

SUPREME COURT OF NIGERIA
FRIDAY 5TH JULY, 2002. SC. 114/1995
CORAM:- A. B. WALI, E. O. OGWUEGBU, A. I. IGUH,
U. A. KALGO, S. O. UWAIFO, JJSC

ALHAJI IBRAHIM MOHAMMED APPELLANT
AND
KLARGESTER NIGERIA LTD RESPONDENT

PLEADINGS - Averments - Binding nature - Plaintiff is bound by his writ of summons and pleadings - For it is desirable that parties have prior knowledge of the case - So as not to procure evidence to prove facts that will be undisputed (H1)

LAND LAW - Evidence - Admissibility - Part of plaintiff's evidence would have been admissible - If a reply was filed setting out its knowledge of the joint ownership of the property - And that it took pre-caution to secure consent of co heirs (H2)

LAND LAW - Conveyance - Jointly owned property - Defendant rightly contended that the sale was subject to ratification - As both Exhibit 2 & original C of O - Did not show that the property exclusively belonged to defendant (H3)

PLEADINGS - Actions - Dismissal - Contradictory evidence - Plaintiff's claim should have been dismissed - On the ground that his evidence was at variance - With averments in the amended statement of claim (H4)

LAND LAW - Contract - Conveyance - Validity - Plaintiff did not acquire any interest in the property - As the sale was void ab initio - By reason of lack of consent of the co heirs (H5)

LAND LAW - Conveyance - Unpleaded evidence - Weight - Evidence of PW3 & 4 that consent of co heirs was obtained prior to the sale is inadmissible - Since it was not pleaded by plaintiff (H6)

LAND LAW - Conveyance - Specific performance - Sustainability -

The order ought not to have been made - As a person who does not own a property cannot be compelled to convey same (H7)

FACTS

Before the High Court of Kaduna State, plaintiff/respondent commenced this action against defendant/appellant, claiming inter alia for orders of specific performance of the contract between the parties, possession, injunction and damages. Respondent's case is that it purchased the property (i.e. No. K20 Chawai Road, Tudun Wada, Kaduna) from appellant at the sum of N35,000.00 sometime in 1986. Respondent's further contention is that the title documents including the original copy of the Certificate of Occupancy thereof was issued to it.

In his defence, appellant denied that he sold the property to respondent. He further stated that the property is a family property and as such does not belong to him alone. He contended that the transaction between him and respondent was made subject to ratification of the co-heirs to the property. After hearing in the matter, the learned trial Chief Judge granted the claims of respondent. Aggrieved, appellant appealed to the Court of Appeal Kaduna Division. The court dismissed the appeal and affirmed the judgment of the trial court. Aggrieved further, appellant filed appeal in Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the Court of Appeal was correct in affirming the reliefs of specific performance, immediate possession and injunction over the property situate at No. K.20 Chawai Road, Tudun Wada Kaduna when there was irrefutable evidence that the property did not belong to the appellant and when the respondent's pleading was not supported by the evidence led in the trial court?"

2. Whether the Court of Appeal was right in limiting the interest of the appellant's 3 co-heirs to the purchase sum of N35,000 when there was evidence that the entire transaction was without their consent and if answered negatively, whether the disclosure of this interest did not vitiate the entire transaction between the respondent and the appellant?"

HELD (Unanimously allowing the appeal per

Ogwuegbu JSC)

PLEADINGS - Averments - Binding nature

1. The above piece of evidence was at variance with the plaintiff's amended statement of claim. It must be pointed out that a plaintiff is held to the case put forward in his writ of summons and pleadings. Before the trial comes on, it is highly desirable that parties should know exactly what they are fighting about, otherwise they will go into great expense in procuring evidence to prove at the trial facts which the other party will immediately concede. (p. 2848 A)

Evidence - Admissibility

2. The plaintiff would have filed a reply setting out its knowledge of the joint ownership of the property and that it took every precaution to secure the consent of all the co-heirs. If a reply had been filed, part of the evidence of the plaintiff reproduced above would have been admissible and the courts below would have legitimately evaluated it. As the evidence stood, it went to no issue. (p. 2848 C)

Conveyance - Jointly owned property

3. The defendant both in his statement of defence and evidence maintained that the property situate at No. K20 Chawai Road, Tudun Wada, Kaduna jointly belonged to him and other children of his late father and that the sale was subject to ratification by them. The said ratification/consent was refused. Going back to the plaintiff's pleadings, its case was that the property it bought belonged to the defendant who was paid the purchase price, issued a receipt to that effect and surrendered the original of the certificate of occupancy to it. The receipt exhibit "2" issued to the plaintiff by the defendant did not show that the property belonged to the defendant. It was only an "acknowledgement receipt of the sum of thirty five thousand naira (35,000.00) only from Messrs. Klargester Nig. Ltd. Kaduna being cost of House No. K20 Chawai Rd Kd." The origi-

nal certificate of occupancy on the admission of the plaintiff's witness, (P.W.1) bore the name of Alhaji Mamman Tela the father of the defendant who died intestate leaving children and widows among whom is the defendant. The plaintiff did not take the necessary precaution which a prudent man would
B have taken in the circumstances. If it had examined the certificate of occupancy, it would have discovered that the defendant was not the owner of the property it was purporting to buy and the discovery would have put it on its enquiry. Since
C the plaintiff did not examine the certificate of occupancy, how could it have conducted a search to satisfy itself that the property did not belong to the defendant. The only reasonable conclusion to be drawn is that the plaintiff knew that the property did not belong to the defendant. This gave credence to the
D defendant's case that the sale was subject to ratification by his co-heirs and that they refused to ratify the sale. (p. 2848 E)

