offer. B The concurring finding of the two Courts below to the contrary is clearly perverse and will not be allowed to stand. That finding and other findings anchored on it are set aside. On the oral and documentary evidence adduced in this case there is nothing to suggest C that the Firm had authority of the Company to make an offer as in Exhibit B for the sale of the property in dispute to anyone, the Respondent inclusive. The Firm's authority was to introduce buyers to the Company for the latter's consideration to accept or not. D The Firm had no authority to contract on the Company's behalf. There is no evidence that Respondent's offer of 2<sup>nd</sup> January 1991 was ever communicated to the Company and accepted by the latter by board resolution. That being so, the Respondent has failed to E prove that there was a valid contract of sale between it and the Company capable of being enforced by an order of specific performance.

The conclusion above is enough to dispose of these appeals. I need to make a short observation on the grant of relief (E) in favour of F the Respondent. On the evidence available the property in dispute was sold to the 2<sup>nd</sup> Appellant on 11<sup>th</sup> February 1991 – see exhibit 1. The respondent knew, through its solicitor, as at 4/2/91 that the Company was going to sell the property to the 2<sup>nd</sup> Appellant. The 1<sup>st</sup> Appellant put G 2<sup>nd</sup> Appellant in possession after the sale to the latter of the property. This happened obviously in February 1991. And the fact that 2<sup>nd</sup> Appellant was in possession was known to the Respondent; PW3, its solicitor, gave evidence to that effect. The injunctive order of the trial Court was H not made until 24/4/91 restraining the 1<sup>st</sup> Appellant from putting the 2<sup>nd</sup> Appellant in occupation of the said property; an act that had been accomplished before the order was made. There was no shred of evidence that 1<sup>st</sup> Appellant in defiance of the order of court put the 2<sup>nd</sup> Appellant in

occupation after 24/4/91. Yet relief (E) was granted by the trial Court and affirmed by the Court below. Any decision given without evidence in support must be perverse. The grant of relief (E) is clearly perverse. I need say no more.

B In conclusion, the appeals of the two Defendants/Appellants have merit and are, therefore, hereby allowed. The judgements of the two courts below are set aside. Plaintiff's claims are dismissed with costs to the Appellants assessed at N1,000.00 in the Court of trial; N3,000.00 in the Court of Appeal and N10,000.00 in this Court.  
C

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#### **WALI JSC**

I have a preview of the lead judgment of my learned brother  
D Ogundare, JSC and I agree with his reasoning and conclusion for allowing the appeal.

I also hereby allow the appeal and I adopt the consequential order made in the lead judgment that of costs inclusive.

E \_\_\_\_\_

#### **IGUH JSC**

I have had the privilege of reading in draft the judgment just  
F delivered by my learned brother, Ogundare, J.S.C. and I am in complete agreement with the reasoning and conclusion therein. I have nothing to add.

Accordingly, I, too allow this appeal and make the same orders including those as to costs as are therein contained.  
G

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#### **KATSINA-ALU JSC**

My Lords, I have had the advantage of reading before now the  
H judgment which my learned brother Ogundare JSC has delivered . I entirely agree with it, and cannot usefully add anything.

I would allow the appeals and set aside the judgment of the two courts below. I would dismiss the plaintiff's claims with costs as awarded.



### EJIWUNMI JSC

I had the privilege of reading before now the copy of the judgment just delivered by my learned brother, Ogundare, JSC. In that judgment, the facts though apparently involved, were carefully analysed and the issues raised in this appeal properly considered. For the reasons given in the said judgment, the appeal was allowed; and I am in entire agreement with the reasons given and the conclusion that the appeal deserves to succeed. However, I would like to add my own contribution as follows:

For this purpose, I will give the facts that are germane to my contribution briefly thus. The 1<sup>st</sup> appellant as owners of three properties situate at Port Harcourt, Ibadan and Lagos being desirous of selling these properties invited several Estate Agents, to get buyers for them. Sumbo Onitiri & Co., a firm of Estate Surveyors, and Valuers was one of the Estate Agents who received this assignment by a letter Exhibit H.

