

SUPREME COURT OF NIGERIA
FRIDAY 2ND MAY, 2003. SC. 40/1999
CORAM:- I. L. KUTIGI, U. MOHAMMED,
A. I. KATSINA-ALU, N. TOBI, D. O. EDOZIE, JJSC

1. ISAAC GAJI
2. LADI GAJI APPELLANTS
3. AYUBA GAJI
(For and on behalf of Gaji Family)
AND
EMMANUEL D. PAYE RESPONDENT

APPEALS - Fresh issues - Raised without leave - Validity - The issues can only be raised with leave - But where such issue relates to jurisdiction - It can be properly raised without leave (H1)

EVIDENCE - Evaluation - Where trial court evaluates evidence and makes findings supported by evidence - It is not the business of appellate court - To substitute its own views for those of trial court (H2)

EVIDENCE - Proof - Cross examination - Plaintiff is entitled to lead evidence through his witnesses - Or by cross examination of defendant's witnesses - To controvert fact pleaded by defence (H3)

EVIDENCE - Witnesses - Failure to cross examine - Effect - Failure to cross examine a witness on a particular matter - Is a tacit acceptance of the truth of the evidence of the witness (H4)

CUSTOMARY LAW - Land law - Disposition of land - Statute of Fraud s.4 - Applicability - The section is inapplicable - Since disposition of land under customary law - Does not require writing as a pre-requisite (H5)

ORDERS OF COURT - Specific performance - Grant - The order is granted to successful litigant - Constraining the losing party to perform agreement - Earlier entered into (H6)

LAND LAW - Contract of sale - Breach - Proper order - Specific performance is the proper order - As damages cannot adequately compensate a party (H7)

LAND LAW - Quic quid plantatur - Principle of - Implication - It implies that once plaintiff is adjudged to be the rightful owner of land - The land together with what is on it automatically becomes his (H8)

FACTS

The parties entered an agreement for the sale of a 22-room hotel. Plaintiff/respondent paid 1st defendant/appellant for the property. When appellant breached the contract of sale, respondent instituted this suit at the High Court of F.C.T. Abuja, claiming for an order of specific performance of the contract and an account of the proceeds on it from date of sale till determination of the suit. In the alternative, respondent claimed for a refund of the purchase price as well as damages for breach of contract. 2nd and 3rd defendants/appellants were joined in the suit upon their intervention.

Though 1st appellant filed a separate statement of defence, he did not put up further participation during the trial. 2nd and 3rd appellants contended that the land on which the hotel was built belonged to the father of 1st and 3rd appellants and therefore is a family property. However under cross-examination, 3rd appellant admitted that he was not of the same father with 1st appellant. Nevertheless, after trial, learned trial judge dismissed respondent's claim as it held that the property was family property and any purported sale without 3rd appellant's consent was voidable. Aggrieved, respondent appealed to the Court of Appeal, Abuja Division. The court allowed the appeal and made an order for specific performance of the contract. Dissatisfied, appellants filed appeal at Supreme Court.

ISSUES FOR DETERMINATION

“(i) Whether the Court of Appeal was entitled to reverse the findings of fact made by the trial court in this case that the property in dispute in this case was family property of the Appellants' family and that the house was put up by the collective efforts of members of the Appellants' family when the findings were adequately supported by evidence.

(ii) Was the Court of Appeal not in error when it granted an

order of specific performance of the contract in this case on the ground that damages will not be adequate compensation to the respondent when the respondent on his own showing in making an alternative claim for damages had prayed the court that damages will be an adequate compensation for him?

(iii) Whether the Court of Appeal was right to have ordered specific performance of the contract when all the terms of the contract are not evidenced in writing?

(iv) Whether having regard to the facts and circumstances of this case, the respondent was entitled to an order of specific performance of the contract, an order of specific performance being an equitable relief that is not ordinarily available in a dispute?

(v) Whether the trial court had jurisdiction over the Plaintiff's claim?

HELD (Unanimously dismissing the appeal per EDOZIE JSC)

APPEALS - Fresh issues - Raised without leave - Validity

1. The Respondent in his brief has raised a preliminary objection to the Appellants' issue No. v, which poses the question whether the trial court had the jurisdiction to entertain the Respondent's claim. The ground for the objection was that the issue was not canvassed before the Court of Appeal and no leave was sought and obtained to raise it as a fresh issue before this court. The general principle is that when a party seeks to file and argue in this court any fresh issue not canvassed in the lower courts whether that issue pertains to land or otherwise, leave to file and argue the issue must be had and obtained first. But where the point or issue sought to be raised relates to the issue of jurisdiction, the point or issue can properly be filed and argued with or without the leave of the court even if it is being raised for the first time. (p. 1506 G)

EVIDENCE - Evaluation

2. As a general principle of law, the evaluation of evidence and the ascription of probative value to such evidence are the primary functions of a trial court, which saw, heard and assessed the witnesses. Where a court of trial, unquestionably evaluates the evidence and makes

definite findings of fact, which are fully supported by such evidence and are not perverse, it is not the business of the Court of Appeal to substitute its own views for those of the trial court. What the Court of Appeal ought to do is to find out whether there is evidence on which the trial court arrived at its findings. Once there is such evidence on record, the appellate court cannot interfere. (p. 1508 H)

EVIDENCE - Proof - Cross examination

3. I do not agree with the Appellants' counsel that the evidence given by the 3rd Appellant (D.W.2) under cross-examination is inadmissible in the circumstances of this case. A plaintiff is entitled to lead evidence through his own witnesses or by cross-examination of the defendant's witnesses to controvert a fact pleaded by the defence. See the case of Bamgboye v. Olanrewaju (1991) 4 NWLR (Pt. 184) 145 at 155 where this court, per Karibi-Whyte, JSC, as he then was, made the following observation:-

"It seems to me consistent with principle that evidence led during cross-examination on issues joined is not inadmissible merely because such evidence is not supported by the pleading of the party eliciting the evidence. For instance, in the instant case, although the defendants did not plead the fact that all the sections of Okesan family had a common ancestor, the reference to the fact that they were all of the same family by paragraph 6 of the statement of claim was sufficient for the admission of any evidence establishing or negating that fact. And this is so whether on cross-examination."