Actions - Dismissal - Contradictory evidence

4. The learned trial Chief Judge should have dismissed the claim
E of the plaintiff on the ground that his evidence was at variance with the averments in the amended statement of claim.
 (p. 2849 C)

Contract - Conveyance - Validity

5. The court below was also in error when it affirmed the decision of the trial court. There can be no question that the plaintiff did not prove its case and that the defendant has no authority to sell the property to the plaintiff. This is a proper
G case where the court below should have applied the maxim nemo dat quod non habet and caveat emptor. The property belonged to the defendant's father who died intestate and was survived by the defendant and a host of other sons, daughters and widows who jointly own the house with him. The evidence
H of the defendant that the co-heirs did not ratify the sale was not contradicted.

In the circumstance, the defendant had nothing which he could contract to convey to the plaintiff. The purported contract was void ab initio. The plaintiff did not acquire even an equitable

interest in the property and exhibit “2” is ineffectual to convey the legal estate in the property to him in the absence of ratification of the contract by the family. (p. 2849 E/G)

Conveyance - Unpleaded evidence - Weight

6. The evidence of PW.3 and PW4 to the effect that the consent of the co-heirs was obtained before the sale was inadmissible because it was not pleaded by the plaintiff and no reply was filed by the plaintiff. (p. 2849 F) B

Conveyance - Specific performance - Sustainability C

7. The court below misconceived the issue in controversy. The subject-matter of the dispute is whether the defendant owned the property or had authority to sell the property which is a subject-matter of inheritance and not the interest of co-heirs in the purchase price of N35,000.00. The equitable reliefs of specific performance and injunction ordered by the trial court ought not to have been made and the court below should have vacated them. Specific performance cannot be ordered against a person who has agreed to sell land/house which he does not own and the co-heirs cannot be compelled to convey to him because the court does not compel a person to do what is impossible. There was no enforceable contract at the time of the contract or at the time when the action was instituted. (p. 2850 C) D
E
F

REPRESENTATION

J. B. Daudu, SAN with J. Bello, for the Appellant

F. E. Aigbovo, for the Respondent G

CASES REFERRED TO

Akeredolu v. Akinremi (1989) 3 NWLR (pt. 108) 164

Ajuwon v. Akanni (1993) 3 NWLR (pt. 316) 182

UBA Ltd. v. Achoru (1990) 6 NWLR (pt. 156) 254 H

Ojomu v. Ajoo (1983) 2 SCNLR 156

Are v. Ipaye (1990) 2 NWLR (pt. 132) 298

Wakoma v. Kalio (1995) 9 NWLR (pt. 18) 131

AC.B. v. A-G Northern Nigeria (1967) NMLR 231

Oduka v. Kasunmu (1968) NMLR 28

Njoku v. Eme (1973) 5 SC 293

Oredoyin v. Arowolo (1989) 4 NWLR (pt. 114) 172

Akpapuna v. Obi Nzeako II (1983) 2 SCNLR 1

Adedibu v. Makanjuola (1944) 10 WACA 33

B Akerele v. Atunrase (1969) 1 All NLR 201

Bansedun v. Iyabo (1962) 1 All NLR (pt. 2) 710

Emegokwue v. Okadigbo (1973) 4 SC 113

C **STATUTE REFERRED TO**

Evidence Act, s. 138

LEAD JUDGMENT BY OGWUEGBU JSC

On 30th June, 1987, the plaintiff company instituted an action leading to this appeal in the High Court of Kaduna State, Kaduna Judicial Division claiming the following reliefs from the defendant:

“(a) *Specific performance of the said agreement;*

(b) *Possession;*

E (c) *A declaration that the certificate of occupancy No. KDA/A/002763 affecting and concerning the piece of land at K.20, Chawai Road, Tudun Wada, Kaduna, vests valid title to the land on the plaintiff;*

F (d) *A perpetual injunction restraining the defendant, his agents, heirs and servants from interfering on the property; and*

(e) *The sum of N50,000.00 (Fifty thousand naira) only as damages for the trespass committed on the said property.”*

Pleadings were ordered, filed and exchanged and at the close of trial, the learned trial Chief Judge, (as he then was) entered judgment for the plaintiff as follows:

G “1. *Immediate possession of the house No. K.20 Chawai Road, Tudun Wada, Kaduna.*

2. *Specific performance of the contract of sale of the said house and*

H 3. *Injunction restraining the defendant, his agents, heirs or servants from in any way interfering with the said house.”*

On appeal to the Court of Appeal by the defendant who was dissatisfied with the judgment of the learned trial Chief Judge, the court below affirmed the decision of the learned Chief Judge and

dismissed the defendant's appeal. He has further appealed to this court. The facts of the case are not complicated and can be gathered from the pleadings which are brief. The relevant paragraphs are as follows:

Amended Statement of Claim:

*"3. On the 8th day of July, 1986 the defendant sold his house B
situate at No. K.20, Chawai Road, Tudun Wada, Kaduna to the plaintiff
for the sum of N35,000.00 (Thirty five thousand Naira) only.*

*4. Pursuant to the said contract of sale, the plaintiff paid to
the defendant the said sum of N35,000.00k as full purchase price for C
the house and the defendant issued to the plaintiff his official receipt
of the purchase price. The plaintiff will at the hearing of the case
tender and rely on the original copy of the said receipt.*