The firm of Sumbo Onitiri & Co., went to work, and apparently communicated offers of a number of likely buyers to 1<sup>st</sup> appellant. One of such offers was by an unnamed buyer who offered the sum of N3.5m to buy the Port-Harcourt property, the subject matter of this appeal. Though the offer was not accepted, it is clear from the evidence on record that the firm of Sumbo Onitiri & Co., the Estate Surveyors and Valuers, not only informed the 1<sup>st</sup> appellant of this offer, but also requested for a formal acceptance of this offer by a board resolution of the 1<sup>st</sup> appellant. Pursuant to this request, the Board of Directors of the 1<sup>st</sup> appellant on the 7<sup>th</sup> of November, 1990 made a resolution as in Exhibit A.

Now, as aforesaid, the offer which led to the resolution in Exhibit A, did not come through. Therefore Sumbo Onitiri, the Estate Surveyor and Valuer, continued with the assignment to get a buyer for the property. Eventually, the Estate firm succeeded in getting the Respondent, Bolex Enterprises (Nig.), interested in the purchase of the property. It would appear that in respect of this transaction, the firm of Sumbo Onitiri & Co., made the offer for the sale of the property to the respon-

dent upon the terms set out in Exhibit B dated 4<sup>th</sup> January, 1991. It reads:

“Re: Sale of Plot 121/122

TRANS AMADI INDUSTRIAL

LAYOUT PORT-HARCOURT

B 1. *DESCRIPTION: A purpose built industrial premises developed with factory structures, office block and staff canteen all on 4.27 acre site.*

2. *LOCATION: Plot 121/122 TRANS AMADI Industrial Layout, Port-Harcourt*

C 3. *LETTABLE SPACE: Factory Structure 1358sm, Warehouses 278sm, Office 321sm, Canteen 96sm, Gate House 15sm*

4. *TITLE: 99 years with 80 years unexpired*

5. *PRICE: N4M (Four Million Naira)*

D *TERMS OF PAYMENT: A Certified Bank Cheque for 4m in favour of INCAR NIGERIA PLC*

*Looking forward to your prompt response”*

E The offer in Exhibit “B” was accepted by the Respondent on the 28<sup>th</sup> January, 1991 when it sent to the firm of Onitiri & Co., a cheque issued in the name of ‘UNTIED BANK FOR AFRICA PLC’.

F The firm of Onitiri & Co., duly acknowledged receipt of the cheque on the same date, that is 28<sup>th</sup> January, 1991. On that same date, the Firm of Sumbo Onitiri and Co. then informed the 1<sup>st</sup> appellant, per Exhibits ‘C’, which reads:

“RE: Plot 121/122 TRANS AMADI INDUSTRIAL LAYOUT, PORT HARCOURT

G *Further to our various discussions in respect of the above, please find enclosed our cheque for N4m. (Four Million Naira) being the purchase price on the above property.*

H *The buyers are Bolex Holdings Limited and will be grateful if an official receipt issued in favour of Bolex Holdings we wish to reiterate that we have been able to obtain a higher figure of N4million as opposed to the N3.5million the Board approved in its meeting of 7<sup>th</sup> November, 1990 due to the upward trend of the economy and our relentless effort in seeing to the logical conclusion of the sale to your best interest.*

*We hope you will settle our fees of N250,000 (Two Hundred and Fifty Thousand Naira) inclusive of travelling and advertisement expenses soonest”.*

It is manifest from the evidence on record and the letter, ‘C’ quoted above that that was the first time the 1<sup>st</sup> appellant knew anything about the offer made to the Respondent by the Firm of Sumbo Onitiri & Co., and its acceptance by the Respondent. B

However, following this development, a meeting was held between the Managing Director of Incar and Mr. Onitiri, the firm of Sumbo Onitiri, Estate Surveyor and Valuers. During that meeting, the 1<sup>st</sup> appellant rejected the offer of the sum of N4 million which the Respondent offered for the purchase of the property. The 1<sup>st</sup> appellant then asked that an additional sum of N200,000 be paid for the Respondent to secure the property as its own. The decision so reached was apparently communicated to the Respondent by the Firm of Sumbo Onitiri & Co. This is because it does appear from Exhibit ‘D’ that the Respondent had allegedly agreed to pay the extra N200,000. Exhibit ‘D’ read thus:- C D

