

SUPREME COURT OF NIGERIA
FRIDAY 30TH MAY, 2003. SC. 97/1999
CORAM:- M. E. OGUNDARE, U. MOHAMMED,
A. I. IGUH, A. I. KATSINA-ALU, D. O. EDOZIE, JJSC

EMMANUEL ILONA APPELLANT
AND
1. SUNDAY IDAKWO RESPONDENTS
2. JOHN IDAKWO

APPEALS - Fresh issues - Raised without leave - Fate - Objection as to Exhibit 6 being a photocopy cannot be entertained in Supreme Court - Since same is a fresh issue on appeal (H1)

LAND LAW - Statutory right of occupancy - Revocation - By Land Tenure Law s. 34(1) - Minister can revoke such right for inter alia non payment of rents - Or requirement of the land for public purposes (H2)

LAND LAW - Statutory right of occupancy - Revocation by mistake - Power to correct - Governor has inherent power to correct such mistake - As he appears to have done by Exhibit 8 (H3)

LAND LAW - Right of occupancy - Irrevocability - Right of occupancy is deemed irrevocable - Unless under section 28 of Land Use Act - For overriding public interest (H4)

LAND LAW - Identity of land - Proof - Plaintiff has the burden to establish the identity of the land - But such burden will not exist when the identity was never a question in issue (H5)

COURTS - Reliefs - Grant of - Basis - Court has no power to award to plaintiff more than what he claimed - Since court does not grant reliefs which have not been claimed (H6)

PLEADINGS - Defences - Estoppel or acquiescence - Need to plead - Party relying on the equitable defences - Must have same pleaded in his statement of defence - Else evidence led in that regard goes

to no issue (H7)

FACTS

Plaintiffs/respondents sued defendant/appellant in the High Court of Kogi State, Idah claiming declaration of title to the land in dispute. With the leave of court the name of one Ukwenya Ochijenu Utenu was joined as co-defendant. It was the case of respondents that their father was granted a right of occupancy in respect of the land in 1964 as per Exhibit 6. Subsequently their father subleased a portion of the land to Total Nig. Ltd. with the requisite consent. Whereupon Total erected a filling station thereon. On the other hand appellant claimed that though Total erected the filling station on the land in the belief that respondents' father had title to the land, it was subsequently discovered by appellant that there was no such title in respondents' father. As a result of which appellant had applied to the Governor to be granted the land and was so granted same, which grant was evidenced by a certificate of occupancy. It was in evidence that though the right of occupancy of respondents' father was purportedly reported as revoked in a letter - Exhibits 3, another letter - Exhibit 8 was later written to cancel Exhibit 3.

Though the intervener, Ukwenya Ochijenu Utenu, did file a statement of defence and counterclaim, and even gave evidence in support of his pleadings, the matter between him and respondents were eventually settled out of court and a term of settlement to that effect filed and adopted as consent judgment. By the terms of the judgment, the land on which the filling station was built was conceded to respondents as between them and the intervener. The court eventually considered the case as between respondents and appellant and held that respondents failed to prove their case. Aggrieved, respondents appealed to Court of Appeal which allowed the appeal and gave judgment to respondents. Dissatisfied, appellant filed appeal at Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the Court of Appeal was right in holding that by virtue of the Respondents' father's Right of Occupancy (Exhibit 6), he was deemed to be a holder of a Statutory Right of Occupancy of the land in dispute and therefore the Statutory Right of Occupancy (Exhibit D1) granted to the Appellant was not superior to the status

and holding of the Respondents' father having regard to the provisions of the Land Use Act, 1978 and the Land Tenure Law?

2. Whether the Respondents have proved their case for declaration of title to the land in dispute?

3. Whether the Court of Appeal was justified in granting the reliefs not sought by the Respondents?

4. Whether there was a reasonable cause of action in the Respondents' claim to warrant the assumption of jurisdiction on the matter by the court?

5. Whether the Court of Appeal was justified in rejecting the defence of laches and acquiescence as unpleaded and irrelevant in the determination of the appeal having regard to the state of the pleadings and evidence adduced?

HELD (Unanimously dismissing the appeal per EDOZIE JSC)

APPEALS - Fresh issues - Raised without leave - Fate

1. The objection that Exhibit 6 is a photocopy not having been raised in the two lower courts cannot be raised in this court as a fresh issue without the leave of this court and as there is no indication that such leave was granted, that issue cannot be entertained.

It is my view that the contention that Exhibit 6 is a photocopy and therefore inadmissible in evidence is not well founded.

(p. 1534 F)

LAND LAW - Statutory right of occupancy - Revocation

2. The Land Tenure Law of Northern Nigeria, Cap 59 of 1963 made provision in Section 34(1) thereof for the revocation of Statutory Right of Occupancy by the Minister for good cause such as, for non-payment of rents, rates and taxes, alienation of the right of occupancy, requirement of the land by government for public purposes, breach of any term contained in the Certificate of Occupancy etc.

The above letter, Exhibit 3 the substance of which was to revoke Exhibit 6 was not signed on behalf of the Minister nor on behalf of the appropriate Permanent Secretary. More importantly, the intended revocation was not in accordance with Section 34(1) of the Land Tenure Law. (p. 1537 H/1538 H)

LAND LAW - Statutory right of occupancy - Revocation by mistake
 3. It would appear from the tenor of Exhibit 3 that the purported revocation of Exhibit 6 was on the ground that it was granted in error. In the case of Saude v. Abdullahi supra at p.415, this court
 B held that it does not require an express provision of the Law or Act to give power to the Governor to correct errors made by him arising from a misunderstanding of the facts and that the Governor had an inherent power to correct mistakes of facts arising from the grant of
 C Right of Occupancy by revocation of such grant. By the same token, the Governor can cancel such a revocation on discovering that the revocation was made in error. This no doubt explains the issuance of Exhibit 8.

Exhibit 8, copied above was a letter sent to Ukwenya Uteno and copied to the Respondents' father by the Permanent Secretary, Min-
 D istry of Works, Kwara State, confirming the validity of Exhibit 6 and by inference cancelling the letter of revocation, Exhibit 3. It seems clear to me, therefore, that a combined reading of Exhibits 3 and 8 shows clearly that the Respondents' father's grant of statutory Right of Occupancy over the property in dispute had not been revoked.
 E (p. 1539 A/1540 C)

LAND LAW - Right of occupancy - Irrevocability

4. Since the land in dispute was vested on the heirs or successors of
 F the Respondents' father from 9th October, 1976, when he died till 1978 when the Land Use Act came into effect and the land being developed and located in an urban area, the land continued to be vested in the said heirs or successors of the Respondents' father and are deemed to be holders of a statutory Right of Occupancy in respect of that land. That Right of Occupancy is irrevocable unless
 G under Section 28 of the Land Use Act for overriding public interest. When, therefore, in the instant case the Appellant was on 24th, April, 1984, granted a statutory Right of Occupancy (Exhibit D1), over the land in dispute, that grant was invalid because there was already a subsisting Statutory Right of Occupancy over that land which has
 H not been revoked. (p. 1541 A/ D)

LAND LAW - Identity of land - Proof

5. The law is well settled by a long string of authorities that in an action for declaration of title to land the onus of proof lies on the plaintiff to establish with certainty and precision the area of land to which his claim relates.