*5. The defendant in addition surrendered to the plaintiff all
the relevant documents concerning the house including original of D
the certificate of occupancy No. 006782. The plaintiff will at the hearing
of this case tender and rely on the copy of the said certificate of
occupancy.*

*6. The plaintiff subsequently applied and obtained a transfer
of the right of occupancy and a new certificate of occupancy, No. E
KDA/A/002763 dated 6th day of October, 1986 was issued to the
plaintiff in its name by the Kaduna Local Government. The plaintiff
will at the hearing of this case tender and rely on the original copy of
the said certificate of occupancy.*

*9. In breach of the said agreement the defendant has since F
the transaction refused to vacate and deliver possession of the house
to the plaintiff and is still trespassing thereon.*

*10. WHEREOF the plaintiff claims against the defendant the
following:*

a. Possession of the said piece of land;

*b. A declaration that the certificate of occupancy No. KDA/A/
002763 affecting and concerning the piece of land at K.20 Chawai
Road, Tudun Wada, Kaduna, vests valid title to the land on the plain- H
tiff;*

c. Specific performance of the said agreement;

*d. A perpetual injunction restraining the defendant, his agents,
heirs and servants from interfering on the property.*

e. The sum of N100,000.00k (one hundred thousand naira)

only as damages for the trespass committed on the said property; and

f. The sum of N12,500.00 (twelve thousand and five hundred naira) only as arrears of rents collected by the defendant from tenants in respect of the said property from July 1986 to December, 1988 at N5,000.00k (five thousand naira) only per annum and subsequent rents to be collected as from January, 1989 to the date the property is delivered to the plaintiff.”

Statement of Defence:

“2. The defendant deny that he sold his house situate at No. K.20 Chawai Road, Tudun-Wada, Kaduna to the plaintiff for the sum of N35,000 as alleged in paragraph 3 of plaintiff’s statement of claim.

3. Furthermore, defendant states that the said house is not his house but a family house being one of the immovable properties in the estate of his late father Alhaji Mammam Tela who died on the 18th day of December, 1984.

4. The defendant deny the contention that he issued a receipt of purchase price as claimed in paragraph 4 of the statement of claim as the said note does not qualify as a memorandum of sale of house.

5. Additionally, the defendant contends that the transaction between the plaintiff’s representative and the defendant was conducted subject to contract or words of similar effect.

6. Defendant in further answer states that certain essential terms of the contract are yet to be worked out and said negotiation was substantially oral with very little in writing.

7. Defendant in answer to paragraph 5 of plaintiff’s statement of claim states that the release of the certificate of occupancy No. 006782 was meant as a sign of good faith and as a security for the sum of N35,000.00 left behind by plaintiff’s representative.

8. Defendant contends that it was clearly understood during the discussion cum negotiation with plaintiff’s representative that acceptance and conclusion of the contract could only be with the general consensus of majority members of the family inheritors estate Late Alhaji Mammam Tela and this was clearly understood to be a condition precedent to the contract.

9. That the change of certificate of occupancy by the plaintiff was completely behind the back of the defendant who was still under

the impression that negotiation was still going on between the parties and so on.

10. *The defendant was not a party to any application for transfer of ownership with the plaintiff and the certificate of occupancy No. KDA/A/002763 dated the 6th day of October, 1986 and obtained by the plaintiff as alleged in paragraph 6 of the statement of claim must have been invalidly and wrongfully obtained.* ^B

13. *Defendant in answer to paragraph 9 of the plaintiff's statement of claim deny that he breached any agreement and that he refused to vacate and deliver possession and is not and or has not been guilty of trespass thereon.* ^C

14. *Defendant shall aver at the hearing of this matter that there was no enforceable contract as the acceptance of plaintiff's offer was made inter alia of subject to approval of consensus of other family members.* ^D

17. *The defendant thereafter summoned a meeting of members of his family whereat amongst other decisions; the decision was taken regarding the general consensus that the house in dispute should not be sold and the refund of plaintiff's money was also ordered. Minutes of the said meeting held at Lafia, Plateau State on 26th July, 1986 is hereby pleaded and shall be relied upon at the hearing of this suit. Further that the written document referred to in paragraph 4 of plaintiff's statement of claim as acknowledging the receipt of N35,000.00 was not intended to be regarded as one comprehensive document embodying all the terms and conditions of the contract.* ^E ^F

21. *WHEREOF the defendant denies the plaintiff's claim in its entirety and in particular paragraphs 11 (a) to (f) of the statement of claim and shall urge this honourable court to dismiss the reliefs sought by the plaintiff with substantial costs...* ^G

The notice of appeal filed contains three grounds of appeal and the following two issues are identified in the defendant's brief for determination in the appeal:

"1. Whether the Court of Appeal was correct in affirming the reliefs of specific performance, immediate possession and injunction over the property situate at No. K.20 Chawai Road, Tudun Wada Kaduna when there was irrefutable evidence that the property did not belong to the appellant and when the respondent's pleading was not supported by the evidence led in the trial court?" ^H

2. Whether the Court of Appeal was right in limiting the interest of the appellant's 3 co-heirs to the purchase sum of N35,000 when there was evidence that the entire transaction was without their consent and if answered negatively, whether the disclosure of this interest did not vitiate the entire transaction between the respondent and the appellant?"