(p. 1510 E)

EVIDENCE - Witnesses - Failure to cross examine - Effect

4. By this evidence, the Appellants through D.W.1 were challenging the testimony of P.W.3 to the effect that it was Sarkin Sabon Gari Gwagwalada who allocated the land in question to the 1st Appellant. But P.W.3 was not cross-examined in that regard. It has been said that the effect of failure to cross-examine a witness upon a particular matter is a tacit acceptance of the truth of the evidence of the witness. In the case of Agbonifo v. Aiwereoba (1988) 2 SCNJ 146, this court held that it is not proper for a defendant not to cross-examine a

plaintiff's witness on a material point and to call evidence on the matter after the plaintiff has closed his case. (p. 1512 A)

Land law - Disposition of land - Statute of Fraud s.4 - Applicability
 5. Before adverting to the guiding principles of the issues, it is pertinent to consider the question about the applicability of Section 4 B of the English Statute of Fraud, 1677. I entirely agree with learned counsel to the Respondent that the section is inapplicable since the transaction the subject matter in dispute was made under customary law, which does not require writing as a pre-requisite for a valid disposition of land. The payment of the purchase price and the delivery C of possession to the plaintiff created a valid title by native law and custom. (p. 1513 H)

Specific performance - Grant D
 6. The decree of specific performance granted in favour of the Respondent cannot be faulted in the circumstances of this case. It is settled law that an order of specific performance is an equitable remedy granted to a successful litigant constraining the losing party E to carry out the agreement, which it had entered into with the successful litigant. Like all equitable remedies, it is at the discretion of the court but the discretion must be exercised judicially according to settled rules and principles. (p. 1514 C)

LAND LAW - Contract of sale - Breach - Proper order F
 7. Although generally, an order of specific performance will not be readily granted where a remedy in damages is adequate, in a case involving sale of land, the law is that damages cannot adequately compensate a party for breach of a contract for the sale of an interest G in a particular piece of land or of a particular house in which case the order for specific performance is available at the instance of the vendor or purchaser. (p. 1514 E)

LAND LAW - Quic quid plantatur - Principle of - Implication H
 8. The claim by the 3rd Appellant that he built 13 rooms on the property in dispute did not change the character of the land. The 3rd Appellant was masquerading as a member and indeed as the head of the family of Gaji. It was only through a vigorous cross-examination

that it emerged that he was not of that family. If he expended money in developing land that did not belong to him, he has himself to blame. That would not preclude the owner of the land from alienating the land together with the building on it. The principle *quicquid plantatur solo solo cedit* implies that once the plaintiff is adjudged to be the rightful owner of the land, the land together with what is on it automatically becomes his.

Similarly, the claim by the 2nd Appellant that she invested her money on the building does not affect her husband's right to sell the property. (p. 1514 H)

REPRESENTATION

O. I. Olorundare, Esq, with M. A. Adesola, Esq, for the Appellants
D. C. Denwigwe, Esq, with A. B. Asogwa, for the Respondent

CASES REFERRED TO

- Nelson v. Nelson (1913) 13 NLR 248
- Re Edward Forster (1938) 14 NLR 83
- Akinloye v. Eyiola (1968) NMLR 29
- Ogboda v. Adelugba (1971) 1 All NLR 68
- C.R.S.N. Corp v. Oni (1995) 1 NWLR (Pt. 371) 270
- Sanusi v. Adebisi (1997) 11 NWLR (Pt. 530) 565
- Otuo v. Nteogwiule (1996) 4 NWLR (Pt.440) 56
- Kupoluyi v. Philips (1996) 1 NWLR (Pt.427) 691
- Bamgboye v. Olanrewaju (1991) 4 NWLR (Pt. 184) 145
- Dina v. New Nigerian Newspapers Ltd (1986) 2 NWLR (Pt. 22) 353
- Nta v. Anigbo (1972) All NLR (Pt.2) 24
- Agbonifo v. Aiwerioba (1988) 2 S.C. (Pt. II) 64
- Anyaoke v. Adi (1986) 3 NWLR (Pt.31) 731
- Okino v. Obanebira (1999) 12 S.C. (Pt. II) 38
- Olowosago v. Adebajo (1988) 9 S.C. 87

STATUTES REFERRED TO

Land Use Act 1978, ss. 39 and 41
English Statutes of Fraud 1677, s. 4

BOOK REFERRED TO

Nigeria Law of Contract 1991 - Professor Sagay

LEAD JUDGMENT BY EDOZIE JSC

This is an appeal against the judgment of the Court of Appeal, Abuja Judicial Division delivered on the 16th day of April 1996, wherein it set aside the decision of the trial High Court of the Federal Capital Territory delivered on 24th of September, 1993 and entered judgment in favour of the Plaintiff. The bone of contention between the parties is the sale of a house consisting of 23 rooms (error for 22) variously known as “Good Hope Hotel” or “Mayor Hotel” situate and lying at Sabon Gari, Gwagwalada in the Federal Capital Territory, Abuja, hereinafter referred to as the property in dispute. B C