But the burden will not exist when the identity of the land in dispute was never a question in issue. The question of the identity of the land in dispute being in issue will only arise when the defendant raises it in his statement of defence in a trial where pleadings were ordered and filed or the cross-examination of the adversary and his witnesses or in his own testimony where the trial is without pleadings.

In the case under consideration, the question about the identity of the land in dispute was not raised in the pleadings nor in the proceedings before the two lower courts. The land in dispute was known to both parties as the land on which was erected the Total Petrol Filling Station along Ahmadu Bello Way at Sabon Gari opposite St. Boniface Primary School, Idah. With this clear description in respect to which no issue was joined in the pleadings or at the trial, it is too late in the day for the Appellant to contend, as he had done, that the Respondents did not establish the identity of the land in dispute to entitle them to judgment. (p. 1542 E/ H)

COURTS - Reliefs - Grant of - Basis

6. It is now clearly settled that a court has no power to award to a plaintiff more than what he has claimed. The rationale for the principle is not far-fetched. A court of law is not a charitable institution doling out reliefs which have not been claimed.

The substance of the above reliefs is an order of nullification of the Appellant's document of title, Exhibit D1, and a declaration that the Respondents' father was entitled to the land in dispute as per Exhibit 6. The trial court refused to grant the reliefs but the Court of Appeal granted them by making an order to the effect "that the Appellants' late father is vested with the title to the land covered by the Total Filling Station at Sabon Gari, Idah." Apart from the difference in semantics, I think the relief granted by the Court of Appeal is substantially the same as the reliefs prayed for. I therefore resolve this issue against the Appellant. (p. 1544 B/1545 C)

PLEADINGS - Defences - Estoppel or acquiescence - Need to plead

7. It is elementary law that the defences of estoppel or acquiescence must be pleaded by the party relying on it.

It is not necessary to plead the defence in any particular manner so long as the matter constituting the defences are stated in such a way as to show clearly that the party pleading relies upon them as a defence.

B The Appellant maintained that he pleaded the equitable defences in question in paragraphs 7 and 13 of his Statement of Defence.

C With much respect to the learned counsel to the Appellant, there is nothing in the above paragraphs of the Statement of Defence suggesting that a plea of estoppel or acquiescence is contemplated.

Since the equitable defences were not pleaded, any evidence led in that regard would go to no issue and be discountenanced. (pp. 1547 C/ G & 1548 B)

D NOTABLE POINTS OF INTEREST

EDOZIE JSC

1. An un-appealed finding stands admitted

E The court below did find, quite rightly in my view, that the land in dispute was developed and was in an area designated as urban area. That finding has not been challenged in this appeal. A finding against which there is no appeal stands admitted and undisputed. (p. 1540 G)

F IGUH JSC

2. Competing titles - He who is earlier is stronger in law

G The law is well settled that where, as in the present case, there are competing interests by two or more parties claiming title to the same piece or parcel of land from a common grantor, the position, both at law and in equity, is that such competing interests will prima facie rank in order of their creation based on the maxim qui prior est tempore potior est jure which simply means that he who is earlier in time is stronger in law. (p. 1548 H)

H **3. Same grantor cannot subsequently re-grant land already granted**

Exhibit 6 being a valid title deed in favour of the respondents, Exhibits D, D1 which were created subsequently by a common grantor in respect of the same property cannot constitute valid grants. The reason is because, after a party has fully divested himself of all interest in land, no rights vest in him to deal with the same property by way of further alienation anymore. B

The principle, as I stated in the Alhaji Kari case (supra) is based on the maxim, *nemo dat quod non habet*, which literally means that no one can give that which he does not have. Exhibit 6 having effectively vested Right of Occupancy, in respect of the land in dispute to the respondents' father in 1964, the same grantor cannot subsequently lawfully vest the same right of occupancy in respect of the same property to the appellant. (p. 1549 E) C

REPRESENTATION

Alex B. Izinyon, SAN, with Adekunle N. Kelejoye; B. K. Abu and C.S. Ekeocha Esq., for the Appellant
P. O. Okolo, Esq., for the Respondents D

CASES REFERRED TO

Romaine v. Romaine (1992) 5 SCNJ 25 E
Ekpenyong v. Nyong (1975) 2 S.C. 71
Titiloye v. Olupo (1991) 7 NWLR (Pt. 205) 519
Raimi v. Akintoye (1986) 3 NWLR (Pt. 26) 97 F
Union Bank Ltd v. Owolabi (1988) 1 NWLR (Pt. 68) 125
Dapub v. Koko (1993) 12 SCNJ 1
Dantumbu v. Adene (1987) 4 NWLR (Pt. 65) 314
Bendel Insurance Co. v. Edokpolor (1989) 4 NWLR (Pt. 118) 725
Okulade v. Alade (1976) All NLR 56 G
Saude v. Abdullahi (1989) 7 S.C. (Pt. II) 116
Kari v. Ganaram (1997) 2 NWLR (Pt. 488) 380

STATUTES REFERRED TO

Land Use Act, 1978, S. 34(2) H
Land Tenure Law of Northern Nigeria, Cap 59 of 1963, S. 34(1)

LEAD JUDGMENT BY EDOZIE JSC

Proceedings giving rise to this appeal are a little bit complex,

both with respect to the parties and the subject-matter in controversy. The proceedings emanated from the administration of the estate of one Joseph Idakwo Ejiga who died intestate, leaving among his heirs the two sons who are the Plaintiffs/Respondents on record.

By a writ of summons in suit No. ID. 17/89 filed at the Idah High Court on 19th of September, 1989, Sunday Idakwo, the 1st Respondent therein as Plaintiff sued his brother, John Idakwo (2nd Respondent) and Emmanuel Ilona (Appellant) as 1st and 2nd Defendants claiming the following reliefs:-

“(a) The 1st Defendant to hand over to him all the properties, money and documents connected with the estate of their late father Joseph Idakwo Ejiga as the administrator of the estate.

(b) The 2nd Defendant to vacate the plot of land at the Total Petrol Filling Station situate at Sabon Gari opposite St. Boniface Primary School, Idah, forming part of the estate of his late father and that any evidence of ownership of the land produced by the said Defendant be declared null and void.”

With the leave of the court granted as the proceedings progressed, the name of Ukwenya Ochijenu Utenu was joined as the 3rd Defendant while the name of John Idakwo was struck out as 1st Defendant and added as 2nd Plaintiff. As reconstituted, the parties in the action are:-

1. Sunday Idakwo	...	..	1st Plaintiff
2. John Idakwo	...	..	2nd Plaintiff

AND

1. Emmanuel Ilona	...	..	1st Defendant
2. Ukwenya Ochijenu Utenu	...	..	2nd Defendant

Pleadings were filed, exchanged and subsequently amended.

In their Amended Statement of Claim dated 27th day of January, 1992, the Plaintiffs' claimed the following reliefs:-

“29 Whereby the plaintiffs claim that the said letter of 26/6/70 declaring the said certificate No.61 null and void be declared void.

30 Whereby the Plaintiffs claim that the 1st Defendant's claim be dismissed and his said certificate of occupancy nullified.