“RE: PLOT 121/122 TRANS AMADI INDUSTRIAL LAYOUT, PORT-HARCOURT E

*Further to the meeting of Friday 1<sup>st</sup> February, 1991 in respect of the above between the Managing Director of Incar and Mr. Onitiri A. A., and the instance of the Managing Director that Bolex Enterprises Nigeria Limited should increase their offer by N200,000.00. I was to confirm that Bolex Enterprises Nigeria Limited has now accepted to pay the N200,000.00. Thus making the sale price N4.2m. We expect to have official receipt of the N4m already paid and the balance will be paid on execution of the Legal Transfer Documents.”* F G

In the meantime, the 1<sup>st</sup> appellant had received other offers for the purchase of the property. Eventually, the 1<sup>st</sup> appellant sold the property to the 2<sup>nd</sup> appellant for N4.25m, and put the 2<sup>nd</sup> appellant in possession. H

Having failed to secure the property as proposed, the Respondent then commenced action against the 1<sup>st</sup> Respondent. However, in the course of the trial the Respondent sought and obtained the leave of Court

to join the 2<sup>nd</sup> Appellant and to amend the reliefs sought, which read:-

“(A) A declaration that the Plaintiff is the equitable owner of the premises known as Plot 121/122 Trans Amadi Industrial Layout, Port Harcourt, Rivers State, which property is registered as No. 40 at page 40 in Volume 20 of the Lands Registry in the Office at Port Harcourt, Rivers State and which land is more particularly delineated on plan number P.H. 607 attached to a lease dated 23<sup>rd</sup> of May 1974.

(B) An Order of specific Performance against the 1<sup>st</sup> Defendant compelling the 1<sup>st</sup> Defendant to honour the contract of sale entered into by the plaintiff and the 1<sup>st</sup> Defendant for the sale of plot 121/122 Trans Amadi Industrial Layout Port Harcourt, Rivers State, which property is registered as No. 40 at page 40 in Volume 20 of the Lands Registry in the office at Port Harcourt, Rivers State and which land is more particularly delineated on plan number P.H. 607 attached to a lease dated 23<sup>rd</sup> of May 1974.

(C) An Order directing the 1<sup>st</sup> Defendant to execute in favour of the Plaintiff a Deed of Assignment of the residue of the term unexpired which term was granted to the 1<sup>st</sup> Defendant by a lease dated 23<sup>rd</sup> of May 1974.

(D) An Order directing the 1<sup>st</sup> Defendant to assist and or provide all Documentation necessary to enable the plaintiff obtain the Governor’s consent to the Deed of Assignment.

(E) An Order directing the 2<sup>nd</sup> Defendant to vacate the premises of the Plaintiff to wit plot 121/122 Trans Amadi Industrial Layout, Port Harcourt, which the 2<sup>nd</sup> Defendant now occupies in violation of an existing Court Order dated 24<sup>th</sup> April 1991, which order restrains the 1<sup>st</sup> defendant from putting the 2<sup>nd</sup> Defendant in occupation of the said Court.”

The learned trial judge after hearing addresses by learned counsel for the parties, delivered a reserved judgment inter alia thus:

“It is manifest from the said judgment that the learned trial judge granted all the reliefs sought for by the respondent.”

As the Appellants were dissatisfied with the judgment and orders of the trial Court, they appealed to the Court of Appeal (Port Harcourt Division). Having lost in the Court, they have now appealed to this Court.

The appellants in their joint brief of argument, identified three issues for the determination of this appeal. These are:-

*“1. What is the true construction of Exhibit A in the circumstances of this case; alternatively does Exhibit A confer a mandate on Sumbo Onitiri & Co. (P.W.1.’s firm) to offer and or accept any offer of the property in dispute to any prospective buyer who is willing to purchase same at any price not below N3.5 million.*

*2. Whether or not the decision of the Court of Appeal shows a proper exercise of its Appellant jurisdiction in the circumstances herein.*

*3. Whether even if there was a contract between the plaintiff and the 1<sup>st</sup> Defendant (which is denied), such contract is void for contravention of the Land Use Act.”*

The respondent relied on two briefs which were dated 29/4/97 and 20/2/98 respectively. I do not consider it necessary to deal with the preliminary objection raised in the respondent’s brief dated 29/4/97 to two issues identified for determination in the Appellant’s joint brief of 17/2/97. This is because I have nothing further to add to the resolution of the questions raised by the preliminary objection in the leading judgment of my learned brother, Ogundare JSC.