In the trial High Court aforesaid, the Respondent on record as Plaintiff sued the 1st Appellant Isaac Gaji as the sole defendant over the property in dispute, which the latter sold to the former. Before the action could proceed, Ladi Gaji and Ayuba Gaji, wife and half brother respectively of the 1st Defendant applied to be joined and were accordingly joined as the 2nd and 3rd Defendants to defend the action for and on behalf of Gaji family. The parties filed and exchanged pleadings. The Plaintiff filed an amended statement of claim, the 1st Defendant a separate statement of defence while the 2nd and 3rd Defendants filed a joint statement of defence. As reflected in paragraph 12 of the Plaintiff’s amended statement of claim, the Plaintiff claimed jointly and severally against the three Defendants the following reliefs:- E

“(a) An order of specific performance of the contract of sale of the Hotel. F

(b) An order for an account by the 1st Defendant of the rent that accrued/or accruing from the date of the sale till the determination of this suit. G

(c) An order of possession of the Hotel to the Plaintiff as bona fide purchaser.

(d) The refund of all rents collected from the date of sale of the Hotel to the plaintiff as money had and received. H

IN THE ALTERNATIVE:

(e) Refund of N11,000 (Eleven Thousand Naira) being the purchase price paid to the 1st defendant between September and November, 1987.

(f) 20% profit which the Plaintiff would have made from the

said N11,000 from the rent collected on the Hotel between November, 1987 till the determination of the suit.

(g) N15,000 (Fifteen Thousand Naira) as special damages for breach of contract.

(h) N5,000.00 (Five Thousand Naira) as general damages.”

B

At the trial, the plaintiff on the one hand and the 2nd and 3rd Defendants on the other gave evidence and called witnesses but the 1st Defendant led no evidence nor did he participate at the trial. The Plaintiff’s case was that in September, 1987, he was introduced by one Bulus Damagai (P.W. 1) to the 1st Defendant who wanted to sell his house known as ‘Good Hope Hotel’ or ‘Mayor Hotel’ consisting

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of 23 (22) rooms. The 1st Defendant had represented that the house belonged to him. They negotiated and agreed on N11,000 (Eleven Thousand Naira) as the selling price. The Plaintiff (P.W. 4) thereupon made a part payment of N6,000 (Six Thousand Naira) and the 1st

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Defendant issued him a receipt (Exhibit P.1). Subsequently, in November, 1987 in the presence of Bulus Garba (P.W.2), the Plaintiff paid the balance of N5,000 (Five Thousand Naira) and was issued with another receipt which was not admitted in evidence for want of registration. It is the Plaintiff’s case that despite the fact that he

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had paid the agreed price, the 1st Defendant has refused to transfer possession of the property in dispute to him. Explaining how the 1st Defendant derived title to the plot of land on which the 22 roomed house was built, the Plaintiff called Muhammadu Ninzoma (P.W.3)

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who testified that it was one Zubairu Sariki the agent of Sarikin Sabon Gari, Gwagwalada who on behalf of the Sariki allocated the plot to the 1st Defendant alone and not jointly with anyone else.

The case for the 2nd and 3rd defendants was that the land on which the house of 22 rooms was built was allocated by Sariki Gwagwalada to the father of 1st and 3rd Defendants and by implication it is the family land of Gaji. The 3rd Defendant (D.W.2) claimed that he moulded some blocks and engaged a mason to develop part of the land by erecting a building of 13 rooms on the land. Ladi Gaji, the 2nd defendant and the wife of the 1st Defendant also developed part of the land by erecting a house of 9 rooms. They both alleged that they were unaware that the 1st Defendant had entered into an

H

agreement to sell the property in dispute and that since the property is owned by the family, it could not be sold by the 1st Defendant

without the consent of the 3rd Defendant, the head of the family. Answering questions under cross-examination, the 3rd defendant (D.W.2) disclosed that he and the 1st Defendant have a common mother but different fathers. To support their claim that they 2nd and 3rd Defendants built the property in dispute, they called as witnesses Abdullahi Bamagi (D.W.4) the bricklayer who built the house, a carpenter Francis Akpan (D.W.5) who roofed the building and Okoro Sunday Vincent (D.W.6) said to be the oldest tenant in the property in dispute. B

At the end of the trial, counsel for the parties addressed the court and in the course of its judgment the court had to make findings on the various issues agitated by counsel. The court found as a fact that there was a contract for the sale of the property in dispute by the 1st Defendant to the plaintiff as a result of which the latter paid the sum of N11,000 to the former; that the property was the family property of the 1st and 3rd Defendants' family; that no consent was obtained from the 3rd Defendant the head of the family thus rendering the sale void or voidable; that members of the family contributed in the development of the property in dispute and that the court had the jurisdiction to entertain the suit. Based on these crucial findings, the trial court dismissed the Plaintiff's claim. C D E

Aggrieved by the decision of the trial High Court, the Plaintiff appealed to the Court of Appeal, which in a unanimous decision set aside the decision of the High Court and entered judgment for the Plaintiff for an order of specific performance of the contract made between the plaintiff and the 1st Defendant and an order of possession of the property in dispute in favour of the Plaintiff. F