At the hearing of the appeal, the learned Senior Advocate appearing for the appellant adopted and relied on the arguments in the defendant/appellant's brief and reply brief. The learned counsel for the respondent did the same. None proffered oral argument. It was the contention of Mr. Daudu, SAN that the findings of the courts below are erroneous in law having regard to the facts settled on the pleadings and the legal conclusions to be drawn from those facts. He referred the court to paragraph 12 of the amended statement of claim where the plaintiff averred that on the 8th day of July, 1986, the defendant sold his house situate at K.20 Chawai Road, Tudun Wada, Kaduna for the sum of N35,000.00 to it and that at the hearing, the evidence of the plaintiff and its witnesses were completely at variance with its pleadings and that in answer to cross-examination Alhaji Ahmed Sule (PW.1), plaintiff's managing director stated that the original certificate of occupancy of the property was in the name of the defendant's father Alhaji Mamman Tailor (sic). It was further submitted in the appellant's brief that PW.1 in his evidence in chief testified that he investigated the title to the property and discovered that it was inherited by the defendant and his co-heirs.

It was further submitted by Daudu, SAN that that piece of evidence as with many others was in conflict with the statement of claim in view of the fact that the plaintiff expressly pleaded that the defendant sold his own property and not that, it was property jointly owned with his co-heirs. It was also submitted that the issue placed before the court below had nothing to do with the person with whom the plaintiff dealt with in the transaction. That the issue was whether the property was owned by the defendant as pleaded by the plaintiff and if it was owned by the defendant, whether the entire transaction was caught by the maxim *nemo dat quod non habet*. If on the other hand the property was owned by the defendant and his co-heirs, then it was mandatory for the respondent to have either amended its statement of claim or filed a reply to the statement of defence be-

cause in the absence of either of the above measures, the evidence offered by the plaintiff that it took all necessary precautions to seek the consent of all the co-heirs would go to no issue, having based its claim on the fact that the defendant was selling his own property. The court was referred to the case of *Akeredolu v. Akinremi* (1989) 3 NWLR (Pt.108) at 164 which dealt with proper function of reply in pleadings. B

On issue (1), the learned Senior Advocate concluded thus:

“... that the Court of Appeal ought on the strength of the above decision have set aside the judgment of the learned Chief Judge since it was apparent that as the evidence that was used to justify the respondent’s case was not supported by the state of its pleadings....that the Court of Appeal was under a duty not to accredit or sustain the High Court’s findings which was based on unpleaded evidence or evidence that was at variance with the pleadings. See the case of Adimora v. Ajufo (1988) 3 NWLR (Pt. 80) 1 at 75 The truth of the matter is that the property in dispute is the subject of inheritance among the appellant and co-heirs, consequently it was apparent that the appellant had nothing to convey to the respondent.” C

The learned Senior Advocate referred the court to the case of *Ajuwon v. Akanni* (1993) 3 NWLR (Pt.316) 182 at 202 where this court applied the maxim *nemo dat quod non habet* to defeat the claim of an unwary purchaser who bought a parcel of land from the wrong vendors. The court was urged to apply the maxim to this case because the plaintiff was aware that the property in dispute was subject to inheritance rights but chose to deal with the defendant as if the defendant was the beneficial owner who could single handedly convey the property to it. F

Two issues were formulated in the respondent’s brief and they overlap with those identified by the defendant. The court will consider all the issues identified in both briefs together. G

On issue (1), it was submitted in the plaintiff/respondent’s brief that the onus of proof that the contract was subject to ratification by the co-heirs was on the defendant and that he failed to discharge that burden. The court was referred to section 138 of the Evidence Act. It was further submitted in the plaintiff’s brief that taking the pleadings into consideration, the substratum of the case was whether there was a sale of the house in dispute, that issue was joined H

on that point and as the defendant had interest in the property being a co-heir, it would be right to say that the property was his. It was conceded in the plaintiff's brief that parties are bound by their pleadings as well as the court and that in the present case, the crux of the plaintiff's pleadings was that the property in dispute was sold by the defendant to the plaintiff for the sum of N35,000.00 and that the documents of title were handed over. As to whether all the heirs entitled to the property consented to the sale, it was submitted that the evidence of PW3 was encompassing and compelling on the issue because he stated positively in his evidence that the co-heirs to the property consented to the sale and that PW4 corroborated this fact in his own evidence and that the contents of exhibit "4" - the minutes of the family meeting held by the heirs cannot defeat the positive testimonies of PW3 and PW4 on the issue of consent. The court was reminded that the defendant is challenging the concurrent findings of fact by the two lower courts and that he failed to advance any cogent reason why the findings should be set aside. He cited the cases of U.B.A. Ltd. v. Achoru (1990) 6 NWLR (Pt. 156) 254 at 275-276; Ojomu v. Ajoo (1983) 2 SCNLR 156, (1983) 9 SC 22 at 53; Are v. Ipaye (1990) 2 NWLR (Pt. 132) 298 at 308-309 and Wakoma v. Kalio (1995) 9 NWLR (Pt 18) 131 at 138. We were urged to resolve the issue in favour of the plaintiff. The defendant/appellant's complaint in issue (1) is that the courts below should not have given judgment to the plaintiff in view of the fact that its evidence was at variance with its pleadings. The plaintiff pleaded in paragraphs 3 and 4 of its amended statement of claim as follows:

"3. On the 8th day of July, 1986 the defendant sold his house situate at No. K.20 Chawai Road, Tudun Wada, Kaduna to the plaintiff for the sum of N35,000.00 (thirty five thousand naira) only.

