

**SUPREME COURT OF NIGERIA**

29TH APRIL, 2005. SC. 68/2000

**CORAM:- M. L. UWAIIS CJN, S. M. A. BELGORE, I. L. KUTIGI,  
D. MUSDAPHER, G. A. OGUNTADE, JJSC**

UBAKA PAUL OKOYE ..... PLAINTIFF/RESPONDENT  
AND

1. THE CHIEF LANDS OFFICER OF  
RIVERS STATE OF NIGERIA ..... DEFENDANTS/RESPONDENTS

2. RIVERS STATE HOUSING  
AND PROPERTY DEV. AUTHORITY

3. O. D. BRIGGS ..... DEFENDANT/APPELLANT

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APPEALS - Ground of Appeal - Whether of mixed law - Or of law - Is not determined by mere labelling - But by thorough examination of the ground with the particulars (H1)

COURTS - Orders - Injunction - When not prayed by a party - Can be granted as a consequential order (H2)

LANDLORD & TENANT - Tenant at sufferance - Where not ejected or sued - Is entitled to full protection of the law (H3)

LAND LAW - Appeals - Leases - Renewal of - Court of Appeal's decision was right - As it does not lie with appellant - To query plaintiff's lease (H4)

**FACTS**

Before the Port Harcourt High Court of Rivers State, the plaintiff/respondent issue a writ against the defendant/appellant with a claim for a decree of specific performance, declaration to nullify the sale of property, N500,000 general damages for trespass to property and rent for 35 rooms at N12.00 per room per month. The plaintiff was said to have acquired the property from one John Iwejua who originally had a lease

for seven years by the Government of Eastern Nigeria. At the expiration of the lease John Iwejua was granted a renewal which could not be engrossed due to the civil war. The property was therefore released to the plaintiff by the Rivers State Abandoned Property Authority as the owner after the civil war. The plaintiff applied for a renewal of the lease and a term of 99 years was granted him. The 3rd defendant contended that the lease granted John Iwejua had expired and the property reverted to the Government. He said John Iwejua had nothing to assign to the plaintiff. He claimed that the property was properly sold to him by the 2nd defendant who had reversionary interest in it when the lease expired. He also claimed that the plaintiff's renewal of the lease for 99 years cannot be engrossed in his favour since he did not satisfy the condition precedent.

The trial judge refused to grant the plaintiff's claim for specific performance and declaration to nullify sale of the property but awarded a refund of rents collected from 35 rooms of the property at the rate of N12.00 per room per month from September 1986 to the date of judgment and N30,300.00 as compensation. Dissatisfied with the judgment the plaintiff appealed to the Court of Appeal and the 3rd defendant cross appealed. The Court of Appeal allowed the appeal wholly and the cross appeal partially. Aggrieved by the decision of the Court of Appeal, the 3rd defendant has further appealed to the Supreme Court.

**ISSUES FOR DETERMINATION**

*“(i) Whether the Court of Appeal was right to have held that the respondent's (plaintiff) appeal before it contained a complaint against the refusal by the trial court to grant the respondent's (plaintiff) claim for a declaration.*

*(ii) Whether having regard to the state of the pleadings and the issues joined between the parties as well as the evidence led, the Court of Appeal was right to have held that Exhibit A, the Deed of Assignment, properly assigned the property in dispute to the respondent (plaintiff), and to have granted the reliefs of specific performance and payment of rents.*

*(iii) Whether the Court of Appeal was right in failing to consider and pronounce on the question of whether the plaintiff/respondent was*

*entitled to claim for injunction in the Court of Appeal having made no such claim in the trial court.”*

**HELD** (Unanimously allowing the appeal per **KUTIGI JSC**)

***Ground of Appeal - Whether of mixed law - Or of law***

1. It is certainly not the christening or labelling of a ground of appeal as a ground law that makes it one because it is not always easy to distinguish a ground of law simpliciter from a ground of mixed law and fact. What is therefore required is a thorough examination of the ground of appeal together with the particulars, if any, to identify the real issue or complaint before taking a stand. The court should thus focus on the question raised rather than on the form of the ground of appeal itself. Where the ground raises an issue of law based on accepted, undisputed or admitted facts, it is a ground of law, but where it is based on facts in dispute or unascertained, it is one of mixed law and fact. (p. 1007 H)

***Injunction - When not prayed by a party***

2. It is true however that the plaintiff did not specifically seek for an order of injunction against the 3rd defendant in the court of trial. But that portion of the judgment quoted above clearly shows that the injunction against the 3rd defendant was of a consequential nature. The plaintiff having been declared to be entitled to the property in dispute needs protection against the 3rd defendant who has lost and has now acquired the status of a trespasser. The order of injunction against the 3rd defendant was therefore a proper and necessary order. It is a consequential order which courts of law are entitled to make in appropriate cases to protect their judgments or orders as in this case. It was a valid order. (p. 1011 A)

***Tenant at sufferance - Where not ejected or sued***

3. The evidence which was accepted by the courts below is that when the original lease expired on 31/12/63, it was renewed by the lessee, Iwejua himself, albeit a tenant at sufferance, before it was assigned to the plaintiff on 10/4/1964. The outbreak of the civil war caused the plaintiff to abandon his area. He returned after the civil war by which time the lease had expired.

He applied for renewal and got approval. He was also then a tenant at sufferance of the property in question and entitled to full protection of the law until lawfully ejected or sued in court. He was never ejected nor sued. He remained in possession. (p. 1011 G)

B

***Leases - Renewal of***

4. The Court of Appeal was therefore right in the way it approached the case. The 3rd defendant/appellant has not been able to convince me that the legal approach was wrong. There was no evidence that the lease had expired and remained unrenewed, before it was assigned to the plaintiff as contended by the 3rd defendant/appellant herein. There was equally no evidence that Iwejua or the plaintiff was lawfully ejected from the property. Finally I do not think it lies in the mouth of the 3rd defendant/appellant to contend in court that the plaintiff is yet to fulfil the conditions for renewal of the lease and therefore not entitled to have his deed engrossed. That is Government's or 1st defendant's business, if I may say so. They (1st and 2nd defendants) gave no evidence. The plaintiff testified that he complied with the conditions in Exhibit B and tendered receipts including Exhibits C, D, E, G-G3 in proof thereof.