It is against this judgment that the Defendants as Appellants have brought the instant appeal predicated on an Amended Notice of Appeal containing fifteen grounds of appeal. Based on the grounds of appeal, the Appellants in their brief of argument formulated the following five issues for determination, viz:- G

“(i) Whether the Court of Appeal was entitled to reverse the findings of fact made by the trial court in this case that the property in dispute in this case was family property of the Appellants' family and that the house was put up by the collective efforts of members of the Appellants' family when the findings were adequately supported by evidence, Grounds 1, 4, 5, 6, 7, 8, 9, 10, 11. H

(ii) Was the Court of Appeal not in error when it granted an order of specific performance of the contract in this case on the ground that damages will not be adequate compensation to the respondent when the respondent on his own showing in making an alternative claim for damages had prayed the court that damages will be an adequate compensation for him? Grounds 14, 15.

(iii) Whether the Court of Appeal was right to have ordered specific performance of the contract when all the terms of the contract are not evidenced in writing? Grounds 2, 13.

(iv) Whether having regard to the facts and circumstances of this case, the respondent was entitled to an order of specific performance of the contract, an order of specific performance being an equitable relief that is not ordinarily available in a dispute? Grounds 9, 11, 12.

(v) Whether the trial court had jurisdiction over the Plaintiff's claim? Ground 3."

In the Respondent's brief, two issues are identified for the determination of the appeal. These are:-

"(i) Whether the Court of Appeal was right in reversing the findings of the trial court as to whether the property in dispute is family property of the Appellants? and

(ii) Whether the Court of Appeal was right to have ordered specific performance of the contract in the proceedings."

The Respondent in his brief has raised a preliminary objection to the Appellants' issue No. v, which poses the question whether the trial court had the jurisdiction to entertain the Respondent's claim. The ground for the objection was that the issue was not canvassed before the Court of Appeal and no leave was sought and obtained to raise it as a fresh issue before this court. The general principle is that when a party seeks to file and argue in this court any fresh issue not canvassed in the lower courts whether that issue pertains to land or otherwise, leave to file and argue the issue must be had and obtained first. But where the point or issue sought to be raised relates to the issue of jurisdiction, the point or issue can properly be filed and argued with or without the leave of the court even if it is being raised for the first time: See *Obiakor v. The State* (2002) 6 S.C. (Pt. II) 33; (2002) 10 NWLR (Pt. 776) 612 at 626. The contention of the Appellants on the issue of jurisdiction is that by virtue of Sections 39

and 41 of the Land Use Act, 1978, the High Court had no jurisdiction to entertain a claim in respect of proceedings relating to land located in a non-urban area. Apparently, learned counsel to the Appellants realizing that the controversy on the jurisdiction of the High Court over proceedings involving land in a non-urban area has been laid to rest by the recent decision of the Supreme Court in the case of *Adisa v. Oyinwola* (2000) 6 S.C. (Pt. II) 47 at 70-71 has withdrawn the fifth issue for determination. The issue is accordingly struck out. ^B

The Appellants' first issue for determination which coincides with Respondent's first issue relates to the correctness of the court below in reversing the trial court's finding to the effect that the property in dispute is the family property of the 1st and 3rd Appellants and not the personal property of the 1st Appellant. In addressing this issue, counsel to the Appellants submitted in his brief that since the finding of the trial court in question is not perverse, the Court of Appeal was in error to have reversed same. He cited several authorities including *Sanusi v. Adebisi* (1997) 11 NWLR (Pt.530) 565, 583. *Okino v. Obanebira* (1999) 12 S.C. (Pt. II) 38; (1999) 13 NWLR (Pt.636) 535 at 558, *Akinloye v. Eyiola* (1968) NMLR 29, 95. It was contended that the lower court was in error to have relied on the evidence extracted from the 3rd Appellant (D.W.2) under cross-examination to the effect that he and the 1st Appellant are of the same mother but of different fathers, since that fact was unpleaded. References were made to the cases of *Otuo v. Nteogwiule* (1996) 4 NWLR (Pt.440) 56 at 72, *Dina v. New Nigerian Newspapers Ltd* (1986) 2 NWLR (Pt.22) 353. It was further contended that on the principle that a party is expected to plead facts and not evidence, the lower court has erred in rejecting the evidence of the 3rd Appellant on the number of children their father had. The cases of *Odunsi v. Bamgbola* (1995) 1 NWLR (Pt.374) 641, 655 and *Oruboko v. Oruene* (1996) 7 NWLR (Pt.462) 555, 557 were alluded to. Referring to the remark by the court below to the effect that the 1st Appellant did not testify, counsel argued that a party need not give evidence personally before his claim can succeed so long as he can prove the case by means of any other credible evidence, vide the case of *C.R.S.N. Corp v. Oni* (1995) 1 NWLR (Pt.371) 270. Finally, counsel pointed out that there was evidence on record to support the finding of the trial court to the effect that the land on which the hotel was built was granted to the ^C
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Appellants family by the father of D.W.1.