4. Pursuant to the said contract of sale, the plaintiff paid to the defendant the said sum of N35,000.00k as full purchase price for the house and the defendant issued to the plaintiff his official receipt of the purchase price..."

The defendant denied the above averments in paragraphs 2, 3, 4, 5, 6 and 8 of the statement of defence as follows:

"2. The defendant deny that he sold his house situate at No. K.20 Chawai Road, Tudun Wada, Kaduna to the plaintiff for the sum of N35,000.00 as alleged in paragraph 3 of the plaintiff's statement

of claim.

3. Furthermore, defendant states that the said house is not his house but a family house being one of the immovable properties in the estate of his late father Alhaji Mamman Tela who died on the 10th day of December, 1984.

4. The defendant deny the contention that he issued a receipt of purchase price claimed in paragraph 4 of the statement of claim as the said note does not qualify as a memorandum of sale of house.

5. Additionally, the defendant contends that the transaction between the plaintiff's representative and the defendant was conducted subject to contract or words of similar effect.

6. Defendant further states that certain essential terms to the contract are yet to be worked out and said negotiations was substantially oral with very little in writing.

8. Defendant contends that it was clearly understood during the discussion cum negotiation with the plaintiff's representative that acceptance and conclusion of the contract would only be with the general consensus of majority members of the family inheritors estate Late Alhaji Mamman Tela and this was clearly understood to be a condition precedent to the contract."

The plaintiff in paragraphs 3 and 4 of its amended statement of claim averred that the property it bought from the defendant belonged to the latter and that a receipt for the purchase price of N35,000.00 was issued by the defendant. Paragraph 3 of the amended statement of claim reads:

"3. On the 8th day of July, 1986, the defendant sold his house situate at K.20 Chawai Road, Tudun-Wada, Kaduna for the sum of N35,000.00 (Thirty Five Thousand Naira) only."

At the trial, Alhaji Ahmed Sule (PW.1) managing director of the plaintiff company testified as follows:

"Before paying the price we investigated ownership of the property and we discovered that it was an inherited house. In other words it was inherited by the defendant and his co-heirs. We knew that the house was for sale because an estate agent Alhaji Mohammed came and told us. I asked the estate agent to take me to the owner and he took me to Sarkin Tudun Wada. Sarkin Tudun Wada told me that the house was jointly owned by the defendant and his relatives,

who jointly mandated him to sell it for N35,000. I accepted to buy it. The original certificate of occupancy was in the name of the defendant's late father Alhaji Mamman Tailor (sic)."

The above piece of evidence was at variance with the plaintiff's amended statement of claim. It must be pointed out that a plaintiff is held to the case put forward in his writ of summons and pleadings. Before the trial comes on, it is highly desirable that parties should know exactly what they are fighting about, otherwise they will go into great expense in procuring evidence to prove at the trial facts which the other party will immediately concede. See *AC.B. v. Attorney-General of Northern Nigeria* (1967) NMLR 231; *Oduka v. Kasunmu* (1968) NMLR 28 and *National Ins. Corp of Nigeria v. Power & Ind. Eng. Co. Ltd.* (1986) 1 NWLR (Pt. 14) 1. **The plaintiff would have filed a reply setting out its knowledge of the joint ownership of the property and that it took every precaution to secure the consent of all the co-heirs.** See *Akeredolu v. Akinremi & Ors.* (1989) 3 NWLR (pt. 108) 164. **If a reply had been filed, part of the evidence of the plaintiff reproduced above would have been admissible and the courts below would have legitimately evaluated it. As the evidence stood, it went to no issue.**

The defendant both in his statement of defence and evidence maintained that the property situate at No. K20 Chawai Road, Tudun Wada, Kaduna jointly belonged to him and other children of his late father and that the sale was subject to ratification by them. The said ratification/consent was refused. Going back to the plaintiff's pleadings, its case was that the property it bought belonged to the defendant who was paid the purchase price, issued a receipt to that effect and surrendered the original of the certificate of occupancy to it. The receipt exhibit "2" issued to the plaintiff by the defendant did not show that the property belonged to the defendant. It was only an "acknowledgement receipt of the sum of thirty five thousand naira (35,000.00) only from Messrs. Klargester Nig. Ltd. Kaduna being cost of House No. K20 Chawai Rd Kd." The original certificate of occupancy on the admission of the plaintiff's witness, (P.W.1) bore the name of Alhaji Mamman Tela the father of the defendant who died intestate leaving chil-

dren and widows among whom is the defendant. The plaintiff did not take the necessary precaution which a prudent man would have taken in the circumstances. If it had examined the certificate of occupancy, it would have discovered that the defendant was not the owner of the property it was purporting to buy and the discovery would have put it on its enquiry. Since the plaintiff did not examine the certificate of occupancy, how could it have conducted a search to satisfy itself that the property did not belong to the defendant. The only reasonable conclusion to be drawn is that the plaintiff knew that the property did not belong to the defendant. This gave credence to the defendant's case that the sale was subject to ratification by his co-heirs and that they refused to ratify the sale. See Ajuwon v. Akanni (1993) 9 NWLR (Pt.316) 182. The learned trial Chief Judge should have dismissed the claim of the plaintiff on the ground that his evidence was at variance with the averments in the amended statement of claim. See Oredoyin & Ors. v. Arowolo (1989) 4 NWLR (Pt. 114) 172; Akpapuna v. Obi Nzeako II (1983) 2 SCNLR 1, (1983) SC 25.