31. Whereby the Plaintiffs claim that the 2nd Defendant's claim be dismissed for lack of evidence to ground his claim.

32. Whereby the Plaintiffs claim against the defendants in addition to the total cost of this action and (sic) general damages.”

The 2nd Defendant filed an amended Statement of Defence dated 16th day of December, 1993, and counter-claimed thus:-

“WHEREOF, the Defendant counter-claims against the Plaintiff (sic) as follows:

(i) A declaration that the Right of Occupancy obtained by his (sic) father covering the land measuring 400 ft by 300 feet situate opposite St. Boniface Primary School, Sabon Gari, Idah was obtained by fraud, in error and therefore null and void. B

(ii) A declaration that in as much as the issues relating to the land aforementioned is concerned, it is already *res judicata*. C

(iii) A declaration that the Letter of Administration obtained by the plaintiff is obtained by fraud and therefore null and void in as much as it covers the land in dispute.”

Each party called witnesses to support its case. The subject-matter in dispute is the plot of land with the Total Filling Station situate along Ahmadu Bello Way, Sabon Gari, Idah, opposite St. Boniface Primary School, Idah. It is the plaintiffs’ case that the Right of Occupancy No. 13457 of that plot of land measuring 0.9 acres was by a letter No. H10127/10 dated 22nd December, 1964, (Exh.6), granted to their late father by the then Government of Northern Nigeria, Kaduna. Their father thereafter paid annual rents. In 1966, he, with the approval of Government sub-leased a portion of the land to Total Nigeria Ltd. and the company erected a filling station thereon. By a letter dated, 26th June, 1970, from Ministry of Works and Surveys, Lands Office, Lokoja (Exh.3), the Plaintiffs’ father was told that his Right of Occupancy had been revoked in favour of Ukwanya Utenu the 2nd Defendant. Upon enquiry by the Plaintiffs’ father, he received another letter dated January, 1971, (Exh.8), to the effect that his Right of Occupancy was still intact. It is the Plaintiffs’ contention that as the administrators of their late father’s estate, they are entitled to the land in dispute. E F G

The 1st Defendant, Emmanuel Ilona, (Appellant), is a petroleum marketer. He pleaded and testified that the portion of land in dispute upon which the Total Filling Station was erected is his property. He stated that the Filling Station with two underground tanks, two pumps and a salesroom was constructed by the Total Nigeria Ltd., on the assumption that the land housing the station belonged to the Plaintiffs’ father. However, after investigation at the Land Office, H

Makurdi, it became evident that the Plaintiffs' father had no title to the land. Consequently, he applied for the land which application was approved by the Governor of Benue State. He was accordingly issued with the Right of Occupancy, Certificate of Occupancy with the site plan - Exhs. D1, D1A and D1B respectively. Thereafter, he
 B erected a fence at the rear of the plot, replaced the underground tanks with two large tanks and one additional one and concreted the drive way and all these he did to the knowledge of the Plaintiffs who did not protest.

C The 2nd Defendant, Ukwenya Ochijenu Utenu died before giving evidence and was substituted by his son Nathaniel Ukwenya Ochijenu who testified to the effect that the entire land in dispute belonged to his father who inherited it from his father, Ukuleno Onoje. It was the latter who first deforested and appropriated the land for farming and other uses. He said that his father and the Plaintiffs' father had disputed over the land in dispute leading to investigations
 D by land officers from Kaduna and the eventual revocation (Exh.3) of the Right of Occupancy (Exh.6) purportedly issued to the Plaintiffs' father. The witness also gave account of series of litigations between his father and the plaintiffs' father and tendered as Exhs. D2 and 5,
 E record of proceedings and judgment in those cases.

After the parties had concluded their oral evidence, learned counsel for the plaintiffs informed the court that his clients and the 2nd defendants had reached a settlement out of court and that a memorandum to that effect had been filed in court. In his reaction,
 F the learned trial Judge, Ochimana, J., in his judgment delivered on 24th October, 1994, entered a consent judgment in the following terms:

G "By this terms of settlement, the Plaintiffs and the 2nd Defendant had reached an amicable settlement. In the circumstances, judgment is hereby entered as between the Plaintiffs and 2nd defendant in the terms of their settlement. The portion of land measuring 100 ft by 100 ft in which stood the uncompleted building opposite St. Boniface Primary School, Sabon Gari, Idah, shall not vest in the Plaintiffs while the remaining portion of the land extending to the its fence of the Total Filling Station is declared for the 2nd Defendant.
 H This brings to an end the series of litigations between the parties."

There is no appeal against that consent judgment as between

the Plaintiffs and the 2nd defendant. The trial court proceeded to consider the case as between the plaintiffs and the 1st Defendant, Emmanuel Ilona, and after reviewing the evidence and the written addresses of learned counsel, it dismissed the plaintiffs' claim on the ground that they had failed to prove their case against the 1st Defendant on the preponderance of evidence to entitle them to judgment. B
Being aggrieved by this judgment, the Plaintiffs lodged an appeal against it to the Court of Appeal, which in a unanimous decision delivered on 13th January, 1998, allowed the appeal, set aside the judgment of the trial court and vested on the plaintiffs' late father the C
title to the land covered by the Total Filling Station at Sabon Gari, Idah. The 1st Defendant is now challenging that judgment by his appeal to this Court.

The appeal is predicated on eight grounds of appeal, and based on them, the learned counsel to the 1st defendant (hereinafter D referred to as the Appellant) formulated five issues for determination. The Plaintiffs, to be henceforth referred to as Respondents have through their counsel adopted the issues as identified by the Appellant. The issues as set out in the Appellant's brief read as follows:-

"1. Whether the Court of Appeal was right in holding that by virtue of the Respondents' father's Right of Occupancy (Exhibit 6), he was deemed to be a holder of a Statutory Right of Occupancy of the land in dispute and therefore the Statutory Right of Occupancy (Exhibit D1) granted to the Appellant was not superior to the status F
and holding of the Respondents' father having regard to the provisions of the Land Use Act, 1978 and the Land Tenure Law? (Encompassing Grounds 1 and 2). E

2. Whether the Respondents have proved their case for declaration of title to the land in dispute? (Encompassing Grounds G
3, 4 and 7)

3. Whether the Court of Appeal was justified in granting the reliefs not sought by the Respondents? (Encompassing Grounds 5)

4. Whether there was a reasonable cause of action in the Respondents' claim to warrant the assumption of jurisdiction on the H
matter by the court? (Encompassing Ground 6)

5. Whether the Court of Appeal was justified in rejecting the defence of laches and acquiescence as unpleaded and irrelevant in the determination of the appeal having regard to the state of the

pleadings and evidence adduced? (Encompassing Ground 8)”.