At the hearing of the appeal, learned counsel for the appellants C.O.I. Joseph SAN, after adopting the appellants brief made further submissions to the Court. He then submitted that the appeal turns on the interpretation of Exhibit A. He therefore contended that this Court cannot be bound by the interpretation of Exhibit A by the lower Court. And further argued that contention of the Appellants is that Exhibit A, did not give a general mandate to Sumbo Onitiri & Co., to sell the property at a price not below N3.5 million. In the course of his submission he referred to page 115 of the Printed Record, lines 21 – 29 and also to page 443 thereof. It was also argued for the Appellants that Exhibit N, shows the limit of the authority given to the firm of Sumbo Onitiri & Co. with regard to the sale of the property. In this regard learned Senior Counsel also referred to the evidence of P.W. 3 and then submitted that the respondent knew the limit of the authority given to Sumbo Onitiri and Co., by the 1<sup>st</sup> Appellant, that authority, in the view of learned Senior Counsel

for the Appellants is as set out in Exhibit H. He finally urged the Court to uphold the appeal, and dismiss the claims of the Respondent.

Mr. Ayanlaja SAN learned counsel for the Respondent, after adopting and placing reliance on the two briefs of argument filed for the Respondent, addressed the Court further on some of the issues raised in the said briefs of argument. He opened his submission by contending that Exhibits A & H be construed together to determine the limit of the authority of P.W.1, Mr., Sumbo Onitiri, of Sumbo Onitiri & Co., with regard to the sale of the property. But learned Senior Counsel also admitted that it is manifest from Exhibit H. that PW.1 was not the only one who had the mandate to find buyers for the 1<sup>st</sup> Appellant. He also agreed that the final voice as to the sale belonged to the 1<sup>st</sup> Defendant. He then submitted that the key question raised in this appeal is whether Exhibit A gave PW.1 the authority to sell the property in dispute. However Mr. Ayanlaja SAN further submitted that Exhibit A should be construed as a general acceptance. And also invited the Court to consider the principle of estoppel by agency. In support of this invitation, he referred to the paragraph 10A of the Statement of defence filed for the respondent at page 127 of the Printed Record.

Before considering the argument of counsel in this appeal, I think it is proper to commend Mr. O. Ayanlaja SAN for conceding in the course of his submission that the key to the resolution of the main question raised in this appeal, lies with the interpretation given to the Exhibit A in the circumstances of this case. Before making this concession, be it noted, that he had argued that it is the combined effect of Exhibits A & H that should determine whether the Respondent had a contract of sale of the property and was therefore entitled to the reliefs granted to it by the trial Court and which was upheld by the Court below. It is however the contention of learned counsel for the Appellants that the Court below was wrong to have upheld the decision of the trial Court which he argued was made in error.

It is clear that the lower Court in the course of its judgment (per Onalaja JCA) at p. 627 of the Printed Record said thus:-

*“1<sup>st</sup> P.W. acted professionally as agent of 1<sup>st</sup> Appellant to sell the*

*property in dispute. Its Agency was never revoked. Under the law it had legal authority to accept the purchase price of N4 million from the Respondent in respect of the land in dispute. Reliance was put at Article 30 paragraph 6 page 88 BOWSTEAD ON AGENCY that:-*

*Every agent who is authorised to any act in the course of his B trade or profession or business as an agent has implied authority to do whatever is usually incidental in the ordinary course of such trade or profession or business to the execution of his express authority.”*

His Lordship Onalaja JCA then continued:

*“Exhibits A & H clearly directed 1<sup>st</sup> P.W. to conclude the nego- C tiation for the sale of property in dispute and created contractual agency. 1<sup>st</sup> Appellant is estopped from denying that it held out Sumbo Onitiri and Co. as its agent for the sale of the land in dispute. It could not reverse the steps taken by its agent which by the act of its agent made Respon- D dent acquired (sic) an equitable interest in (sic) dispute.”*

After that major finding, the Court below after quoting several passages from the judgment of the trial Court, which were described as findings of fact by the learned trial judge, the Court below, per Onalaja E JCA, then said:-