All the issues having been resolved against the 3rd defendant/appellant, the appeal completely fails. (p. 1012 A)

F

**NOTABLE POINTS OF INTEREST**

**OGUNTADE JSC**

***1. When equitable interest will supersede legal estate***

Even if the interest of the plaintiff/respondent was equitable following his compliance with the terms of Exhibit 'B', was the 1st defendant/respondent right to assign the legal estate in the property to the 3rd defendant/appellant?

In answering this question, the consideration must be whether or not the 3rd defendant/appellant was aware of plaintiff/respondent's equitable interest. The evidence of the 3rd defendant/appellant was that the searches he conducted at the land registry did not reveal to him that there was a prior owner of the property. This evidence in my view does not

accord with common sense. There was a building on the land. There were tenants in the property. There is therefore no doubt that the plaintiff/respondent was therefore an equitable owner in possession.

I think that the trial Judge fell into an error by not considering whether the 3rd defendant/appellant, no doubt a purchaser for value B bought the property without notice of the plaintiff/respondent's interest. It is my view that the court below was right to hold that on the facts, the plaintiff must be deemed to have actual or constructive notice of the plaintiff/respondents' equitable interest having regard to the fact that there was a building with sitting tenants on the land and this ought to have put C the 3rd defendant/ appellant in notice. (p. 1029 E)

## 2. *Specific performance was rightly granted*

The plaintiff/respondent was seeking specific performance which is an D equitable remedy. It is also discretionary. The trial Judge recognised plaintiff's right but elected to award to him compensatory damages. The court below however was of the view that it would be unjust to take plaintiff/respondent's house from him and give him damages as compen- E sation. The learned authors of SNELL'S Principles of Equity, 27th edition at page 575 paragraph 5 write:

*"5. Specific performance a discretionary remedy.*

*Although the court will not order specific performance where F damages would fully compensate the plaintiff, the converse of this proposition is not true. There are many cases in which the court will not grant specific performance even if the remedy in damages is insufficient; for specific performance is a discretionary remedy. This does not mean G that it will be granted or withheld arbitrarily; the discretion is judicial discretion, and is exercised on well-settled principles. It means that in an action for the specific performance of a contract of the class usually enforced, the court may take into account circumstances which could not be taken into account in an action for damages for breach of contract, H such as the conduct of the plaintiff, or the hardship which an order for specific performance would inflict on the defendant."*

I am satisfied that the court below was right in its decision. The 3rd

defendant/appellant was in my view properly denied the privilege of reaping the fruit of another's labour. (p. 1030 H)

### **REPRESENTATION**

B 1st & 2nd Defendants/Respondents absent and not represented. 3rd Defendant/Appellant absent and not represented.

Chief Chris Uche - SAN., (with him, Mrs. D. N. Abuchi-Ogbonda, C. N. Nosike, Miss Miriam Nogeze, Dr. L. I. Ofoegbu and Abdul Ibrahim), for the Plaintiff Respondent.

### **CASES REFERRED TO**

Omosanya v. Anifowshe (1959) 4 FSC 94

N.N.S. Co. Ltd. v. Establishment Sima of Vaduz (1990) 7 NWLR (Pt. 164)

D 526

Ogbechie v. Onochie (1986) 2 NWLR (Pt.23) 484

Metal Construction (W.A.) Ltd. v. Migliore (1990) NWLR (Pt.126) 299

Ajayi v. Omoregbe (1993) 6 NWLR (Pt.301) 512 at 573

E Adelaja v. Fanoiki (1990) 1 NWLR (Pt.131) 137 at 148

Bamgboye v. University of Ilorin (1999) 6 S.C. (Pt.II) 72; (2001) FWLR (Pt.32) 12, 43

M.D.P.D.T. v. Okonkwo (2001) 3 S.C. 76; (2001) FWLR (Pt.44) 542

F John A. Osagu v. S. O. Oyeyinka & Anor. (1987) 6 SCNR 94

### **STATUTE & RULES REFERRED TO**

Constitution of the Federal Republic of Nigeria 1999 s. 233(3)

Supreme Court Rules 1985 O. 8 r. 2(2), O. 6 r. 8(6)

G

### **LEAD JUDGMENT BY KUTIGI JSC**

In the High Court of Rivers State holden at Port Harcourt, the plaintiff claimed against the defendants jointly and severally as follows -

H “(a) A decree of specific performance constraining the 1st defendant to engross the deed as contained in paragraph 2 of the Letter of Renewal Exhibit C, the plaintiff having perfected his obligation of payments of the necessary fees consequent to the engrossing of the deed.

*(b) A declaration that the purported sale of the property No. 9 Yenagoa Street Diobu Port Harcourt, also known as Plot 5 in Block 254 Orije Layout Diobu, Port Harcourt by the 2nd defendant to the 3rd defendant is null and void.*

*(c) N500,000.00 general damages for trespass to the property by the defendants jointly and severally.*

*(d) Rent for 35 rooms at N12.00 per room per month from 1/9/1986 until judgment is given from the 3rd defendant.”*

Each defendant filed a separate Statement of Defence. After the filing and exchange of pleadings the case proceeded to trial. The plaintiff testified as the sole witness for himself. The 1st and 2nd defendants called no evidence but rested their cases on that of the plaintiff, while the 3rd defendant testified on his own behalf but called no witness. Counsel on both sides later addressed the court. They also in addition made written submissions.

In a reserved judgment the learned trial Judge refused the plaintiff's claims for specific performance, declaration that the sale of the property by the 2nd defendant to the 3rd defendant was null and void, as well as damages for trespass. The plaintiff was however awarded a refund of rents collected from 35 rooms of the property at the rate of N12.00 per room per month from September, 1986, to the date of judgment. He was also awarded additional N30,300.00 as compensation.

Dissatisfied with the judgment of the High Court, the plaintiff appealed to the Court of Appeal holden at Port Harcourt. The 3rd defendant also cross-appealed.

The issues before the Court of Appeal were clearly whether or not the plaintiff was entitled to the reliefs claimed by him and whether or not he (plaintiff) was also entitled to the compensation award of N30,300.00 as well as the arrears of rent.