The court below was also in error when it affirmed the decision of the trial court. There can be no question that the plaintiff did not prove its case and that the defendant has no authority to sell the property to the plaintiff. This is a proper case where the court below should have applied the maxim nemo dat quod non habet and caveat emptor. The property belonged to the defendant's father who died intestate and was survived by the defendant and a host of other sons, daughters and widows who jointly own the house with him. The evidence of the defendant that the co-heirs did not ratify the sale was not contradicted. The evidence of PW.3 and PW4 to the effect that the consent of the co-heirs was obtained before the sale was inadmissible because it was not pleaded by the plaintiff and no reply was filed by the plaintiff. In the circumstance, the defendant had nothing which he could contract to convey to the plaintiff. The purported contract was void ab initio. The plaintiff did not acquire even an equitable interest in the property and exhibit "2" is ineffectual to convey the legal estate in the property to him in the absence of ratification of the con-

tract by the family. See *Adedibu & Or. v. Makanjuola* (1944) 10 WACA 33 at 36 and *Akerele v. Atunrase* (1969) 1 All NLR 201.

Issue (2) The court below erred when it held as follows:

“....I will say straight away that no one disputes that the co-heirs has (sic) interest in the house, but as far as the circumstances of this case are concerned their interest centred on the sharing of the proceeds of the purchase price, the N35,000.00. Having their signatures on the sale agreement in my view is not the determining factor, whether a valid contract of sale existed between the appellant and the respondent. “

The court below misconceived the issue in controversy. The subject-matter of the dispute is whether the defendant owned the property or had authority to sell the property which is a subject-matter of inheritance and not the interest of co-heirs in the purchase price of N35,000.00. The equitable reliefs of specific performance and injunction ordered by the trial court ought not to have been made and the court below should have vacated them. Specific performance cannot be ordered against a person who has agreed to sell land/house which he does not own and the co-heirs cannot be compelled to convey to him because the court does not compel a person to do what is impossible. See *Bansedun v. Iyabo* (1962) 1 All NLR (Pt.2) 710. **There was no enforceable contract at the time of the contract or at the time when the action was instituted.**

It was contended in the plaintiff/respondent's brief that this court should not disturb the concurrent findings of the courts below. The plaintiff woefully failed to prove its case and the courts below should have dismissed the action. The findings of the courts below led to a miscarriage of justice warranting the intervention of this court.

In conclusion, I find myself unable to uphold the judgment of the court below which affirmed the judgment of the trial court. I hereby allow the appeal and dismiss the plaintiff's claim with N10,000.00 costs to the defendant.

H

WALI JSC

I have had the privilege of reading in advance the lead judgment of my learned brother Ogwuegbu, JSC and I entirely agree

with his reasoning and conclusion for allowing this appeal. I adopt the same as mine. I hereby allow the appeal, set aside the judgment of the court below and the lower court. The plaintiff's claim is accordingly dismissed with N10,000 costs to the defendant/appellant.

B

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Ogwuegbu, JSC and I agree entirely that there is merit in this appeal and that the same ought to be allowed. C

It is not in dispute that the landed property in dispute known as and called No. K20 Chawai Road, Tudun-Wada, Kaduna was originally the property of the late father of the defendant, Alhaji Mamman Tela the said father of the defendant died intestate in 1984, leaving D many heirs behind, including the defendant/appellant. The property on the death of the deceased Alhaji Mamman Tela therefore devolved on and became the communal or family property of all the members of the family of the said late Alhaji Mamman Tela. In this regard, paragraph 3 of the defendant's amended statement of defence averred E as follows:

"Furthermore, defendant states that the said house is not his house but a family house being one of the immovable properties in the estate of his late father Alhaji Mamman Tela who died on the 18th day of december, 1984." F

This averment in the defendant's amended statement of defence was not disputed by the plaintiff which in the examination-in-chief of PW 1, Alhaji Ahmed Sule, the plaintiff company's managing director testified thus: G

"Before paying the price we investigated ownership of the property and we discovered that it was an inherited house. In other words it was inherited by defendant and his co-heirs. "

Under cross-examination, PW1 stressed the point and stated as follows:- H

"The original certificate of occupancy was in the name of defendant's late father Alhaji Mamman Tela. "

Strange enough, however, it would appear that the defendant purportedly sold the property in issue to the plaintiff as the sole

beneficial owner thereof. In this connection, the plaintiff per paragraphs 3 and 4 of its amended statement of claim averred as follows:

“3. On the 8th day of July, 1986 the defendant sold his house situate at No. K20, Chuwai Road, Tudun Wada, Kaduna to the plaintiff for the sum of N35,000.00 (Thirty five thousand Naira) only.

B *4. Pursuant to the said contract of sale the plaintiff paid to the defendant the said sum of N35,000.00 as full purchase price for the house and the defendant issued to the plaintiff his official receipt of the purchase price. The plaintiff will at the hearing of the case tender and rely on the original copy of the said receipt.”*

C In the first place, if, as pleaded in the said paragraphs 3 and 4 of the amended statement of claim, the plaintiff was the sole beneficial owner of the landed property in issue, no iota of evidence was led by it in support of this averment. On the contrary, the evidence D led by the plaintiff, as already pointed out, is that the property in issue originally belonged to one Alhaji Mamman Tela, the father of the defendant and that on the death intestate of the said Alhaji Mamman Tela in 1984, the property devolved on his numerous heirs who numbered about 18, including the defendant.