*“After a careful consideration of the evaluation of evidence and findings of fact regarding Exhibits A and H by the learned trial Judge, I am convinced that the findings were aptly justifiable and borne F out from the evidence leading to the conclusion that the findings were not perverse and handicapped to disturb the said findings. The attack on the judgment on the legal effect and interpretation put on Exhibits A & H lack any substance, merit, and unjustifiable thereby rejecting it and find- G ing it against the Appellants notwithstanding my observation that there was lacuna as to what this Court was to make of the complaints in issues 1 & 2 of 2<sup>nd</sup> Appellants issues.”*

Now, it is manifest from the passages quoted above from the judgment of the Court below, that as far as that Court was concerned, H the respondent was entitled to succeed, having regard to the combined effect of Exhibits A & H.

In order to appreciate the conclusion reached above by the Court

below and what I would say later thereon, I deem it necessary to set out Exhibit A & H.

Exhibit H dated 12<sup>th</sup> March 1990 was written by the 1<sup>st</sup> Appellant to several Estate Agents of which Sumbo Onitiri & Co. was one, to seek B buyers for the properties of the 1<sup>st</sup> Appellant situate at Port Harcourt, Ibadan and Lagos.

Exhibit A reads:-

SALE OF PROPERTIES

C *"This is to inform you that it is our intention to put the following properties on sale:*

*1. Plot 121/122, Trans Amadi Industrial Layout, Port-Harcourt, Rivers State.*

*2. KM 10, Old Lagos Road, Ibadan, Oyo State.*

D *3. 10A Ijora Causeway, Ijora, Lagos State.*

*You are hereby given instruction to look for prospective buyers for the Properties and communicate to us as soon as you get them.*

*Please note that similar instruction is given to other Estate Agents.*

E *We shall advise you of the terms and conditions for the sale of the properties when necessary."*

Before Exhibit A is reproduced, the facts that immediately led to its issuance by the 1<sup>st</sup> Appellant would be stated. These facts are as given F by PW.1, Sumbo Onitiri, when he was recalled by his counsel during the trial of this case. At page 111 of the Printed Record, he said thus:-

G *"All the offers received so far I was communicating to the General Manager of the defendant company. This is one of the letters I wrote concerning one of the offers I got. Ajose Adeogun seeks to tender it. Chief Akerele does not object, admitted and marked Exhibit 'N'.*

*By the time I wrote Exhibit 'N' the highest offer I had was N3.5 million. When I got the offer for N3.5 million, I requested for the board's resolution from the defendant, in order to have a clear mandate. They H gave the resolution which is tendered as Exhibit 'A'. After exhibit 'A' I asked the Company that made the offer to come and pay. They gave conditions that they are going to pay a deposit and after collecting the document from UBA, then they pay the balance. The company that made*



*the offer did not fulfil the condition.”*

It is clear from the above evidence of Sumbo Onitiri that pursuant to his request, the Board of the 1<sup>st</sup> Appellant’s company on 7<sup>th</sup> November 1990, resolved as in Exhibit A thus:-

“SALE OF PROPERTY AT PLOT 121/122 TRANS AMADI INDUSTRIAL LAYOUT PORT-HARCOURT RIVER STATE B

*It was RESOLVED that the offer of N3.5 million for the sale of Property at Plot 121/122 Trans Amadi Industrial Layout Port Harcourt, from Sumbo Onitiri & Co., Estate Surveyors and Valuers, be accepted and that management be authorised to endorse all Legal Transfer Documents.”* C

After the attempt to sell the property on the basis of Exhibit ‘A’ failed, it is undisputed that the Firm of Sumbo Onitiri & Co. Ltd. continued to look for buyers. Eventually the Respondent became interested.