The Court of Appeal in a considered judgment allowed both the appeal and the cross-appeal as it relates to the payment of compensation only. It held that the plaintiff was entitled to the reliefs (except damages for trespass) claimed by him and granted him same. The cross-appeal of the 3rd defendant was also allowed and the compensation of N30,300.00

was set aside. For the purpose of clarity the Court of Appeal on pages 12-13 of its lead judgment made the following orders -

B “(1) *An order of specific performance in favour of the appellant (meaning plaintiff) is to be carried out by the 1st and 2nd respondents (meaning defendants) by engrossing the Deed of Lease of Plot 254 Orije Layout Port Harcourt, otherwise known as 9 Yenagoa Street, Diobu, Port Harcourt is hereby decreed.*

C (2) *The purported sale of the aforementioned property to the 3rd respondent (defendant) is null and void and no property passed.*

(3) *A perpetual injunction is ordered against the 3rd respondent (defendant) or his agents from entering into that property.*

D (4) *Cumulative rental collected by the 3rd respondent (defendant) for a period of 4 years commencing from September, 1986 to September, 1990, shall be payable to the appellant (plaintiff).*

(5) *The award of N30,300.00 as compensation is set aside. In that case the appeal of the 3rd respondent (Defendant) on this head only succeeds.”*

E Still aggrieved by the decision of the Court of Appeal, the 3rd defendant has now further appealed to this court. His Notice of Appeal contained 5 Grounds of Appeal. Only the 3rd defendant and the plaintiff filed and exchanged briefs of argument in the appeal. At the hearing on 31/01/2005 the 3rd defendant/appellant was absent and not represented. He F was therefore treated as having argued his appeal vide Order 6 Rule 8(6) of the Supreme Court Rules, 1985. Chief Chris Uche, learned Senior Advocate of Nigeria who appeared for the plaintiff/respondent, adopted his brief and cited additional authorities of Ude v. Nwara (1993) 2 NWLR G (Pt.278) 638 at 644 and Ogualaji v. A-G of Rivers State & Anor. (1997) 6 NWLR (Pt.508) 209 at 224, 233. We were urged to follow these authorities and dismiss the appeal.

H Learned counsel for the plaintiff/respondent has in his brief raised, by way of preliminary objection, points of law to grounds 1, 2, 3, 4 & 5 of the grounds of appeal as being either grounds based purely on facts or on mixed law and facts. That for the grounds to be competent, the appellant needed leave of the Court of Appeal or of this court and which

is lacking vide the provision of Section 233(3) of the Constitution. That grounds 1 & 4 are based on the contention that the Court of Appeal granted a declaration which was not an issue before it as well as ordered an injunction which was not claimed. The two grounds are therefore grounds of mixed law and fact. He said grounds 2, 3 & 5 challenge evaluation, B inference and conclusions reached by the Court of Appeal on disputed facts. They are at best therefore grounds of mixed law and facts. All the grounds of appeal are therefore incompetent for want of leave. A number of cases were cited in support including -

Ogbechie v. Onochie (1986) 2 NWLR (Pt.23) 484. C

Ajayi v. Omoregbe (1993) 6 NWLR (Pt.301) 512.

Metal Construction (W.A.) Ltd. v. Migliore (1990) NWLR (Pt.126) 299.

Oke v. Eke (1982) (1982) 12 S.C. (Reprint) 100; 12 S.C. 228. D

The court was urged to strike out the grounds of appeal for incompetence.

The appellant in his Reply brief however contended that although the plaintiff/respondent stated the correct principles of law relating to competency of the grounds of appeal, the said principles were not properly applied to the grounds of appeal herein. He said the objection is founded on a misconception of the decision in Ogbechie v. Onochie (supra) and other cases cited by the plaintiff/respondent in his brief. He said grounds F 1 & 4 complain about the grant of prayers for a declaration and injunction by the Court of Appeal which were never sought in the trial court. These are grounds of law and therefore competent. That grounds 2, 3 & 5 complain about the inference drawn and conclusions reached on undisputed facts. They are therefore grounds of law and are competent. A G number of cases were cited in support including - Nwadike v. Ibekwe (1987) 4 NWLR (Pt.67) 718; Bamgboye v. University of Ilorin (1999) 6 S.C. (Pt.II) 72; Shanu v. Afribank (2000) 10-11 S.C.1; (2000) 10 SCNJ 1; Aderounmu v. Olowu (2000) 4 NWLR (Pt.652) 253). H

We were urged to dismiss the preliminary objection and hear the appeal on its merit.

**It is certainly not the christening or labelling of a ground of**

**appeal as a ground law that makes it one because it is not always easy to distinguish a ground of law simpliciter from a ground of mixed law and fact. What is therefore required is a thorough examination of the ground of appeal together with the particulars, if any, to identify the real issue or complaint before taking a stand** (see N.N.S. Co. Ltd. v. Establishment Sima of Vaduz (1990) 7 NWLR (Pt. 164) 526. **The court should thus focus on the question raised rather than on the form of the ground of appeal itself. Where the ground raises an issue of law based on accepted, undisputed or admitted facts, it is a ground of law, but where it is based on facts in dispute or unascertained, it is one of mixed law and fact.** I shall be guided by these principles. A careful examination of the 5 Grounds of Appeal show that -

Ground 1 It essentially complains that the Court of Appeal wrongly interpreted the Grounds of Appeal before it when it held that the plaintiff appealed against the refusal of the trial court to grant a declaration and consequently granted the declaration which was not appealed or claimed by the plaintiff. To me this is a ground of law which required no leave. It is therefore competent.

Ground 2 This complains about inference or inferences drawn by the Court of Appeal from the document, Exhibit A (the Deed of Assignment). This I believe is a ground of law. It is therefore competent.

Ground 3 Complains about the granting of an order of specific performance on wrong principles by the Court of Appeal and which order was never appealed. Where the lower court reaches a conclusion which cannot reasonably be drawn from the facts as found, that would be a misconception of the law. So it is in this case. It is a ground of law and is valid.

Ground 4 This relates to the granting of an order of injunction against the 3rd defendant which was not claimed and that the Court of Appeal failed in the performance of its judicial duty when it so ordered. Clearly too this is a question of law. The ground is competent.

Ground 5 This is questioning the conclusions reached by the Court of Appeal based on the undisputed facts pertaining to the presence of the 3rd defendant in the disputed property and collecting property and

collecting rents therefrom. It is in my view a ground of law. It is competent.

Accordingly, the preliminary objection is overruled. It is dismissed. I will now proceed to consider the appeal on the merit.