In response to the above submissions, learned counsel to the Respondent argued in his brief that the finding by the trial court that the property in dispute is the family property of the father of the 1st and 3rd Appellants is at variance with the admission by the 1st Appellant in his statement of defence that the property is personal to him and furthermore it is inconsistent with the testimony of the 3rd Appellant that he and the 1st Appellant have different fathers. Counsel pointed out some inconsistency in the evidence of D.W.1 and D.W.2 with respect to the person to whom the land, the subject matter in dispute was allocated. It was revealed that while D.W.1 testified that the land was allocated to the father of 1st and 3rd Appellants, the evidence of the 3rd Appellant (D.W.2) was that the land was allocated to him. Counsel contended that had the trial court adverted its mind to the inconsistency highlighted above, it would not have arrived at the same conclusion that the property in dispute was the family property of the father of 1st and 3rd Appellants. There was therefore good ground for the court below to interfere with the findings of fact made by the trial court.

The issue under consideration is whether the lower court was justified in reversing the finding of the trial court that the property in dispute is family property and not the personal property of the 1st Appellant. As a general principle of law, the evaluation of evidence and the ascription of probative value to such evidence are the primary functions of a trial court, which saw, heard and assessed the witnesses. Where a court of trial, unquestionably evaluates the evidence and makes definite findings of fact, which are fully supported by such evidence and are not perverse, it is not the business of the Court of Appeal to substitute its own views for those of the trial court. What the Court of Appeal ought to do is to find out whether there is evidence on which the trial court arrived at its findings: Once there is such evidence on record, the appellate court cannot interfere. *Sanusi v. Adebisi* (1997) 11 NWLR (Pt. 530) 565 at 583, *Okino v. Obanabira* (1999) 19 S.C. (Pt. II) 38; (1999) 13 NWLR (Pt.636) 535, 558. In *Samuel Agbonifo v. Madam Irobere Aiwerioba & Anor* (1988) 2 S.C. (Pt. II) 64 at p.80, the Supreme Court observed thus:-

“In my judgment, the function of an appellate court on a question of fact is mainly limited to seeing whether or not there was

evidence before the trial court upon which its decision on fact was based; whether it wrongly accepted or rejected any evidence tendered at the trial; whether evidence or called by either party to the conflict was put on either side of an imaginary balance and weighed one against the other, in other words whether the trial court properly evaluated the evidence; whether the trial court correctly approached the assessment of the evidence before it; whether the evidence properly admitted was sufficient to support the decision upon the inference drawn therefrom. These are the result of all the decided cases on the point. See for example, *Anachuna Anyaoko & Ors. v. Dr. Felix Adi & Ors.* (1986) 3 NWLR (Pt.31) 731 at 742, *Ogboda v. Adelugba* (1971) 1 All NLR 68 at 71, *Mba Nta & Ors. v. Ede Nwede Anigbo & Ors.* (1972) All NLR (Pt.2) 24 at p.80, *Mogaji & Ors. v. Odofin & Ors* (1978) 4 S.C. 91 and a host of other cases...

Where the issue is that of credibility of witnesses, the appellate court has a very limited, if any, scope to interfere: *Lawal Buraimah Fatoyinbo & Ors. v. Satiatu Abike Williams alias Sanni & Ors.* (1956) 1 FSC 87. It can only do so when the trial court decided to believe a witness quite contrary to the trend of accepted evidence or where oral testimony is contrary to the contents of a written document. See *Fashanu v. Adekoya* (1974) 1 All NLR (Pt. 1) 35”

In the instant case, the 2nd and 3rd Appellants pleaded in paragraphs 3 and 6 of their joint statement of defence, thus:-

“3. Thus 2nd and 3rd Defendants aver that the house referred to in paragraph 5 of the statement of claim does not belong to the 1st defendant but a family house which belongs to late Mallam Gaji the late father of 1st and 3rd defendants.

6. The 3rd defendant avers that he is the head of Gaji family and did not at anytime authorize the 1st defendant to sell the said property to the plaintiff.”

Having thus asserted that the property in dispute belongs to the family of Gaji of which the 3rd Appellant is the head, the onus is upon the 2nd and 3rd Appellants to prove that assertion. In his attempt to discharge that burden, Ayuba Gaji, the 3rd Appellant demolished their case when, in answer to questions under cross-examination, he at page 42 line 4 et seq testified thus:-

“I am never called Umaru. My name is Ayuba. I do not agree that Isaac Gaji is not related to me. Our mother’s name is Sumboya.

She is alive at the moment. Yes my name is Umaru now since my conversion to Islam. My relationship with Isaac is that we have the same mother but different fathers. My father's name is Daudu." (Underlining for emphasis)

It is evident from the above extract particularly the underlined words that the 3rd Appellant is not a member of Gaji family but that of Daudu family. A fortiori, he could not be the head of a family of which he is not a member. I do not agree with the Appellants' counsel that the evidence given by the 3rd Appellant (D.W.2) under cross-examination is inadmissible in the circumstances of this case. A plaintiff is entitled to lead evidence through his own witnesses or by cross-examination of the defendant's witnesses to controvert a fact pleaded by the defence. See the case of Bamgboye v. Olanrewaju (1991) 4 NWLR (Pt. 184) 145 at 155 where this court, per Karibi-Whyte, JSC, as he then was, made the following observation:-

"It seems to me consistent with principle that evidence led during cross-examination on issues joined is not inadmissible merely because such evidence is not supported by the pleading of the party eliciting the evidence. For instance, in the instant case, although the defendants did not plead the fact that all the sections of Okesan family had a common ancestor, the reference to the fact that they were all of the same family by paragraph 6 of the statement of claim was sufficient for the admission of any evidence establishing or negating that fact. And this is so whether on cross-examination."