In regard to issue 1, the leading Senior Advocate to the Appellant submitted in his brief that the court below was in error when it held that the Respondents’ father, as from 1978, is deemed to be a holder of Statutory Right of Occupancy granted under the Land Use Act in relation to the land in dispute. Expatriating, the learned Senior Advocate contended that the Right of Occupancy, Exh.6 was a temporary right and therefore a mere licence which did not vest title on the holder, that on the death of the respondents’ father on 7th October 1976, the devolution of his property was governed and regulated by the relevant native law and custom by virtue of Section 30 of Land Tenure Law Cap 59 Laws of Northern Nigeria and not the Letters of Administration, Exhibit 1, which is a concept of the English Law. It was further argued in the alternative that the Statutory Right of Occupancy Exh. D1 granted to the Appellant had pursuant to Section 5(2) of the Land Use Act extinguished all other existing rights, if any, created by Exh. 6. The case of *Kari v. Ganaram* (1997) 2 NWLR (Pt. 488) 330 was referred to. It was canvassed that the revocation of Exhibit 6 by Exhibit 3 was valid but that the purported revalidation of Exhibit 6 by Exhibit 8 was invalid in law because Exhibit 8 was not a response to Exhibit 3. Finally, it was submitted that Exhibit 6, being a photocopy was inadmissible in evidence and that objection to that effect was taken at the trial as reflected at p.5, lines 32-33 and p.52 of the record of proceedings and furthermore, that even if no objection was taken, the trial court was bound to expunge it from the proceeding on the authorities of the following cases:- *Salawa Jagun Okulade v. Abolade Agboola Alade* (1976) All NLR 56 (reprint); *Raimi v. Akintoye* (1986) 3 NWLR (Pt.26) 97 at 104; *Bendel Insurance Co. v. Edokpolor* (1989) 4 NWLR (Pt.118) 725. If Exhibit 6 is expunged from the record, counsel concluded, the Respondents’ case would crumble leaving the Appellant’s Exhibit D1 as the only valid title affecting the land in dispute.

In response to the foregoing contentions, learned counsel for the Respondents, in his brief of argument made submissions to the following effect:- The Respondents’ father was in 1964 granted the Statutory Right of Occupancy (Exhibit 6) in respect of the land in dispute. Exhibit 3, written in 1970, purportedly revoked Exhibit 6 based upon the petition of Mr. Ukwenya Utenu (the 2nd Defendant)

but the said Exhibit 6 was revalidated by Exhibit 8 dated 2nd, January, 1971. The land in dispute which was developed and being in an area designated as urban area was deemed to be vested in the estate of the Respondents' father with the coming into effect of the Land Use Act, 1978, by virtue of Section 34(2) of that Act. Since Exhibit 6 had not been validly revoked, the subsequent purported grant on April 24th 1984, of the Appellant's Statutory Right of Occupancy, Exhibit D1, over the same piece of land was invalid. The following cases are apposite:- Saude v. Abdullahi (1989) 7 S.C. (Pt. II) 116; (1989) 9 NWLR (Pt. 116) 387, Titiloye v. Olupo (1991) 7 NWLR (Pt. 205) 519, Romaine v. Romaine (1992) 5 SCNJ 25, Dantumbu v. Adene (1987) 4 NWLR (Pt. 65) 314 at pp. 336 - 337, Pother Dapub v. Haruna Bako Koko (1993) 12 SCNJ 1 at p.11 and Joshua Ogunleye v. Baba Tayo Oni (1990) 4 SCNJ 65. The contention that Exhibit 6 is a temporary Right of Occupancy is not tenable. Equally untenable is the argument that the said Exhibit 6 is a photocopy. The record of proceedings does not contain any objection on that ground. Learned counsel therefore urged that the appeal on the first issue for determination be dismissed as it lacks substance.

Let me first deal with the question whether Exhibit 6 is inadmissible in evidence on the ground that it is a mere photocopy of the original document. Learned counsel to the Appellant claimed that he timeously raised objection at the trial in that regard and referred to p.51, lines 32-33 and to p.52 without identifying the portion. I will reproduce as hereunder p.5 1 lines 32-33 and p.52 lines 1 to 18.

“Okolo: We seek to tender ID ‘A’ in evidence.

Abalaka: We object on the ground of lack of proper foundation.

Igono: I object on the ground that the witness is not competent to tender this document for the following reasons:

- (1) he has never had the custody of this document and
- (2) that he is not the maker and this does not form part of the series as defined in Sec. 90 E.A. Here there is evidence to show to the contrary.

Okolo: The witness is the proper person to tender this document. The witness is proper.

PW.1. I requested for ID ‘A’ from the plaintiff when I was called as a witness because the file is in Makurdi for processing.

Court: It is clear from the record that ID 'A' has been in the custody of the plaintiff and the witness called for it for inspection when he was called as a witness. It follows that the issue of custody has not changed but as plaintiff told the court, since P. W. 1 is from the Land and Survey department the document can properly be
 B tendered through him in his official capacity since the maker can no longer be found. Accordingly ID 'A' is admitted in evidence and marked Exhibit 6"

C With profound respect to the learned counsel for the Appel-
 C lant, there is nothing in the above excerpt to suggest, even remotely, that Exhibit 6 is a photocopy. On the contrary, the passage points to the fact that Exhibit 6 is an original document, which should be tendered by the maker or a person having proper custody of it. The objection that Exhibit 6 is a photocopy not having been raised in the two lower courts cannot be raised in this court as a fresh issue without
 D the leave of this court and as there is no indication that such leave was granted, that issue cannot be entertained: *Agbaje v. Adigun* (1993) 1 NWLR (Pt. 269) 261, *Skenconsult (Nig) Ltd. v. Ukey* (1981) 1 S.C. 6, *Uor v. Loko* (1988) 2 NWLR (Pt.77) 430, *Adeniji v. N.B.N. Ltd* (1989) 1 NWLR (Pt. 96) 212, *Oguma v. I.B.W.A.* (1988) 1 NWLR (Pt. 73) 658 A.G. *Oyo State v. Fairlakes Hotels Ltd* (1988) 12 S.C (Pt.1) 1; (1988) 5 NWLR (Pt.92) p. 1 *Oniah v. Onyia* (1989) 2 S.C. (Pt. 1) 69; (1989) 1 NWLR (Pt.99) 514. By the force of these authorities, it is my view that the contention that Exhibit 6 is a photocopy and
 F therefore inadmissible in evidence is not well founded.

I will now turn to the contention that Exhibit 6 is a temporary statutory Right of Occupancy. In this regard, it is sufficient to reproduce hereunder, the caption and paragraphs 1, 2, 3 and 5 of Exhibit 6 which was the letter from Ministry of Lands and Survey, Kaduna, dated 22/12/1964 and addressed to the Respondents' father:-

G "APPLICATION FOR THE GRANT OF A RIGHT OF OC-
 CUPANCY

With reference to your application dated 26th August, 1963, which was forwarded to this Ministry, under Provincial Secretary's letter No.CER/279/7 of 13th February, 1964, I am directed to inform
 H you that the Honourable Minister has approved the grant of a Right of Occupancy to you in respect of a plot of 0.9 acre as on plan No. Right of Occupancy 13457 (Temp) survey will be necessary on the

following terms:-

- (i) Rent £30 per annum
- (ii) Improvement £1,500 within (2 years)
- (iii) Term 40 years
- (iv) Rent Revision Quinquennial
- (v) Purpose (s) For Petrol Filling Station

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2. The grant has been made under Certificate of Occupancy No. 13457.