The 3rd defendant/appellant has submitted in his brief (3) issues for determination thus - B

*“(i) Whether the Court of Appeal was right to have held that the respondent’s (plaintiff) appeal before it contained a complaint against the refusal by the trial court to grant the respondent’s (plaintiff) claim for a declaration.”* C

*(ii) Whether having regard to the state of the pleadings and the issues joined between the parties as well as the evidence led, the Court of Appeal was right to have held that Exhibit A, the Deed of Assignment, properly assigned the property in dispute to the respondent (plaintiff), and to have granted the reliefs of specific performance and payment of rents.* D

*(iii) Whether the Court of Appeal was right in failing to consider and pronounce on the question of whether the plaintiff/respondent was entitled to claim for injunction in the Court of Appeal having made no such claim in the trial court.”* E

The three (3) issues will be considered separately. But before I do that I would first of all like to set out briefly the facts of the case as follows-

The Plaintiff acquired the property in dispute by purchase from one John Iwejua. The said John Iwejua originally Nigeria (see Exhibit A). At the expiration of his lease thereof, John Iwejua was granted a renewal for another term. F

The renewal could not be engrossed on Exhibit A due to the civil war. After the civil war the Rivers State Abandoned Property Authority G released the property to the plaintiff as the owner thereof. He later applied to the Government of Rivers State for a renewal of the lease which was approved for a term of 99 years.

The 3rd defendant contended that the lease originally granted to H John Iwejua had expired on 31/2/1963 and that the property had reverted to the Government. He said John Iwejua had nothing to assign to the plaintiff on 10/4/1964 as he purported to do when the assignment was

executed. That the property was properly sold to him by the 2nd defendant who had the reversionary interest vested in it when the lease expired on 31/12/1963. The 3rd defendant also claimed that the plaintiff's renewal of the lease for 99 years now cannot be engrossed in his favour as he did not  
B satisfy the conditions precedent.

Issue (i) above is clearly to the effect that the plaintiff did not in the Court of Appeal complain against the refusal of the trial court to grant him a declaration that the sale by the 2nd defendant to the 3rd defendant was  
C null and void. Issue (iii) also is similarly to the effect that the plaintiff in the High Court did not claim for an injunction and that the Court of Appeal was wrong to have made that order which was not sought for.

The record shows on page 4 of the lead judgment of the Court of Appeal as follows-

D *"The appellant (plaintiff) framed two issues for determination and the issues are as follows -*

*"(a) Was the plaintiff/appellant entitled to the grant of the reliefs sought for in the court below or not?*

E *That is to say for-*

*One specific performance declaration that the purported sale of the said property to Mr. Briggs is null and void.*

*The injunction and the damages for trespass, or in the alternative*  
F *was the learned trial Judge right to award the sum of N30,300.00 as compensation instead of decreeing for specific performance and granting other reliefs?"*

Also on page 4 of the lead judgment is contained -

G *"Ground 1 complained of error in law in the failure or refusal of the court below to make an order of specific performance., declaration and injunction."*

On page 12, the judgment reads -

H *"Having held that the 3rd respondent (defendant) has no business in the house under dispute, he or his agent is permanently restrained from entering into the property."*

It is thus not true as contended by the 3rd defendant/appellant that the plaintiff did not complain in the Court of Appeal about the failure of the

trial court to declare the sale by the 2nd to 3rd defendant as null and void. He asked for it and he got it in the Court of Appeal even though the trial court refused it. **It is true however that the plaintiff did not specifically seek for an order of injunction against the 3rd defendant in the court of trial. But that portion of the judgment quoted above clearly shows that the injunction against the 3rd defendant was of a consequential nature. The plaintiff having been declared to be entitled to the property in dispute needs protection against the 3rd defendant who has lost and has now acquired the status of a trespasser. The order of injunction against the 3rd defendant was therefore a proper and necessary order. It is a consequential order which courts of law are entitled to make in appropriate cases to protect their judgments or orders as in this case. It was a valid order.**

Briefly on issue (ii). The law as applied to the facts as found by the courts in this case is very clear. The pleadings and evidence led thereon clearly show that the Deed of Assignment (Exhibit A) was validly executed before it was assigned to the plaintiff. It was on the basis of Exhibit A that the Rivers State Abandoned Property Authority released the property to the plaintiff on his return after the civil war. It was also on the same basis of Exhibit A that the then Government of Eastern Nigeria also renewed the lease before it was assigned to the plaintiff. After the civil war the plaintiff applied to the Government of Rivers State for a renewal of the lease once more and an approval was given by the 1st defendant for 99 years. The Court of Appeal clearly found that the plaintiff's story as to how he acquired the property from John Iwejua is true and acceptable. The 3rd defendant's version was rejected.

**The evidence which was accepted by the courts below is that when the original lease expired on 31/12/63, it was renewed by the lessee, Iwejua himself, albeit a tenant at sufferance, before it was assigned to the plaintiff on 10/4/1964. The outbreak of the civil war caused the plaintiff to abandon his area. He returned after the civil war by which time the lease had expired. He applied for renewal and got approval. He was also then a tenant at sufferance of the property in question and entitled to full protection of the law until lawfully**

**ejected or sued in court** (see Ude v. Nwara (supra) Ogualaji v. A-G of Rivers State (supra). **He was never ejected nor sued. He remained in possession. The Court of Appeal was therefore right in the way it approached the case. The 3rd defendant/appellant has not been able**  
B **to convince me that the legal approach was wrong. There was no evidence that the lease had expired and remained unrenewed, before it was assigned to the plaintiff as contended by the 3rd defendant/appellant herein. There was equally no evidence that Iwejua or the**  
C **plaintiff was lawfully ejected from the property. Finally I do not think it lies in the mouth of the 3rd defendant/appellant to contend in court that the plaintiff is yet to fulfil the conditions for renewal of the lease and therefore not entitled to have his deed engrossed. That is Government's or 1st defendant's business, if I may say so.**  
D **They (1st and 2nd defendants) gave no evidence. The plaintiff testified that he complied with the conditions in Exhibit B and tendered receipts including Exhibits C, D, E, G-G3 in proof thereof.**  
E **All the issues having been resolved against the 3rd defendant/appellant, the appeal completely fails.** It is hereby dismissed with N10,000.00 costs against the 3rd defendant/appellant only.

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**UWAIS CJN**

F I have had the advantage of reading in draft the judgment read by my learned brother, Kutigi, JSC. I entirely agree with him and have nothing to add.  
G Accordingly, I too hereby dismiss the appeal with N10,000.00 costs in favour of the respondent, against the appellant.