However, it is not in dispute that the 1<sup>st</sup> Appellant was not informed about the negotiation for the sale until after Sumbo Onitiri & Co. got the sum of N4 million from the Respondent. In this respect it is interesting to note that when PW.1 Sumbo Onitiri, was asked whether he wrote to the 1<sup>st</sup> Appellant after he got the Respondent, the witness answered thus:- D E

*“I did not write because of the Board’s Resolution.”*

The question then is whether the Board’s Resolution Exhibit A empowered the Firm of Sumbo Onitiri & Co. to commit the property to the Respondent. F

Earlier in this judgment, I quoted a passage from the judgment of the Court below where reference was made to Article 30 at Page 88 of Bowstead on Agency. The Court below apparently relied on that authority to endorse the judgment of the trial Court in its conclusion that Exhibit A and H clearly directed 1<sup>st</sup> P.W. to conclude the negotiation for the sale of the property and created contractual agency. And that 1<sup>st</sup> Appellant is estopped from denying that it held out Sumbo Onitiri and Co. as its agent for the sale of the land in dispute. The 1<sup>st</sup> Appellant could not therefore reverse the steps taken by its agent which by the act of its agent enabled the respondent to acquire an equitable interest in the disputed property. G H

It does seem to me however, that the Court below might have

relied wrongly on Article 30 of Bowstead on Agency to uphold the trial Court in the latest edition of this work titled Bowstead and Reynolds on Agency, 16<sup>th</sup> Edition, at page 126. After Article 30 the provisions of which are in pari material with Article 30 previously quoted above, the learned Authors made certain comments followed by illustrations to show the limits of Article 30. For example the sixth illustration at page 128 of the Bowstead and Reynolds, it is clearly stated that an estate agent in England has normally no authority to sell land; even though he is instructed as to the price at which the vendor will sell, his function is to solicit offers and transmit them to his principal: See Keen v. Mear 9192)) 2 Ch 574; Wragg v Lavett 91948) 2 ALLER 968.

I think also that it is necessary to add that generally an agent cannot act beyond the powers given to him by his principal. This rule was aptly stated in the case of Du BUSSCUE V. ALT (1878) 8 CHD (CA) 286 where at 310 per Thesiger LJ said:

*“The first contention raised a question which, as it appears to us, does not present any difficulty. As a general rule no doubt, the maxim “delegatus non potest delegare” applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third person.”*

It is also pertinent to refer to the 8<sup>th</sup> Edition of Chitty on Contracts (Specific Contracts) Vol. 2, where at para. 32 – 015, the learned authors of this work said:-

*“ An agent employed by the vendor to find a purchaser is an agent in a limited sense only. He has authority to describe the property and make statements as to its value so as to bind its principal, but he has not implied authority to receive a pre-contract deposit on such terms as to make the prospective vendor liable and no power, without express authority, to conclude a contract for a lease or sale”. See MULLENS V. MILLER (1882) 22 Ch. D. 194; Sorrell v. Finch (1977) A.C. 728 at 753.*

The principles that govern an estate agent and his principal, the vendor for the sale or lease of land, that are deducible from the authorities referred to above may be put thus: an agent employed by a vendor to find a purchaser is an agent in a limited sense only. He has authority to

describe the property and make statements as to its value so as to bind the principal, but he has no implied authority to receive a deposit and no power, without express authority, to conclude a contract to grant a lease or a contract for the sale. It is his duty to communicate to his principal the best offer received by him at any time before a binding contract for the sale of the property has been actually signed by the principal, unless, of course, he has been informed by his principal that such an offer is not acceptable. It must also be noted that when a vendor merely authorises a house agent so sell at a stated price he must not be taken to be authorising the agent to do more than agree the price with an intending purchaser. The making of a contract is not part of an estate agents' business, and, although, on the facts of an individual case, the principal may authorise him to make a contract, such an authorisation is not lightly to be inferred from vague or ambiguous language.

I now turn to the instant case. From the facts there can be no doubt that the firm of Sumbo Onitiri, Estate Surveyors and Valuers, was engaged by the 1<sup>st</sup> Appellant to solicit for the sale of the property in dispute by virtue of exhibit H. A relationship of Agent and Principal was therefore created between them. In keeping with that relationship, the firm of Sumbo Onitiri duly informed its principal when the firm got someone who was interested in buying the property. Sumbo Onitiri, presumably the principal officer in the firm of Sumbo Onitiri gave evidence as PW.1 during the trial of this case. His evidence, which I have reproduced above, clearly showed that he asked and indeed got a Board resolution of 1<sup>st</sup> Appellant wherein the 1<sup>st</sup> Appellant accepted the offer of N3.5 million for the sale of the property to that someone introduced by the firm of Sumbo Onitiri. Now it is that resolution of the Board of the 1<sup>st</sup> Appellant, Exhibit A, that PW.1, Sumbo Onitiri, claimed was his mandate in his transaction with regard to the purported sale of the property to the Respondent. I do not think that Exhibit A, can upon any view be regarded as a mandate for a separate transaction. PW.1, Sumbo Onitiri, took the proper steps that he should take when he handled the N3.5 million offer which proved abortive. There is no evidence to suggest in the record of proceedings that the 1<sup>st</sup> Appellant gave to the firm of Sumbo