In the case at hand, 2nd and 3rd Appellants having by paragraphs 3 and 6 of their joint statement of defence pleaded that the property in dispute belongs to late Mallam Gaji the late father of 1st and 3rd Appellants and that 3rd Appellant is the head of that family, the Respondent was at liberty to lead evidence in-chief or in cross-examination to debunk those facts. It is my respectful view that having regard to the evidence of 3rd Appellant disclosing that he and the 1st Appellant have different fathers, the facts pleaded in paragraphs 3 and 6 of the joint statement of defence of 2nd and 3rd Appellants had not been established. Put differently, Appellants have not established that the property in dispute is the family property of the father of 1st and 3rd Appellants as going by the printed record

there is or was never in existence the father of 1st and 3rd Appellants.

There is yet another dimension to this case. Notwithstanding the fact that the onus was on the Appellants to show that the property in dispute is the family property, the Respondent was at pains to lead evidence to show that the property in dispute is the personal property of the 1st Appellant. In this regard, P.W.3, Muhammadu Ninzoma at p.37 of the record had this to say:-

“...I know the house of Isaac Gaji at the Sabon Gari Gwagwalada which is the subject matter of this case. Initially Isaac built the plot (sic) and was using it as residential premises, but he later converted it into a Hotel. It was one Zubairu Sarki who gave the plot to Isaac. At the time the plot was given to Isaac, I was an Assistant to Zubairu who made the allocation. Zubairu was the agent of the Sarki Sabon Gari Gwagwalada. It was the Sarki Sabon Gari who authorised us to allocate the plot to people. Isaac is not a native of Piri village. We allocated the plot to Isaac singly and not together with any other person. He approached me and I took him to Zubairu who made the allocation...”

The substance of the evidence of P.W.3 quoted above is that it was Zubairu Sarki the agent of Sarkin Sabo Gari Gwagwalada who allocated to the 1st Appellant the land on which the house the subject matter in dispute was built. The witness was not cross-examined on this vital issue. It was after the Plaintiff/Respondent had closed his case that the defence called Yamusa Aliyu (D.W.1) to challenge the evidence of P.W.3 by stating at p.80 of the record thus:-

“Yes, I know Mohammed Ninzoma (P.W.3). He lives in Sabon Gari Gwagwalada. There is nobody called Zubairu Sarki Gwagwalada, Muhammadu Ninzoma is not Assistant to anyone in authority in Gwagwalada. He is a stranger. He came from a village called Bako.”

By this evidence, the Appellants through D.W.1 were challenging the testimony of P.W.3 to the effect that it was Sarkin Sabon Gari Gwagwalada who allocated the land in question to the 1st Appellant. But P.W.3 was not cross-examined in that regard. It has been said that the effect of failure to cross-examine a witness upon a particular matter is a tacit acceptance of the truth of the evidence of the witness: *Oforlete v. State* (2000) 7 S.C. (Pt. 1) 80; (2000) 12 NWLR (Pt.681) 415 at 436. In the case of *Agbonifo v. Aiwereoba* (1988) 2 SCNJ 146, this court held that it is not proper for a defen-

dant not to cross-examine a plaintiff's witness on a material point and to call evidence on the matter after the plaintiff has closed his case. By the force of these authorities, the evidence of D.W.1 ought to have been taken with a pinch of salt. But the learned trial Judge attached much weight to it and relied heavily on it in concluding that the property in dispute is family property, when at page 55 line 1 et seq of the record, he held thus,

"The testimony of D.W. 1 is clearly more comprehensive, explicit and more believable than that of P.W.3. This is because D.W.1 had established direct link with the traditional authorities of Sabon Gari, Gwagwalada... It is for these reasons that I much prefer the evidence of D.W.1 to that of P.W.3 on the issue of whether the property was family property. I believe D.W.1's story that the land on which the Hotel was built was initially granted the defendants' family by D.W.1's father and that the building was put up through the collective effort of the defendants' family members. That of course makes the property family property..."

It is patent that the conclusion that the property in dispute is the family property of Gaji family could not have been arrived at if the trial court had properly appraised and evaluated the evidence of P.W.3, D.W.1 and D.W.2, particularly the evidence of D.W.2 to the effect that he and the 1st Appellant are not of the same father. In this connection, the court below had this to say at p. 113 line 21 et seq:-

"The learned trial Judge did not consider this piece of evidence and if he had done so, he would have easily found that the 3rd Respondent is a member of Dauda Family and not a member of Gaji Family and that he is therefore not the Head of Gaji Family which he claims to be..."

Since the trial court did not adequately evaluate the evidence before it on vital issues, the court below was eminently justified in interfering with its findings: *Ebba v. Ogoto* (1984) 1 SCNLR 372. I therefore resolve the first issue for determination against Appellants.