5. The date of commencement of this Right of 4 Occupancy will be date of acceptance as signified by you on this letter and should be within one month of the receipt of this letter by you”

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The Respondents’ father signified his acceptance of the grant on 14th January, 1965. The contention of learned counsel to the Appellant is that the abbreviated word (Temp) appearing immediately after the figure 13457 in Exhibit 6 means temporary and indicates that what was granted was a temporary Right of Occupancy. Counsel to the Respondents appears to have conceded that the abbreviated word means “temporary” but he asserted that it was merely an indication that the size of the land being granted was 0.9 acres approximately, pending the determination of the exact size after survey. I am inclined to accept the views of Respondents’ counsel. If a temporary Statutory Right of Occupancy was contemplated, that would have been indicated on the caption of the letter. Further, the first sentence of the letter leaves no one in doubt that what the Honourable Minister approved was “the grant of a Right of Occupancy” and not a grant of temporary Right of Occupancy. At any rate, parties did not join issues in their pleadings as to whether the Right of Occupancy granted was temporary or otherwise nor was that question canvassed in the two lower courts. The distinction is of fundamental importance. In the case of *Kari v. Ganaram* (1997) 2 NWLR (Pt. 488) 380 at pp 401, 402, this court, per Iguh, JSC, had this to say:-

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“A temporary Right of Occupancy cannot, in my opinion, amount to the same thing, in law, as a Statutory Right of Occupancy. A temporary Right of Occupancy, as its title implies, is essentially limited or transient in nature. It amounts to no more than a bare licence to occupy land on a temporary, and sometimes short term basis and generally confers no legal estate on the grantee of such a right. This is unlike a statutory Right of Occupancy which is clearly

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not temporary in nature, confers more extensive rights on the holder, is far superior to a temporary Right of Occupancy and usually confers on the holder, a legal estate in and over the property in question. Besides, unlike a statutory Right of Occupancy it need not be for any fixed duration.”

B In the instant case, the Right of Occupancy under consideration is as indicated on Exhibit 6 for 40 years with effect from 14th January 1965. That implies that it remains extant till the year 2005. It is therefore not a temporary right of occupancy or licence, the right of which is extinguished at the death of the licensee. It follows therefore that when the respondents’ father died on 9th October, 1976, the Right of Occupancy granted in respect of the land in dispute devolved on his heirs or successors under the relevant law, be it customary or statutory.

D It remains to consider the validity of the Appellant’s Statutory Right of Occupancy, Exhibit, DI vis-à-vis the Respondents’ Right of Occupancy, Exhibit 6. The starting point, I think, is a consideration of Exhibits 3 and 8. Of these, the trial court at p. 142, lines 13 to 24 had this to say: -

E “Exhibit 3 clearly laid to rest the legal tussle over the land on which the Total Petrol Filling Station, Sabon Gari, stands. From all that I have said above, it is my view that the answer to issue No.3 is in the affirmative, that is that Exhibit 3 properly revoked the late Joseph I. Ejiga’s Right of Occupancy with effect from 26th June 1970. F Although he was still operating the Total Petrol Filling Station even after his Right of Occupancy was revoked until 1976, when he died, he had no legal title to the land in dispute. Since late J.I. Ejiga lost his title to the disputed area in June 1970, the plaintiffs have no right to contest the ownership of the land with anybody - either Ukwenya Utenu or the 1st Defendant.”

G Earlier at p.141 from line 33 to 35, the learned trial Judge said:-

“From the wording of Exhibit 8, it is clear that it was not a reply to late J.I. Ejiga’s letter for confirmation of Exhibit 3 but it was the Permanent Secretary’s own decision.”

H In its appraisal of the Exhibits, the Court of Appeal, per Kalgo, JCA., (as he then was), who wrote the lead judgment to which the other Justices concurred in, commented at p.298 line 18 et seq of

the record thus:-

“There is no doubt that Exhibits 3 and 8 were at cross purposes and contradicted each other even though it is i clear that they were talking about the same piece of land. But what is glaringly obvious is that both exhibits do not appear to be relevant to this appeal because Mr. Utenu is not anymore a party to the land in dispute as his dispute with the Appellant had been settled out of court. And although reference was made to the Right of Occupancy granted to the Appellants’ father in both exhibits, they do not either separately or together affect the validity of the Right of Occupancy (Exhibit 6). I therefore do not agree with the learned trial Judge in his judgment (p. 142 of the record) that Exhibit 3 properly revoked late J.I. Ejiga’s Right of Occupancy.”

It must be borne in mind that it was not part of the Appellant’s case either on the pleadings or evidence that Exhibit 3 revoked Exhibit 6. His case simply was that a search was conducted and the land in question was found to be vacant hence he applied for it and was granted Exhibit D1. It was the Respondents who tendered Exhibits 3 and 8 to show the unsuccessful attempt made to deprive their father of his right to the property in dispute.

The Land Tenure Law of Northern Nigeria, Cap 59 of 1963 made provision in Section 34(1) thereof for the revocation of Statutory Right of Occupancy by the Minister for good cause such as, for non-payment of rents, rates and taxes, alienation of the right of occupancy, requirement of the land by government for public purposes, breach of any term contained in the Certificate of Occupancy etc. Exhibit ‘3’ which the Appellant maintains had revoked Exh. 6 reads as follows:

Exhibit “3”
No.Lan/7/Vol.111/365
Ministry of Works and Survey,
Lands Office (Division)
Lokoja, Nigeria.
26th June, 1970.
Dear Sir,

RIGHT OF OCCUPANCY NO. 61 (FORMERLY RIGHT OF
OCCUPATION NO. 13457)

I am directed to refer to a land dispute between you Ukenya

Uteno/ J.I. Ejiga for a piece of land covered by Right of Occupancy No. 61 and to convey to you the final decision of my Permanent Secretary as follows:

2. The legal position is as follows:-

(i) Mr. Ukwenya Uteno is the rightful owner of the land as his Customary Right of Occupancy has not at any time been revoked and therefore the purported grant of Certificate of Occupancy No. 61 is null and void.

(ii) Mr. J.I. Ejiga has no legal rights over the parcel of land purported to be covered by Certificate of Occupancy No. 61. However he is entitled to sue for damages or for losses incurred or both.”

3. Your attention are (sic) drawn to paragraph 2(1)11 above.

SGD

J. I. S. Iregu,
Asst. Estates officer, Lokoja

Mr. Ukwenya Uteno,
Idah.

Mr. Joseph I. Ejiga,
C/o Qua Iboe Mission,
P. O. Box 1,
Idah.”

The above letter, Exhibit 3 the substance of which was to revoke Exhibit 6 was not signed on behalf of the Minister nor on behalf of the appropriate Permanent Secretary. More importantly, the intended revocation was not in accordance with Section 34(1) of the Land Tenure Law. It would appear from the tenor of Exhibit 3 that the purported revocation of Exhibit 6 was on the ground that it was granted in error. In the case of Saude v. Abdullahi supra at p.415, this court held that it does not require an express provision of the Law or Act to give power to the Governor to correct errors made by him arising from a misunderstanding of the facts and that the Governor had an inherent power to correct mistakes of facts arising from the grant of Right of Occupancy by revocation of such grant. By the same token, the Governor can cancel such a revocation on discovering that the revocation was made in error. This no doubt explains the issuance of Exhibit 8 which reads thus:-

“Exhibits 8”

H. 10127/85

2nd January, 1971.

Mr. Joseph I. Ejiga,
C/o Qua Iboe Mission,
P. O. Box 1,
Idah.