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**BELGORE JSC**

H I agree entirely with the judgment of my learned brother, Kutigi, JSC., having already read it in draft. As I find his reasoning and conclusions comprehensive enough, I will adopt them as mine in dismissing this appeal with N10,000.00k costs to the first respondent against the

### MUSDAPHERJSC

I have had the preview of the judgment of my Lord, Kutigi, JSC., just delivered with which I am in entire agreement. For the same reasons so lucidly set out in the judgment, which I respectfully adopt as mine, I too, resolve all the three issues submitted for the determination of the appeal against the appellant, consequently this appeal is dismissed by me. I award N10,000 costs against the appellant in favour of the plaintiff/respondent.

### OGUNTADEJSC

The appellant was the plaintiff at the Port-Harcourt High Court of Rivers State where he issued his writ against the respondents as the defendants claiming for:

“(a) .....A decree of specific performance to be issued by this Honourable Court, constraining the 1st defendant to engross the deed as contained in paragraph 2 of the letter of renewal Exhibit C.

(b) A declaration that the purported sale of the property by the 2nd defendant to the 3rd defendant is null and void.

(c) N500,000.00 general damages for trespass to the property by the defendant jointly and severally.

(d) Rent for 35 rooms at N12.00 per room per month from 1/9/86 until judgment is given from (sic) the 3rd defendant.”

Each of the three defendants filed a separate Statement of Defence. The suit was tried by Denton West, J., who on 2nd March, 1992, gave judgment in the matter. In the judgment, the trial Judge:

(1) Refused to grant the claim for declaration and specific performance as sought by the plaintiff.

(2) Awarded N30,300.00 as compensation to the plaintiff against the 3rd defendant.

(3) Ordered the 3rd defendant to “refund the rents collected on this property for 35 rooms at the rate of N12.00 per room from September,

1986” to the plaintiff.

The plaintiff was dissatisfied with the judgment of the trial Judge. He brought an appeal against it. The 1st defendant was also dissatisfied with the judgment. He filed a cross-appeal against it. The appeal came before the Court of Appeal, Port-Harcourt Division and that court by a majority decision allowed the appeal partially and the cross-appeal wholly. The majority judgment in its conclusion held:

*“In the final result, the main appeal succeeds and the judgment of the High Court presided over by Denton-West, J.. is set aside and I make:*

*(1) An order of specific performance in favour of the appellant is to be carried out by the 1st and 2nd respondents by engrossing the deed of lease of Plot 254, Orije Layout, Port-Harcourt otherwise known as of Yenagoa Street, Diobu, Port-Harcourt is hereby decreed.*

*(2) The purported sale of the aforementioned property to the 3rd respondent is null and void and no property passed.*

*(3) A perpetual injunction is ordered against the 3rd respondent or his agents from entering into that property.*

*(4) Cumulative rental collected by the 3rd respondent for a period of 4 years commencing from September, 1986-September, 1990 shall be payable to the appellant.*

*(5) The award of N30,300.00 as compensation is set aside. In that case the appeal of the 3rd respondent on this head only succeeds.”*

The minority judgment affirmed the decision of the trial court refusing to grant specific performance and an injunction in favour of the plaintiff. The award of N30,300.00 as compensation to the plaintiff was set aside. The order enjoining the 3rd defendant to pay over to the plaintiff the rents he had been collecting on the property was set aside.

The plaintiff later died and was substituted by his son who is the present plaintiff/respondent. The 3rd defendant was dissatisfied with the judgment of the court below and has brought a further appeal before this court on five grounds of appeal. The plaintiff/respondent has in his brief raised a preliminary objection to the five grounds of appeal raised by the 3rd defendant/appellant. It was contended that the grounds of appeal being of facts or of mixed law and fact, the 3rd defendant/appellant should have

obtained the leave of the court below or this court in compliance with Section 233 of the 1999 Constitution of the Federal Republic of Nigeria. Plaintiff/respondents counsel placed reliance on *Ogbechie v. Onochie* (1986) 2 NWLR (Pt.23) 484; *Ajayi v. Omoregbe* (1993) 6 NWLR (Pt.301) 512 at 573; *Metal Construction (WA) Ltd. v. The Christ Apostolic Church* B (1998) 4 NWLR (Pt.584) 162; *Ojemen v. Momodu & Ors.* (1983) 1 SCNLR 188; *Oke v. Eke* (1982) 12 S.C. 228; (1982) 12 S.C. (Reprint) 100; *Akpasubu v. Unweni* (1982) 11 S.C. (Reprint) 55; (1982) 12 S.C. 132 and *Akwiwu Motors Ltd. v. Dr. Babatunde Songonuga* (1984) 5 S.C. 184. C

The 3rd defendant/appellant's counsel in his Reply brief submitted that the grounds of appeal raised were all of law. He relied on the views of Eso, JSC, at page 60 of the report in the *Onochie* case (*supra*) where the learned Justice observed.

*"If the tribunal errs in its conclusion (that is in applying the law to the facts in a case) where this process requires the skill of a trained lawyer, it is error in law."* D

Another case relied upon by counsel is *Nwadike v. Ibekwe* (1987) 4 NWLR (Pt.67) 718 where this court per Nnaemeka-Agu, JSC., said: E

*"From this and other decisions on the point it appears to me that a ground which complains that the judgment is against the weight of evidence is a ground of fact..... In general terms it can be said that all grounds of appeal which raise facts which want some determination either F way are grounds of facts. Where, however, the question raised by the ground is one of law as applied to disputed facts; or the ground raised partly law and partly facts it is ground of mixed law and fact. The ground with its particulars ought to be regarded as a whole..... Where G a ground deals merely with a matter of inference, even if it be an inference of fact, a ground framed on it is a ground of law; provided it is limited to admitted or proved and accepted facts admitted or proved and accepted facts....."*

Appellant's counsel also relied on *Bamgboye v. University of Ilorin* H (1999) 6 S.C. (Pt.II) 72; (2001) FWLR (Pt.32) 12, 43; *M.D.P.D.T. v. Okonkwo* (2001) 3 S.C. 76; (2001) FWLR (Pt.44) 542 and *Shanu v. Afribank* (2001) (2001) 10-11 S.C. 1; 10 SCNJ, 1 at 9.

It is necessary that I examine each of the five grounds of appeal raised by the appellant in order to determine whether or not they are facts or of mixed law and fact. It is of course beyond argument that an appellant raising a ground of fact or mixed law and fact must first obtain the leave of the court below or this court pursuant to Section 233 of the 1999 Constitution of Nigeria. Otherwise, the ground must be pronounced incompetent.