In the Appellants' 2nd issue for determination, the contention of learned counsel in his brief is that specific performance of the contract of sale of the property in dispute could not have been granted as the contract was not in writing nor was there a memorandum to that effect as contemplated by Section 4 of the English Statue of Fraud,

1677 which is a statute of general application. Learned counsel cited the Book "Nigerian Law of Contract" 1991 pages 169-171 by Professor Sagay and the case of Shittu v. Mbonu (1995) 4 NWLR (Pt.389) 341, 347 to 348. Dealing with the Appellants' 3rd and 4th issues, it was canvassed in their brief that since the sum of N11,000 claimed by the Respondent as damages in his alternative relief was adequate, specific performance of the contract of sale should not have been granted by the lower court having regard to the developments effected by the 2nd and 3rd Appellants on the property in dispute. B

In his response, learned counsel to the Respondent in his brief of argument contended that the provisions of Section 4 of the Statute of Fraud, 1677 is inapplicable to the transaction under consideration, which is subject to customary law. Learned counsel referred to the case of Yesufu v. Egberongbe (1997) 6 S.C. (Pt.1) 63 to submit that where there is a breach of contract for the sale of land, the aggrieved party has an option to regard the contract as still subsisting and sue for specific performance of the contract. He further argued that where a party claims relief in the alternative, recourse can only be had to the alternative relief where and after the substantive relief has failed. C D

The appellants' 2nd, 3rd and 4th issues together with the Respondent's 2nd issue pose the question whether the Court of Appeal was right to have decreed specific performance of the contract in the circumstance of the case. Before adverting to the guiding principles of the issues, it is pertinent to consider the question about the applicability of Section 4 of the English Statute of Fraud, 1677. I entirely agree with learned counsel to the Respondent that the section is inapplicable since the transaction the subject matter in dispute was made under customary law, which does not require writing as a pre-requisite for a valid disposition of land. The payment of the purchase price and the delivery of possession to the plaintiff created a valid title by native law and custom: Isaac Talabi Ogunbambi v. Adeniji Soyombo Abowaba (1951) 13 WACA 222. That apart, there is no appeal against the finding of the lower courts that there was a binding agreement between the 1st Appellant and the Respondent. E F G H

The decree of specific performance granted in favour of the Respondent cannot be faulted in the circumstances of this case. It is settled law that an order of specific performance is an equitable remedy granted to a successful litigant constraining the losing party

to carry out the agreement, which it had entered into with the successful litigant. Like all equitable remedies, it is at the discretion of the court but the discretion must be exercised judicially according to settled rules and principles. Although generally, an order of specific performance will not be readily granted where a remedy in damages is adequate, in a case involving sale of land, the law is that damages cannot adequately compensate a party for breach of a contract for the sale of an interest in a particular piece of land or of a particular house in which case the order for specific performance is available at the instance of the vendor or purchaser: *Anaeze v. Anyaso* (1993) 5 NWLR (Pt. 291) 1; (1993) 5 SCNJ 151, *Universal Vulcanising Nig Ltd. v. Ijesha United Trading and Transport Co. Ltd.* (1992) 5 NWLR (Pt. 266) 388; (1992) 11-12 SCNJ (Pt. 11) 234. In the present case, the trial court found as a fact that the respondent paid to the 1st Appellant the sum of N11,000 (Eleven Thousand Naira) as consideration for the sale of the property in dispute. As noted earlier, there was no appeal against that finding. Applying the principle enunciated above, the Respondent was entitled to a decree of specific performance of the property in dispute. It is not open to the court to enquire into the adequacy of the consideration. The claim by the 3rd Appellant that he built 13 rooms on the property in dispute did not change the character of the land. The 3rd Appellant was masquerading as a member and indeed as the head of the family of Gaji. It was only through a vigorous cross-examination that it emerged that he was not of that family. If he expended money in developing land that did not belong to him, he has himself to blame. That would not preclude the owner of the land from alienating the land together with the building on it. The principle *quic quid plantatur solo solo cedit* implies that once the plaintiff is adjudged to be the rightful owner of the land, the land together with what is on it automatically becomes his: See *Kupoluyi v. Philips* (1996) 1 NWLR (Pt.427) 691 at 699. Similarly, the claim by the 2nd Appellant that she invested her money on the building does not affect her husband's right to sell the property. I will therefore resolve the issue under consideration in favour of the Respondent against the Appellants. All the issues canvassed herein having been resolved in favour of the Respondent against the Appellants, the appeal lacks substance. Accordingly, it is hereby dismissed with N10,000 (Ten Thousand Naira) costs against the Appellants in

favour of the Respondent.

KUTIGI JSC

I read in advance the judgment just rendered by my learned brother, Edozie, JSC. I agree with his reasoning and conclusions. The appeal clearly lacks merit. It is accordingly dismissed. The judgment of the Court of Appeal is hereby confirmed. The Respondent is awarded costs of N10,000.00 only.

MOHAMMED JSC

I agree that this appeal is without merit and ought to be dismissed. My learned brother, Edozie, in the lead judgment which he wrote, considered all the salient issues raised in this appeal before he dismissed it. I agree entirely with him.

The appellants hinged their case on their averment that the property in dispute was a family property and as such the 1st appellant had no right to sell it without the consent of the members of the family. The 3rd appellant, Ayuba Gaji, told the trial court that he was the senior brother of the 1st appellant who sold the house in dispute to the respondent. He said that he was the head of Gaji family and that the sale was invalid because it was done without his consent.

However, it was clear from the evidence that the 3rd appellant was not a member of Gaji's family. In his testimony he told the trial court he was related to the 1st appellant through their mother but they had different fathers. This established that the 3rd appellant had no claim over the property in dispute. I agree with the learned Justice of the Court of Appeal that this evidence has knocked out the foundation of the case of the appellants.

In sum, this appeal is dismissed. I affirm the judgment of the Court of Appeal. I abide by all consequential orders made in the lead judgment including the award of costs.

KATSINA-ALU JSC

I had read in advance the judgment just delivered by my learned brother, Edozie, JSC. I agree with it and, for the reasons which he gives, I too dismiss the appeal. I also abide by the order for costs.