Dear Sir,
Grant of Right of Occupancy

B

Please refer to my letter No. H10127/83 of 19th October, 1970. As you are unable to produce evidence to substantiate ownership of the plot vested in you by the late Atta of Igala and as a certificate of occupancy has been formally granted to Mr. Ejiga under C of O No. 61, the said piece of land on which stands a Petrol Filling Station of Total Oil Products (Nig) Ltd. is hereby legally regarded as Mr. Ejiga's as it has been registered as his.

I have the honour to be Sir,

D

Your Obedient Servant
(Sgd) T.W.B. Bako,
For Permanent Secretary.

Mr. Ukenya Uteno,
C/o Sole Administrator,
Local Government Authority Office,
Idah.

E

No.11.1-127/85A

Ilorin, 2nd January, 1971.

F

Copy to.

Mr. J. I. Ejiga,
C/o Qua Iboe Mission,
P. O. Box 1,
Idah

G

For information. Your C of O No. 61 remains valid.

Sgd. T.W.B Bako,
Permanent Secretary,
Ministry of Works and Survey."

Exhibit 8, copied above was a letter sent to Ukenya Uteno and copied to the Respondents' father by the Permanent Secretary, Ministry of Works, Kwara State, confirming the validity of Exhibit 6 and by inference cancelling the letter of revocation, Exhibit 3. It seems clear to me, therefore, that a combined reading of Exhibits 3 and 8

H

shows clearly that the Respondents' father's grant of statutory Right of Occupancy over the property in dispute had not been revoked. Consequently, the Respondents' father was still the holder of the Right of Occupancy, Exhibit 6, up till the 9th of October, 1976, when he died and thereafter, and as I had already opined, that Right of Occupancy devolved on his heirs or successions. In 1978, when the Land Use Act came into force, it provided in Section 34, subsections 1 and 2 thereof, thus:-

“34(1) The following provisions of this section shall have effect in respect of land in an urban area vested in any person immediately before the commencement of this Decree.

2. Where the land is developed, the land shall continue to be held by the person in whom it was vested immediately before the commencement of this Decree as if the holder of the land was holder of a Statutory Right of Occupancy issued by the Military Governor under this Decree.”

The court below did find, quite rightly in my view, that the land in dispute was developed and was in an area designated as urban area. That finding has not been challenged in this appeal. A finding against which there is no appeal stands admitted and undisputed: See *Adejumo v. Ayantegbe* (1989) 6 S.C. (Pt. 1) 76; (1989) 3 NWLR (Pt. 110) 417, *Okuoja v. Ishola* (1982) 7 S.C. 314, *Awote v. Owodunmi* (1986) 5 NWLR (Pt.45) 941, *Atoyebi v. Gov. of Oyo State* (1994) 5 NWLR (Pt.344) 290. Since the land in dispute was vested on the heirs or successors of the Respondents' father from 9th October, 1976, when he died till 1978 when the Land Use Act came into effect and the land being developed and located in an urban area, the land continued to be vested in the said heirs or successors of the Respondents' father and are deemed to be holders of a statutory Right of Occupancy in respect of that land. That Right of Occupancy is irrevocable unless under Section 28 of the Land Use Act for overriding public interest. As was observed by Belgore, JSC., in *Kari v. Ganaram* supra at p. 409

“Where there is a subsisting right of occupancy, it is good against any other right. The grant of another Right of Occupancy over the same piece of land will therefore be merely illusory and invalid. The appellant's Right of Occupancy subsists up to now as it has not been revoked and the wrongful grant to the 1st respondent has no

effect whatsoever on its authenticity.”

When, therefore, in the instant case the Appellant was on 24th, April, 1984, granted a statutory Right of Occupancy (Exhibit D1), over the land in dispute, that grant was invalid because there was already a subsisting Statutory Right of Occupancy over that land which has not been revoked. B

It was contended by learned counsel for the Appellant that upon the grant of the Statutory Right of Occupancy, (Exhibit D1) to the Appellant, the grant extinguished the Right of Occupancy in Exhibit 6. He relied on Section 5(2) of the Land Use Act which reads:- C

“Upon the grant of a Statutory Right of Occupancy under the provisions of sub-section (1) of this section, all existing right to the use and occupation of the land which is the subject of the Statutory Right of Occupancy shall be extinguished.”

That contention would have been in order if Exhibit 6 was a mere licence or a temporary Right of Occupancy still subsisting but as I had earlier indicated it was not: see *Kari v. Ganaram* supra. It is trite law that one of the methods of proving ownership of land is by production of document of title, vide *Idundun v. Okumagba* (1976) 9/10 S.C. 227. D
E

A document of title such as a Certificate of Occupancy is prima facie evidence of title but it will give way to a better title: *Ogunleye v. Oni* (1990) 2 NWLR (Pt.135) 745; *Registered Trustees, Apostolic Church v. Olowolemi* (1990) 6 NWLR (Pt. 156) 514 and *Abioye v. Yakubu* (1991) 5 NWLR (Pt. 190) 13. F

Being of the view that the Right of Occupancy (Exhibit 6) of the land in dispute was at no time revoked both before and after the coming into force of the Land Use Act, the purported grant of Right of Occupancy in 1984 as per Exhibit D1 over the same parcel of land is null and void. My answer to the first issue for determination is therefore in the affirmative, that is to say, that the court below was right in holding that Exhibit D1 was not superior to Exhibit 6. G

The 2nd issue poses the question whether the Respondents have proved their case for a declaration of title to the land in dispute. On this, it was pointed out in the Appellant’s brief that Exhibit 6 bears an intended Certificate of Occupancy No. 13457 whereas the Letters of Administration (Exhibit 1) relates to Certificate of Occupancy No. 4415. It was then submitted that in the light of the discrepancy, the H

respondents were unable to prove their title to the land in dispute. In reply, the Respondents in their brief agreed that Exhibit 6 originally bore the No. 13457, explaining that due to political changes in the country, the number was later changed to 61 and thence to BN 4415 which latter number was reflected in Exhibit 1.

B I think that the complaint on this issue borders on the identity of the land in dispute. The law is well settled by a long string of authorities that in an action for declaration of title to land the onus of proof lies on the plaintiff to establish with certainty and precision the area of land to which his claim relates. While a plan is not a sine qua non in cases for declaration of title to land, nevertheless, the land must be described with such degree of accuracy that the said parcel of land to which the declaration of title is sought to be tied cannot be in any doubt: *Baruwa v. Ogunsola* (1938) 4 WACA 159, *Ezeokeke v. Umunocha Uga & Ors* (1962) SCNLR 199; (1962) 1 All NLR 482, D *Ate Kwadzo v. Robert Adjei* 10 WACA 374, *Imah v. Okogbe* (1993) 9 NWLR (Pt.316) 159. But the burden will not exist when the identity of the land in dispute was never a question in issue. The question of the identity of the land in dispute being in issue will only arise when the defendant raises it in his statement of defence in a trial where E pleadings were ordered and filed or the cross-examination of the adversary and his witnesses or in his own testimony where the trial is without pleadings. See *Ezeudu v. Obiagwa* (1986) 2 NWLR (Pt.21) 208; *Fatuade v. Onwoamanam* (1990) 2 NWLR (Pt. 132)322. In the F case under consideration, the question about the identity of the land in dispute was not raised in the pleadings nor in the proceedings before the two lower courts. The land in dispute was known to both parties as the land on which was erected the Total Petrol Filling Station along Ahmadu Bello Way at Sabon Gari opposite St. Boniface Primary School, Idah. With this clear description in respect to which no issue G was joined in the pleadings or at the trial, it is too late in the day for the Appellant to contend, as he had done, that the Respondents did not establish the identity of the land in dispute to entitle them to judgment. I, therefore, see no merit on this issue which must be resolved against the Appellant.