In ground one, the appellant is complaining that the court below misunderstood the import and ambit of the appeal to it concerning the claim for declaration. This ground does not necessitate a consideration of any issue of fact. It is therefore a ground of law alone.

Ground two is a complaint against the inference of fact drawn by the court below as to whether or not Exhibit 'A', the Deed of Assignment relied upon by the plaintiff was capable of conveying an interest in the land in dispute. This is a ground of law alone.

Ground three is a complaint that the court below having correctly stated the principles governing the grant of a specific performance misapplied those principles to facts in the case. This is a ground of law alone.

Ground 4 is a complaint that the court below failed and or neglected to deal with an issue of law raised before them as to whether it could grant an injunction which the plaintiff has not claimed before the trial court. This is a ground of law.

Ground 5 is a complaint that the court below failed to consider the implications at law of a lessee whose interest had expired divesting himself of the property which at law was in the reversioner. This is a ground of law.

The preliminary objection of the plaintiff/respondent has no merit. It is accordingly struck out.

In the appellant's brief filed on behalf of the 3rd defendant/appellant, the issues for determination in the appeal were formulated thus:

(i) Whether the Court of Appeal was right to have held that the respondent's appeal before it contained a complaint against the refusal by the trial court to grant the respondent's claim for a declaration?

(ii) Whether, having regard to the state of pleadings and the issues joined between the parties as well as the evidence led, the Court of Appeal was right to have held that Exhibit 'A' the Deed of Assignment, properly assigned the property in dispute to the respondent, and to have granted of the reliefs of specific performance and payment of rents? B

(iii) Whether the Court of Appeal was right in failing to consider and pronounce whether the plaintiff/respondent was entitled to claim an injunction in the Court of Appeal, having made no such claim in the trial court? C

The plaintiff/respondent's three issues are similar in substance to the appellant's three issues.

Before I consider the issues formulated for determination, it is important that the facts leading to the dispute before the court of trial be fully exposed and understood. Notwithstanding the seeming bitterness D with which the case was fought from the trial court to this court, the facts are not much in dispute and are easy to understand.

In the Statement of Claim filed, the plaintiff/respondent pleaded that the land in dispute was originally leased to one John Evirlobi Iwejua for seven years with effect from 1st January, 1957. The 'unexpired' residue of the lease was assigned to the plaintiff/respondent with effect from 10/4/64. At the expiration of the 'term' the plaintiff/respondent sought from the Eastern Nigeria Government and was granted an extension of the lease F for 99 years on some stated conditions, which the plaintiff/respondent has not been revoked. The 3rd defendant/appellant however claimed that he purchased the property from 1st respondent and has been collecting rents from the property since September, 1986.

The 1st defendant pleaded that the interest of Iwejua from whom G plaintiff/respondent acquired his interest had expired and that the plaintiff did not meet the conditions stipulated in the letter granting him provisional approval. The 1st defendant sold the property in 1986 to the 3rd defendant/H appellant.

The 2nd defendant in substance averred that the plaintiff/respondent's interest expired on 31/12/63 and that the property was sold to the 3rd defendant/appellant.

The 3rd defendant pleaded that he purchased the property from 1st respondent on 26/5/86 after a search at the Lands Registry, which search did not reveal that the land had been sold or assigned. The land was granted to Iwejua by the Eastern Region Government for 7 years from 1/1/57. The B grantee Iwejua mortgaged the property to plaintiff on 12/1/61. The plaintiff was assigned the residue of the ‘unexpired’ lease on 10/4/64. The plaintiff assigned the land to himself as ‘vendor’ and purchaser.

The suit was heard on the above state of pleadings. By way of recapitulation, the plaintiff’s right to the reliefs he sought was premised on C two pedestals, namely:

(1) That he acquired interest in the land on 10/4/64 from Iwejua.

(2) That the Eastern Nigeria Government to which the 1st respondent is a successor in title had undertaken to grant him a lease of 99 years D on the land if he met certain conditions; and that as he had met those conditions he was entitled to a decree of specific performance.

The defendants on the other hand contended that the plaintiff/respondent did not and could not acquire any interest from Iwejua on 10/ E 4/64 since the interest of Iwejua in the land had expired on 10/12/63. Further it was pleaded that the provisional lease of 99 years granted to the plaintiff/respondent was conditional; and as the plaintiff did not fully meet the conditions, he could not get a decree of specific performance.

Earlier in this judgment, I stated the terms of the judgment given by F the two courts below. I also observed that the plaintiff brought an appeal against the judgment of the trial court before the court below. Since the appellant’s first issue relates to the nature of the complaint the plaintiff took before the court below, it is helpful to consider the relevant ground of G appeal to the court below. Did the plaintiff in his appeal to the court below complain against the refusal of the trial court to grant his claim for declaration?

The relevant ground of appeal is ground one and reads:

H “(1) *The learned trial Judge erred or misdirected himself in law when he failed to grant the specific performance and the injunction sought for by the plaintiff/appellant after the plaintiff had proved his case as required by law.*

### PARTICULARS

(1) *Equity presumes that which ought to be done. The learned trial Judge awarded the damages in trespass but failed to order (a) Specific Performance (b) Declaration and Injunction, the onus was on the plaintiff which he discharged. See Kodilinye v. Odu (1933) 2 WACA 336; B Umeojiako v. Ezenamuo (1990) 1 NWLR (Pt.126) 243; Odunukwe v. The Administrator General East Central State (1978) 1 S.C. (Reprint) 19; (1978) 1 S.C. 25 at 31; Dung v. Chollom (1992) 1 NWLR 1 (Pt.2) p.738 at 743.*

(2) *The appellant proved what he claims that he is entitled to, but the learned trial court had drawn the wrong conclusion from the totality of the evidence before it. Finnih v. Imade (1992) 1 SCNLR 87 at 101.* C

(3) *Having paid the required consideration and acquired an equitable interest when the lease had not been engrossed or lease executed he is entitled to an order of specific of performance and other reliefs sought for see John A. Osagie v. Alhaji S. O. Oyeyinka & Ors. (1987) 6 SCNJ 94.* D