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TOBI JSC

C I read the judgment of my learned brother, Edozie, JSC., and I agree with him that this appeal should be dismissed.

The burden of proof in our adversary system is on the party who alleges the fact or who will fail if the burden is not discharged. And those persons in this appeal, in relation to the property, being family property, are the defendants. This is because the case of the D defendants is that the land in dispute is the family land of Gaji.

Family property could be created by a number of ways, including death intestate (devolution), conveyance inter vivos, will and gift or allotment. For land to qualify as family land, the party who so claims must not only identify the origin of the property but also E its status. See *Alhaji Olowosago v. Alhaji Adebajo* (1988) 9 S.C. 87; (1988) 4 NWLR (Pt. 88) 275 at 287. See also *Lewis v. Bankole* (1908) 1 NLR 81; *Nelson v. Nelson* (1913) 13 NLR 248; *Re Edward Forster* (1938) 14 NLR 83; *George v. Fajore* (1939) 15 NLR 1; *Shaw v. Kehinde* (1947) 18 NLR 129 F

A party who alleges family ownership of property should lead credible evidence as to how the property is owned by the family. In this respect, the party must show any of the above ways of ownership, that is by devolution, conveyance inter vivos, will or outright gift or allotment.

G In paragraph 3 of the joint Statement of Defence of 2nd and 3rd Defendants, they averred as to the family ownership of the property in dispute:

H “The 2nd and 3rd defendants aver that the house referred to in paragraph 5 of the statement of claim does not belong to the 1st defendant but a family house which belong to late Mallam Gaji the late father of 1st and 3rd defendants. The plaintiff shall be required to prove the ownership at the trial.”

At the trial, the defendants gave evidence in vindication of paragraph 3 of the statement of defence of the 2nd and 3rd defendants. D.W.2, Ayuba Gaji (mistaken for P.W.2 at page 40 of the Record), in his evidence said at page 40 of the Record:

“Our father one day went to visit the Sarkin Sabon Gari Gwagwalada and requested the Sarki to give him a plot to build. The Sarkin Sabon Gari told my father to go back home that he was going to consult his people in Gwagwalada about our father’s request. After one week my father told me and Isaac to go and ask the Sarkin Sabo Gari about the land. We went and told the Sarkin Sabon Gari that we were sent by our father to enquire about our father’s request. The Sarkin then told us that he had been advised that we could be shown a plot of land. He then called Alhaji Inusa to go and show me the plot they had discussed. Alhaji Inusa then took me to the place. We returned to the Sarkin and thanked him... I then looked for people to make the blocks for me. After they made the blocks, I requested the bricklayer to design 13 rooms for me in the house. The bricklayer did so and work continued. After completing the building I went and saw how they did it.”

D.W.3, Ladi Isaac Gaji, in her evidence, said at page 42 of the Record:

“I married Isaac in 1982. I know the GOOD HOPE HOTEL. There are between 23 to 34 rooms in the Hotel. 13 out of the 23 rooms were built by the parents of my husband. I built 9 rooms myself... I know Emmanuel Paye in this case. I was not informed before the house consisting of all the rooms 23 in number was sold. It was one evening that Emmanuel Paye came to our house and told me that he had given my husband N6,000.00 for the purchase of the house called GOOD HOPE HOTEL. I told him that the house did not belong solely to my husband. I told him that my husband’s parents and myself had all contributed in building the house.”

The above evidence has gone so well and so good. If the evidence had stopped as above, the appellants could not have had any problem in the matter, but there was a twist, which came out in cross-examination. D.W.2, in answer to a question, said at p. 42 of the Record:

“My relationship with Isaac is that we have the same mother but different fathers. My father’s name is Dauda.”

Since Dauda is his father's name, he is clearly not a member of the Gaji family. And that has destroyed his case completely.

It is new learning to me that evidence procured from cross-examination is inadmissible. Evidence procured from cross-examination is as valid and authentic as evidence procured from examination-in-chief. Both have the potency of relevancy and relevancy is the heart of admission in the Law of Evidence. Where evidence is relevant, it is admissible and admitted whether it is procured from examination-in-chief or cross-examination. The point accordingly fails.

A trial Judge is both a Judge of law and facts. He gets in contact with the facts for the first time. As a Judge of facts, he evaluates the evidence of the witnesses. Because he saw the witnesses, he is in the best position to assess the evidence. But the law does not give him the exclusive power to evaluate the evidence. Since the evidence of witnesses is duly recorded, an appellate Judge has the power to evaluate such evidence, this time around, from the Record. If an appellate Judge finds from the Record that the trial Judge properly evaluated the evidence before him, an appellate Judge has no business to interfere and substitute his own findings and conclusion, just to make the difference and exhibit appellate power. The law does not give such power to an appellate Judge. But where the evaluation of the evidence which led to the finding of a trial Judge is perverse, an appellate Judge is in a good position to reverse such evaluation and therefore the finding that resulted in the evaluation. This is because the evaluation and subsequent finding is not borne out from the evidence of the witness.

I see such a situation in this appeal. The learned trial Judge made findings which are clearly perverse and the court below was therefore clearly in a position to reverse such findings and I cannot see my way clear in reversing the findings of that court.

It is in the light of the above and the more detailed reasons given by my learned brother, Edozie, JSC., that I also dismiss this appeal. I award N10,000.00 costs in favour of the respondent.

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