H The 3rd issue relates to the relief granted by the lower court, that is, the Court of Appeal, to the Respondents, particularly that part of the judgment of the Court of Appeal which reads thus:-

“The Appellant (sic) (Respondents’) late father is vested with the title to the land covered by the Total Filling Station at Sabon Gari Idah” See (p.310 lines 20-24 of the record)

It is submitted in the Appellant’s brief that the above relief was not prayed for and ought not to have been granted. The following cases were cited as authorities for the view that a court is not a father Christmas to grant to a party a relief not specifically prayed for:- Ekpenyong & Ors. v. Nyong (1975) Vol. 9 NSCC 28; Kalio v. Kalio (1975) 9 NSCC 16, and Union Bank Ltd v. Owolabi (1988) 1 NWLR (Pt.68) 125 at 135. It was further argued that the relief in question cannot be justified as a consequential order. It was stressed that a consequential relief is normally incidental and not a fundamental departure from the reliefs claimed vide the following cases: Dr. M.T.A. Liman v. Alhaji. Shehu Mohammed (1999) 6 S.C. (Pt. I) 67; (1999) 9 NWLR (Pt.617) 144, Fredrick Obayagbona v. Obazee and Anor (1972) 7 NSCC 383; Mrs. Bassey Ita Okon v. Attorney-General Cross River State & Anor (1992) 6 NWLR (Pt.248) 473 at 488 and Akinbobola v. Plisson Fisko (Nig) Ltd & Ors (1991) 1 NWLR (Pt.167) 270 at 288. In reply to the foregoing submissions, it was conceded in the Respondents’ brief that the order vesting the land in dispute on the Respondents’ father was not a relief prayed for in the Respondents’ amended Statement of Claim, but it was argued that the order was the general consequence of the relief to nullify the Appellant’s documents of title (Exhibit D1). To that extent therefore, the order was a consequential one. The cases of Obayagbona v. Obazee (1972) 5 S.C. 247 and Akinbobola v. Plisson Fisko Nigeria Ltd. (supra) were alluded to in support of the contention.

It is now clearly settled that a court has no power to award to a plaintiff more than what he has claimed. The rationale for the principle is not far-fetched. A court of law is not a charitable institution doling out reliefs which have not been claimed.

In the case of Nwanya v. Nwanya (1987) 3 NWLR (Pt.69) 697 at 704, Olatawura, JSC., (as he then was), said:-

“We have consistently been reminded that our court is not father Christmas, hence he who comes to court must come prepared to prove his claim in accordance with the Law.”

In the same vein, this court in the case of Ekpenyong v. Nyong (1975) 2 S.C. 71 at 80 reiterated the principle thus:

“Secondly, as we think that as the reliefs granted by the learned trial Judge were not those sought by the applicant, he went beyond his jurisdiction ‘when he purported to grant such reliefs. It is trite law that a court is without power to award to a claimant that which he did not claim.”

B However, as in any other equitable remedy, the court can order an injunction even where it is not specifically claimed but appears incidentally necessary to protect established right: *Williams v. Snowden* (1880) AN 124, *Atolegbe v. Shorun* (1985) 4 S.C (Pt. 1) 250 at 286. In *Garba v. University of Maiduguri* (1986) 1 NWLR (Pt. 18) 550, it was held that where a person has not specifically asked for a relief from a trial court, a trial court has power to grant such as relief as a consequential relief: *Okupe v. F.B.I.R.* (1974) 1 ANLR. A consequential order must be one made giving effect to the judgment, which it follows. It is not an order made subsequent to a judgment, which detracts from the judgment or contains extraneous matters: *Obayagbona & Anor v. Obazee & Anor*, supra. *F.A. Akinbobola v. Plisson Fisko Nig. Ltd. & 2 Ors.*, supra. In the case of *Liman v. Mohammed*, supra, this court held that the order for specific performance was not a consequential order following from the claim for damages for breach of contract.

E In the case in hand, the Respondents in the amended Statement of Claim, which supersedes the writ of summons claimed in relation to the Appellant, two reliefs which at the risk of repetition read thus:-

F “29 Whereof the plaintiffs’ claim that the letter of 26/6/70 declaring the said certificate No. 61 null and void be declared void.”

30 Whereof the Plaintiffs’ claim that the 1st Defendants’ Claim be dismissed and his said certificate of Occupancy nullified.”

G The substance of the above reliefs is an order of nullification of the Appellant’s document of title, Exhibit D1, and a declaration that the Respondents’ father was entitled to the land in dispute as per Exhibit 6. The trial court refused to grant the reliefs but the Court of Appeal granted them by making an order to the effect “that the Appellants’ late father is vested with the title to the land covered by the Total Filling Station at Sabon Gari, Idah.” Apart from the difference in semantics, I think the relief granted by the Court of Appeal is substantially the same as the reliefs prayed for. I therefore resolve

this issue against the Appellant.

The 4th issue for determination questions “whether there was a reasonable cause of action in the Respondents’ claim to warrant the assumption of jurisdiction on the matter by the court.” The contention of the Appellant on this issue is that while the Respondents’ Letters of Administration relates to a Certificate of Occupancy No. 4415, their Right of Occupancy, Exhibit 6, bears the number 13457 and by implication both documents did not relate to the same parcel of land. Furthermore, it was pointed out that whereas Exhibit 1 was granted to one Sunday Ejiga, the two Respondents who initiated the action are Sunday Idakwo and John Idakwo and no evidence was led to show that Sunday Idakwo is one and the same person as Sunday Ejiga. On the foregoing premises, it was submitted that the Respondents did not have sufficient interest in the subject matter in dispute and therefore had no locus standi to bring the action. The Respondents in their brief contended that they had the requisite interest to maintain the action. B
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D

It seems to me quite amazing and ridiculous that these fundamental questions which were not raised in the lower court are now being vigorously and repeatedly canvassed on appeal without the leave of this court to do so. Be that as it may, I have considered the complaints raised and I find them not well founded. This is evident from the evidence of the 1st Respondent who at p. 43 line 5 et seq testified inter alia, thus:- E

“My names are Sunday Idakwo Ejiga... F

Joseph Idakwo Ejiga is my father. He is dead...

I have letters of administration of the estate of my Deceased father

Court: A copy of the Letters of Administration is admitted and marked Exhibit 1... G

There are two C of O’s covering the land in question. The first C of O was issued in Kaduna and it is 13457 and when we came to Kwara State it was changed to C of O No. 61. When we came to Benue it was changed to BN 4415...” H

The above account which was not contradicted explains beyond controversy the several numbers which the Respondents’ document of title bore at different times and also that the 1st Respondent is one and the same person as Sunday Ejiga appearing on Exhibit

1.1, therefore, hold that the Respondents have sufficient interest in the land in respect to which the Right of Occupancy Exhibit 6 was issued. This issue is resolved against him Appellant.