Onitiri any express right to conclude the transaction of sale with the Respondent. It is patent from a careful reading of Exhibit A that it was limited to the sale of the property for N3.5 million. It is mischievous to suggest that it was a mandate for subsequent transactions with other persons. A careful reading of Exhibit A clearly shows that the 1<sup>st</sup> Appellant was there concerned with the sale of the property for the sum of N3.5 million to the person introduced by the firm of Sumbo Onitiri & Co. I have no doubt in my mind from a perusal of Exhibit A, that it is preposterous to suggest that there is anything in it which authorised the firm of Sumbo Onitiri & Co. to use it as a mandate for carrying out his engagement as an agent of the 1<sup>st</sup> Appellant to find purchasers for the properties of the 1<sup>st</sup> Appellant. In the absence of any other evidence beyond that of PW1, Sumbo Onitiri, I must hold that Exhibit A, is not a mandate for the firm of Sumbo Onitiri to negotiate the sale of the property without first informing its principal, the 1<sup>st</sup> Appellant. It is also my view, and I so hold, that the firm of Sumbo Onitiri as agent of the 1<sup>st</sup> Appellant went beyond the authority given to the Firm by the 1<sup>st</sup> Appellant, in the transaction conducted with the Respondent.

It is not in dispute that the 1<sup>st</sup> Appellant knew nothing about the transaction between the firm of Sumbo Onitiri & Co. and the Respondent until the cheque for the sum of N4 million was forwarded to the 1<sup>st</sup> Appellant. This offer was promptly rejected by the 1<sup>st</sup> Appellant. With the rejection of that offer by the 1<sup>st</sup> Appellant, it cannot be said that a valid contract came into existence between the 1<sup>st</sup> Appellant and the Respondent. In the absence of a valid contract between the 1<sup>st</sup> Appellant and the Respondent, it is my humble view that the Respondent cannot sue the 1<sup>st</sup> Appellant in the circumstance for the breach of a non-existent contract. See Dunlop Rheumatic Tyre Co. v. Selfridge & Co. (1914 – 15) ALL E.R. 333.

However, can it be said that the respondent had obtained an equitable interest in the property? I do not think that the Respondent can lay claim to any equitable interest in the property. Upon the facts disclosed, it is clear that the Respondent paid the sum of N4 million to the firm of Sumbo Onitiri & Co. towards the purchase of the disputed prop-

erty. But it is also manifest that the action of the firm of Sumbo Onitiri & Co., was in excess of the authority allowed it by the 1<sup>st</sup> Appellant. Hence the purported agreement to sell the disputed property to the Respondents cannot bind the 1<sup>st</sup> Appellant so as to enable the Respondent to obtain any interest; legal or equitable in the disputed property. It follows that as the Respondent is not in possession of any legal or equitable interest in the property, the Respondent cannot be the beneficiary of the equitable order of specific performance. See SPRY on Equitable Remedies 2<sup>nd</sup> Edition at page 51. This is a classic example of where an agent tried to force the sale of property against the wishes of the vendor, his principal. The matter is, in my view, made worse by the unproven claim of the agent that he had a mandate to conclude the deal without the knowledge or consent of his principal by virtue of a document Exhibit A, which was meant for an offer not connected with that which is under consideration in this appeal. The erroneous interpretation of a contractual document or a clause therein cannot be construed by a party to such a contract as acknowledgement of the correctness of such interpretation by the other party.

In conclusion it is my humble view that the appeals of the two Appellants deserve to succeed for the reasons given above and the fuller reasons given in the leading judgment of my learned brother Ogundare JSC. The appeals are therefore allowed, the judgements of the two Courts below are hereby set aside. The claims of the Respondent are dismissed with costs to the Appellants assessed at N1,000.00 in the trial Court; N3,000.00 in the Court of Appeal and N10,000.00 in this Court.

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