(4) *The appellant based his entire case on the Abandoned Property E Edict and was not required to prove his title to land as decided in Idundun & Ors. v. Okumagba (1976) 9 & 10 S.C. 227; (1976) 9-10 S.C. (Reprint) 140; (1976) 1 NMLR 200; Olale v. Ekwelendu (1989) 7 SCNJ 181 at 210; Finnih v. Imade (1992) 1 SCNLR 87 at 101.* F

When the above ground of appeal is closely scrutinized, it is apparent that the principal complaint is directed against the failure of the trial court to grant to the plaintiff specific performance and injunction. Paragraph 1 of the ‘Particulars’ thereunder attempts to expand the complaint to include a failure on the part of the trial court to grant the claim for a declaration. Can the particulars under a ground of appeal be used to expand the ambit and scope of the principal complaint? Ordinarily, the answer to that question must be in the negative. G

Order 8 rule 2(2) of the Rules of this court provides: H

“(2) *If the ground of appeal allege misdirection or error in law, the particulars and the nature of the misdirection or error shall be clearly stated.*”

As to what constitutes ‘particulars’ in a ground of appeal, this court in *Globe Fishing Industries Ltd. v. Coker* (1990) 7 NWLR (Pt. 162) 265 at 300 observed per Akpata, JSC.,

B *“The particulars and nature of the error or misdirection alleged in a ground of appeal which are required to be specific by order 8 rule 2(2) are the specific reasoning, finding or observations in the judgment or ruling relating to or projecting the error or misdirection complained of. They are in a sense the itemization of the error or misdirection in the judgment or ruling.*

C *Particulars required are not the arguments or narratives that should be proffered at the hearing of the appeal to establish that the court erred or misdirected itself. They should not be independent complaint from the ground of appeal itself but ancillary to it.”*

D See also *Honika Sawmill (Nig.) Ltd. v. Hoff* (1994) 2 NWLR (Pt.326) 252 and *Amuda v. Adelodun* (1994) 8 NWLR (Pt.360) 23 at 31.

E The plaintiff/respondent in his first ground of appeal to the court below certainly had not raised a complaint as to the failure of the trial court to grant his claim for declaration. That the question of declaration was raised in the particulars under the ground did not elevate the failure of the trial court to grant a declaration into a ground of appeal of its own. ‘Particulars’ under a ground of appeal do not metamorphose into a ground of appeal. The only complaint raised under ground 1 above is that the trial court failed to grant the claim for specific performance and injunction.

F The plaintiff’s Notice of Appeal in its paragraph 2 under the column “PART OF THE DECISION COMPLAINED OF”, the plaintiff/respondent stated:

G *“Failure to grant:*  
*(a) Specific Performance*  
*(b) Injunction”*

H It needs be stated that the plaintiff/respondent in paragraph 4 under the column “Relief sought” stated that he wanted a declaration that the purported sale of the property to Mr. D. D. Briggs (3rd defendant) is null and void. But a relief in an appellate court is only granted in response to the issue raised from a ground or grounds of appeal. See *Adelaja v. Fanoiki*

(1990) 1 NWLR (Pt.131) 137 at 148; Egbe v. Alhaji (1990) 1 NWLR (Pt.128) 546, 567; Olowosago v. Adebajo (1988) 4 NWLR (Pt.88) 275, 283.

The court below in the lead judgment per Pats-Acholonu, JCA., (as he then was), demonstrated an awareness of the correct legal position B when it said:

*“It is an elementary principle of law and I dare say trite that any issue formulated which does not arise from any ground of appeal shall be disregarded, rejected and refused by the court as being of no use.”* C

A little later in the judgment the learned Justice went on to say:

*“The appellant’s complaint in the appeal for refusal to grant the relief is related to the claims which are so intertwined and inextricably involved and wound with each other that severability is impossible.”* D

The court below in electing to consider the issue of declaration then said:

*“Perhaps one might vouchsafe an opinion that it was inelegantly framed but these items of claim made in the Statement of Claim which were refused seem to have been complained about in the ground of appeal. This is buttressed by the appellant’s reasoning that having paid the required consideration and therefore acquired an equitable interest when the lease has not been engrossed or executed he is entitled to an order of specific performance and relied on the authority of John A. Osagu v. S. O. Oyeyinka & Anor. (1987) 6 SCNR 94.”* E F

It seems to me that the plaintiff/respondent’s counsel had through carelessness created the problem for his client, which the court below correctly laboured to contain. I have in this judgment set out fully the claims of the plaintiff. The trial court refused to grant the claims for declaration that the sale of the property in dispute to the 3rd defendant was null and void and for specific performance. As I stated earlier the case of the plaintiff before the trial court was that he had reached an agreement with the 1st defendant’s predecessor, the Eastern Nigeria Government, that the land be leased to him for 99 years. The plaintiff pleaded that he met all the conditions set for the lease of the land to him. The 1st defendant/respondent however claimed to have sold the same property to the 3rd G H

defendant/appellant. If the sale to the 3rd defendant/appellant was not set aside under the claim for declaration made by the plaintiff/respondent, it would be odious and improper to make an order of specific performance compelling the 1st defendant/respondent to enter into a lease agreement with the plaintiff/respondent in respect of a parcel of land which it claimed it had sold to the 3rd defendant/appellant. The result of what I said is that although the plaintiff/respondent had not properly and specifically appealed against the refusal of the court of trial to grant his claim for declaration, the court below was right to have treated the appeal on specific performance as intertwined and inseparable from the order of the trial court refusing to grant the declaration sought.

I now consider together the 2nd and 3rd issues for determination. The plaintiff/respondents in paragraphs, 5, 6, 7 and 8 of his Statement of Claim pleaded thus:

“5. The said plot 5 in Block 254 also known as No.9 Yenagoa Street, Diobu, Port Harcourt was originally leased to one John Evirlobi Iwejua by an indenture of lease dated the 25th day of July 1960 registered, as No.47 at page 47 in Volume 242 for a period of seven years with effect from 1st January, 1957, as contained in the plaintiff’s assignment. The unexpired residue of the lease was later assigned to the plaintiff with effect from 10th April, 1964 by an instrument of assignment registered as No.26 at page 26 in Volume 387 at the office of Registry in Port Harcourt. Photocopy of the said assignment is herewith attached and marked as Exhibit A.

6. At the expiration of the said assignment, the plaintiff applied for a renewal of the lease for which a reply Reference No.RSL.2638/75 dated/..... (sic)..... was sent to the plaintiff. Photocopy of the reply attached and marked as Exhibit B.