The 5th and last issue relates to the defences of laches and acquiescence. In respect of these, it was submitted in the Appellant's brief that the lower court was in grave error in holding that the equitable defences were not pleaded and therefore not relevant in the consideration of the case. References were made to paragraphs 7 and 13 of the Appellant's Statement of Defence at pages 38 and 40 of the record and the oral testimony of the Appellant at page 97 lines 10-20 of the record. It was therefore submitted that the Appellant's pleadings and evidence were sufficient for the lower court to hold that the Respondents were caught by the doctrine of laches and acquiescence. The following cases were cited and relied upon-Ramsden v. Dyson (1866) LR 1, HL, 129 at 149, Morayo v. Okiade (1942) 8 WACA 40. Owodunmi v. George (1967) 1 All NLR 188 (Reprint), Anileru v. Adomuoye (1967) 1 All NLR 289 (Reprint), Asiru Gbadamosi & Ors. v. Alhaji Salami Bello & Ors. (1985) 1 NWLR (Pt. 2) 211 at 212. The Respondents in their brief maintained that the defence of laches and acquiescence were not raised by the Appellant either in his pleadings or in his oral evidence and that it was not correct for the Appellant to say that the Respondents watched the Appellant developing the land from 1977 to 1989 without any interference. It was pointed out that Exhibit 1 was issued on 12th May, 1989, and that it was from that date that the Respondents' right to exercise control over the land in dispute commenced.

It is elementary law that the defences of estoppel or acquiescence must be pleaded by the party relying on it: Egbe v. Adefarasin (1987) 1 NWLR (Pt.27) 24. It is not necessary to plead the defence in any particular manner so long as the matter constituting the defences are stated in such a way as to show clearly that the party pleading relies upon them as a defence see: Abisi v. Ekwealor (1993) 6 NWLR (Pt.302) 643; Ezewani v. Onwordi (1986) 4 NWLR (Pt.33) 37.

The Appellant maintained that he pleaded the equitable defences in question in paragraphs 7 and 13 of his Statement of Defence at pp.38 and 40 of the record of proceedings. These are reproduced hereunder:-

"7. The 2nd defendant denies paragraph 20 of the Statement

of Claim and at the hearing shall give evidence and call witnesses to show that he is the owner in effective physical possession through his agents of the land upon which the Total Filling Station in respect of the land in question.

13. The 2nd defendant shall at the hearing lead evidence to show the state of the land in dispute at the time the Total Petroleum Company came upon the land and how the defendant came to subsequently possess same.”

With much respect to the learned counsel to the Appellant, there is nothing in the above paragraphs of the Statement of Defence suggesting that a plea of estoppel or acquiescence is contemplated. It is therefore not surprising when the court below, per Kalgo, JCA., (as he then was), at p.310 lines 10 to 17 observed thus: -

“I do not in view of my findings above think it is necessary to consider issue (2). I only wish to observe that both laches and acquiescence being equitable defences were not pleaded by any of the parties at the trial: See *Ibenwelu v. Lawal* (1971) 1 All NLR 23 at 26 and although the learned trial Judge dealt with them at length in his judgment, it is in my considered view that it is not relevant or applicable in this appeal”

I cannot agree more. Since the equitable defences were not pleaded, any evidence led in that regard would go to no issue and be discountenanced. This issue is also resolved against the Appellant.

The conclusion I have arrived at is that the appeal lacks substance. The judgment of the Court of Appeal delivered on 18th January, 1988, is hereby affirmed. I award to the Respondents as against the Appellant costs assessed and fixed at N10,000.

OGUNDARE JSC

I agree entirely with the judgment of my learned brother, Edozie, JSC., just delivered, a preview of which I had ere now. For the reasons given by him, which I hereby adopt as mine, I too dismiss this appeal and affirm the judgment of the Court below. I abide by the order for costs made by him.

MOHAMMED JSC

I entirely agree with the opinion of my learned brother, Edozie, JSC., in the judgment which he wrote on this appeal. It is evident from the facts and the law upon which the decision in the lead judgment is based that this appeal is without merit and ought to be dismissed. Consequently, I hereby dismiss the appeal and affirm the decision of the court below. I also award N10,000.00 costs to the respondents.

C _____

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Edozie, JSC., and I entirely agree that this appeal is without substance and ought to be dismissed.

D The law is well settled that where, as in the present case, there are competing interests by two or more parties claiming title to the same piece or parcel of land from a common grantor, the position, both at law and in equity, is that such competing interests will prima facie rank in order of their creation based on the maxim qui prior est tempore potior est jure which simply means that he who is earlier in time is stronger in law. See Ahmadu Bello University v. Fadinamu Trading Co. Ltd. & Anor. (1975) 1 NMLR 42; Abiodun Adelaja v. Olatunde Fanoiki & Anor. (1990) 2 NWLR (Pt. 131) 137 at 151; F Barclays Bank Ltd. v. Bird (1954) Ch. 274 and 280.

G The Right of Occupancy in the present case was granted to the respondents' father per Exhibit 6 in 1964. Exhibit 6 expressly stated that the grant is for 40 years which, in effect, means that the term thereby created is still current and running. It is worthy of note, however, that there is no suggestion that the grant or term thereby created was at any time revoked as provided by law.

H The appellant's purported grant of the same land, on the other hand, was by Exhibits D, D1 in 1984 and 1986 respectively when the Right of Occupancy granted to the respondents' father had not been extinguished and was still subsisting. It seems to me crystal clear that no circumstances have been established to warrant the overriding of Exhibit 6 by Exhibits D, D1.

In the second place, Exhibit 6 being a valid title deed in

favour of the respondents, Exhibits D, D1 which were created subsequently by a common grantor in respect of the same property cannot constitute valid grants. The reason is because, after a party has fully divested himself of all interest in land, no rights vest in him to deal with the same property by way of further alienation anymore. See Okafor Egbeche v. Chief Idigo (1934) 11 NLR 140, Adam Akeju & Anor. v. Chief Suenu & Ors. (1925) 6 NLR 87; Sanyaolu v. Coker (1983) 3 S.C. 124 at 163; Ugo v. Obiekwe (1989) 2 S.C. (Pt. II) 41; (1989) 1 NWLR (Pt.99) 566 and Alhaji Kari v. Alhaji Isa Ganaram & Ors. (1997) 2 NWLR (Pt. 488) 380 at 403. The principle, as I stated in the Alhaji Kari case (supra) is based on the maxim, *nemo dat quod non habet*, which literally means that no one can give that which he does not have. Exhibit 6 having effectively vested Right of Occupancy, in respect of the land in dispute to the respondents' father in 1964, the same grantor cannot subsequently lawfully vest the same right of occupancy in respect of the same property to the appellant.

It is for the above and the more detailed reasons contained in the leading judgment of my learned brother, that I, too, dismiss this appeal as lacking in substance. I abide by the order for costs made in the leading judgment.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment of my learned brother, Edozie, JSC., in this appeal. I agree with it and, for the reasons he has given, I also would dismiss the appeal with costs.

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