E The said property thus became family property on the death of Alhaji Mamman Tela. It is trite law that parties are bound by their pleadings and evidence which is at variance with the averments in the pleadings goes to no issue and should be discountenanced by the court. See *Emegokwue & Ors. v. Okadigbo* (1973) 4 S.C. 113; F *Ekpenyong & Ors. v. Chief Ayi* (1973) 3 E.C.S.L.R. 411; *Odumosu v. African Continental Bank Ltd.* (1976) 11 SC 261 at 264; *Kalu Njoku & Ors v. Ukwu Eme & Ors.* (1973) 5 SC 293. It is not open to a party to depart from his pleadings and to put up an entirely new G case at the hearing. See *Adenuga v. Lagos Town Council* (1950) 13 W.A.C.A. 125. Matters not pleaded are not in issue and consequently any evidence regarding them must not be admitted and if admitted they should be ignored or discountenanced. See *George v. U.B.A. Ltd.* (1972) 8-9 SC 264; *Umofia v. Ndem* (1973) 12 SC 69. In the H same vein, Facts pleaded but not supported by evidence go to no issue and must similarly be discountenanced. See *Shell B. P. and another v. Abedi* (1974) 1 SC 23. In the present suit, the plaintiff’s case is founded on the premise that the property in issue is that of its vendor, the defendant. This averment was neither established nor

was evidence in respect thereof tendered at the trial. Rather the undisputed evidence adduced by the plaintiff was that the house in issue originally belonged to the defendant's father and that the same on his death devolved on his many heirs of which the defendant was one. This finding as to the communal or family nature of the house was affirmed by the court below. Said the Court of Appeal:- B

"I will say straight away that no one dispute that the co-heirs have interest in the house"

In the present case, the evidence before the court is that the sale of the property in issue was executed by the defendant as the sole beneficial owner therefore without the concurrence of the other co-owner members of the family. In such a case, the principle *nemo dat quod non habet* will apply and the sale would be invalid and null and void. See *City Property Development Ltd. v. A-G. Lagos State and Ors.* (1976) NSCC 43; *Akerele v. Atunrase* (1969) NSCC 180. It is for the above and the more detailed reasons contained in the leading judgment of my learned brother that I, too, allow this appeal as the sale of the family property in issue by the defendant to the plaintiff is void in that all the owners thereof were not parties to the purported sale. I abide by the orders for costs contained in the said judgment. E

KALGO JSC

I have had the privilege of reading in draft the judgment of my learned brother Ogwuegbu, JSC just delivered in this appeal. I agree with him that on the pleadings and evidence presented at the trial by the parties, this appeal ought to be allowed. F

In paragraphs 3, 4, 5 and 6 of the amended statement of claim, the respondent as plaintiff averred that: G

"3. On the 8th day of July, 1986 the defendant sold his house situated at No. K20, Chawai Road, Tudun Wada, Kaduna to the plaintiff for the sum of N3 5,000.00 only.

4. Pursuant to the said contract of sale, the plaintiff paid to the defendant the said sum of N35,000.00k as full purchase price for the house and the defendant issued to the plaintiff his official receipt of the purchase price. The plaintiff will at the hearing of the case tender and rely on the original copy of the said receipt. H

5. *The defendant in addition surrendered to the plaintiff all the relevant documents concerning the house including original of the certificate of occupancy No. 006782. The plaintiff will at the hearing of this case tender and rely on the copy of the said certificate of occupancy.*

B 6. *The plaintiff subsequently applied and obtained a transfer of the right of occupancy, and a new certificate of occupancy No.KDA/A/002763 dated the 6th day of October, 1986 was issued to the plaintiff in its name by the Kaduna Local Government. The plaintiff will at the hearing of this case tender and rely on the original copy of the said certificate of occupancy.”*

C The appellant, as defendant specifically pleaded in paragraphs 3, 4, 5, 6, 7, and 8 of his statement of defence as follows:

D “3. Furthermore, defendant states that the said house is not his house but a family house being one of the immovable properties in the estate of his late father Alhaji Mamman Tela who died on the 18th day of December, 1984.

E 4. *The defendant deny the contention that he issued a receipt of purchase price as claimed in paragraph 4 of the statement of claim as the said note does not qualify as a memorandum of sale of house.*

F 5. *Additionally, the defendant contends, that the transaction between the plaintiffs representative and the defendant was conducted subject to contract or words of similar effect.*

6. *Defendant in further answer states that certain essential terms of the contract are yet to be worked out and said negotiation was substantially oral with very little in writing.*

G 7. *Defendant in answer to paragraph 5 of plaintiff’s statement of claim state that the release of the certificate of occupancy No. 006782 was meant as a sign of good faith and as a security for the sum of N35,000.00 left behind by plaintiff’s representative.*

H 8. *Defendant contends that it was clearly understood during the discussion cum negotiation with plaintiff’s representative that acceptance and conclusion of the contract could be with the general consensus of majority members of the family inheritors estate Late Alhaji Mamman Tela and this was clearly understood to be a condition precedent to the contract.”*

The main averment of the respondent in this action was that

the appellant” sold his house situate at No. K20 Chawai Road, Tudun Wada, Kaduna for the sum of N35,000.00K to him”. But the evidence produced by the respondent at the trial pointed to the fact that the house in dispute did not belong exclusively to the appellant, and the respondent himself confirmed this in the course of his investigations on the ownership of the house prior to the purchase. In his evidence in chief, the respondent testified that:

“Before paying the price we investigated ownership of the property and we discovered that it was an inherited house. In other words it was inherited by the defendant and his co-heirs” ...Sarkin Tudun Wada told me that the house was jointly owned by defendant and his relations who jointly mandated him to sell it for N35,000.00k. I accepted to buy it for that price.” (Italics mine)

This evidence together with the evidence of other witnesses of the respondent reveals that the house in dispute did not belong to the appellant. It was an inherited house jointly owned by the appellant and his co-heirs who mandated the appellant to sell it. All this evidence was not pleaded at all by the respondent in his amended statement of claim. And in cross-examination, the respondent also conceded that the original certificate of occupancy which was handed over to him by the appellant after payment of N35,000.00k was in the name of the appellant’s late father Alhaji Mamman Tela. The appellant in his defence denied that the house in dispute was his own exclusively and that the receipt which he issued to the respondent was a temporary one intended to be confirmed after the meeting of all the co-heirs on whether to sell the house or not. The appellant’s pleadings supported this evidence. It is however very clear from the pleadings of the respondent in his statement of claim that the appellant sold his house to him, whereas in his (respondent’s) evidence in court, he agreed that the house in dispute was not that of the respondent; it was a family house inherited by the appellant and other co-heirs of his deceased’s father. This was clear from the certificate of occupancy which the appellant gave him after payment of the N35,000.00. Therefore the appellant did not sell “his house” to the respondent. The Court of Appeal agreed with the findings and decisions of the trial Chief Judge which it said could not be faulted. But unfortunately, none of the evidence relied upon by the trial court was pleaded by the respondent. According to the pleadings of the

respondent which I set out earlier in this judgment, the appellant “sold his house” to the respondent for N35,000.00k simpliciter. This was not strictly proved at the trial. Therefore, the rest of the evidence stated above upon which the court below acted, went to no issue at all and should have been discountenanced. See *Aboyegi v. Momoh* B (1994) 4 NWLR (Pt. 341) 646; *Etuwewe v. Etuwewe* (1993) 2 NWLR (Pt. 274) 185; *Ogbuokwelu v. Umeanafunkwa* (1994) 4 NWLR (Pt. 341) 676; *Emegokwue v. Okadigbo* (1973) 4 SC 113.

The respondent is also bound by his pleadings. See *Shell SP v. Abedi* (1974) 1 All NLR (Pt. 1) 1; *Nsirim v. Nsirim* (1990) 3 NWLR C (Pt.138) 285. *Oduka v. Kasumu* (1968) NMLR 28 and if he did not call any evidence on it, he is deemed to have abandoned it. See *Ojikutu v. Odeh* (1954) 14 WACA 640; *Omoboriowo v. Ajasin* (1984) 1 SCNLR 108, (1984) 1 SC 206; *F.C.D.A. v. Naibi* (1990) 3 NWLR D (pt. 138) 270. That being the case, the respondent has completely failed to prove his case since he could not prove that the house allegedly sold to him by the appellant was owned solely and exclusively by the appellant. That should be the end of the matter. I therefore hold that there was no valid contract of sale between the parties and E the question of specific performance of the contract or possession of the house in dispute by the respondent, did not arise. I am therefore of the view that there are specific circumstances which make it possible for this court to interfere notwithstanding the concurrent findings of the two lower courts. See *Enang v. Adu* (1981) 11-12 SC 25; F *Lokoyi v. Oloji* (1983) 2 SCNLR 127, (1983) 8 SC 61; *Ojomu v. Ajao* (1983) 2 SCNLR 156, (1983) 9 SC 22.

For the above and the more detailed reasons given in the leading judgment, I allow this appeal and set aside the decisions of G the trial court and the Court of Appeal. I abide by the consequential orders made in the leading judgment including the order as to costs.

UWAIFO JSC

H I read in advance the judgment of my learned brother, Ogwuegbu, JSC. I agree with him that there is merit in the appeal.

The plaintiff/respondent who claimed to have purchased the landed property in question at K20 Chawai Road, Tundun Wada, Kaduna and that it had acquired title thereto, had a duty to show that

he purchased from the person in whom title resided. While it pleaded that the property, belonged to the defendant/appellant, it gave evidence that when it became known that it was inherited property by the defendant and other co-inheritors, negotiation was made with the said others and their consent obtained for the sale of the property. Without amending the statement of claim this evidence about getting the co-inheritors agreement was inadmissible as it is not in respect of any issue joined by the parties. See *Emegokwue v. Okadigbo* (1973) 4 SC 113 at 117. The respondent knew that the property was not solely owned by the appellant or that, in any case, it did not originally belong to him. He knew and testified to the fact that the original certificate of occupancy was in the name of the appellant's late father. From the respondent's pleading, his real case is that the appellant claimed that the property was his personal property or that he was the sole beneficial owner of it, and on that basis sold to the respondent. The appellant is the eldest son of his father, Alhaji Mamman Tela. Even though he is the eldest son, having sold as the sole owner when he is not, and without any evidence that his position as the eldest son confers right of sole ownership on him, the sale is void ab initio on the basis that he sold what he did not own nemo dat quod non habet: See *Ajuwon v. Akanni* (1993) 9 NWLR (Pt. 316) 182 at 202. I too allow the appeal with costs of N10,000.00 to the appellant. Appeal allowed.

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