7. A further reply was sent to the plaintiff on 14th November, 1966 Reference No. LP3390/73 conveying approval by the Governor of Eastern Nigeria for the renewal of the lease of plot 5 in block 254 Orije Layout Port Harcourt for 99 years, being the subject matter of this suit. The letter of approval for the renewal of the lease was copied to the plaintiff photocopy of the renewed lease attached and marked as Exhibit C.

7 (1) *The 99 years lease took effect from 1/1/64, with a rent of 8.15 (now about N52.50k).*

7 (2) *Paragraph 2 of the said letter conveying the approval of the renewal of the lease to the plaintiff contained the obligations to be discharged by the plaintiff before the deed is engrossed. The obligations were discharged by the payment of the following:-*

(a) *Preparation and stamping fees of 4.10 (approximately N29.00 now) on receipt No.B258632 (Eastern Nigeria) dated 23/11/66. Photocopy of the receipt attached and marked as Exhibit D.*

(b) *1965 and 1966 rents at 8.15 per year totalling 17.10 (now approximating N120.50k) paid on Eastern Nigeria Receipt No.B258681 of 23/11/66. Photocopy of the receipt attached and marked as Exhibit E.*

(c) *Stamping fee of 1.10 lease Plot 5 Block 254 Orije Layout, Port Harcourt subject matter of this suit on Eastern Nigeria Receipt No. A 812020 of 23/11/66.*

8. *By discharging his obligations by the said payments in compliance with paragraph 2 of the said letter of renewal of lease, the plaintiff was entitled to have his deed engrossed. The 1st defendant failed, refused and neglected to perfect his own side of the obligation of engrossing of the deed.”*

The 1st defendant in paragraph 4, 6, 8 and 10 of its Statement of defence pleaded:

“4. *It is admitted that one Mr. John Evirlobi - Iwejua assigned the unexpired residue of his interest in the property to the plaintiff. The plaintiff’s residual interest terminated on the 31st December, 1963. All other averments in paragraph 5 of the 1964. Statement of Claim is denied.*

6. *That the alleged approval by the Governor of Eastern Nigeria in 1966 was a provisional approval and the stipulations of that provisional approval were never complied with by the plaintiff before the Civil War broke out. The total sum as contained in Exhibits D, E and F does not satisfy the conditions in the provisional approval. The provisional approval in 1966 therefore lapsed. All other averments contained in paragraph 7 is hereby denied.*

8. *The plaintiff could not perfect the obligations of the provisional*

*approval until the out break of the Civil War when the property became abandoned and was governed by the Abandoned Property (Custody and Management) Edict 1969.*

B 10. In answer to paragraph 10 of the Statement of Claim, the 1st defendant avers that the plaintiff having lost his legal interest in the property in 1963 by his refusal to perfect the provisional approval for renewal, the 2nd defendant was right in law to sell the property subject to the right of plaintiff to compensation. By 1986 when this property was sold, the Rivers State Government by virtue of the Land Use Decree 1978, C head (sic) become vested with the title of land in Rivers State including the land in dispute and the structure on it."

The 2nd defendant in paragraph 4 of its Statement of Defence pleaded:

D "4. Paragraph 6 of the Statement of Claim is denied. Plaintiff applied for renewal of the lease by letter dated 15/11/75 to which letter RSL 2638/75 dated 6/10/76 was a reply.

E The duration of the original lease was for 7 years from 1/1/57 which expired on 31/12/63. The assignment was stated to be:

*'for all the residue now unexpired of the said term of 7 (seven years granted by the indenture of lease.....'*

F It is at the expiration of the lease and of the assignment that plaintiff applied for renewal.

The 3rd defendant in paragraph 4, 5, 6, 7 and 12 pleaded:

G "4 (a) In further answer to paragraphs 5(1), 6 and 7 of the plaintiff's Statement of Claim the 3rd defendant says that a search at the land Registry Port Harcourt confirms that the property in dispute is a state land.

*(b) That the land was granted to one John Evirlobi Iwejua by the Eastern Region Government for a period of 7 (seven) years with effect from 1/1/57. Registered as No.47 at Page 47 in Volume 242.2*

H *(c) That the original grantee John Evirlobi Iwejua by an equitable mortgage dated 12/1/61 mortgaged the property to Godwin E. Okoye. The equitable mortgage was registered as No. 100 at page 100 in Volume 225 of the land Registry Port Harcourt.*

*(d) That the plaintiff later on was assigned the residue of the original lease of 7 (seven) years on the 10/4/84. The Assignment was registered as No.26 at page 26 at page 26 Volume 387 of the land registry in Port-Harcourt.*

*5. The 3rd defendant shall further contend that the assignment allegedly made to the plaintiff was a nullity as he made the assignment to himself vide a power of attorney both as a vendor and as a purchaser.*

*6. The 3rd defendant says that the original lease for 7 (seven) years lapsed on the 31/12/63 and was never renewed nor did the plaintiff apply for any renewal of the lease until 1975. So that any purported letter of renewal dated 14/11/66 allegedly made by the Government of Eastern Nigeria to the plaintiff to take effect from 1/1/64 is not only wrongful but tainted with fraud.*

*7. The 3rd defendant shall contend that the lease of the land having lapsed, all properties on it reverted back to the Eastern Region Government and was inherited by the Rivers State Government which had the rights and powers to act on it as it deemed fit. The alleged letter of renewal by the Eastern Region Government was ineffective and null and void. Furthermore it was only a letter and not an agreement.*

*12. The 3rd defendant avers that he is the rightful owner of the property known as No. 9 Yenagoa Street Port-Harcourt having made all the necessary payments to the Rivers State Government. Particularly, the 3rd defendant shall rely on the following documents at the hearing of this action.*

*1. Application to purchase Government property dated 13/1/82 to the Secretary Government Property Disposal Unit Ministry of Housing and Environment Port Harcourt and the subsequent reply dated 14/1/82.*

*2. Receipt for application form No.2529 dated 22/1/82.*

*Receipt for search fees dated 14/10/83.*

*3. Offer letter Ref. No.RSL. 11328/81 dated 21/10/83 from Ministry of Lands and Housing Property Valuation Letter.*

*4. Property Valuation letter Ref. No.RSL/11328/ 83 dated 9/12/83.*

*5. Receipts No.21787, 21589 and 21833 dated 31/1/84 for N303.00, N50.00, N3,030.00 for fees paid to the Ministry and part*

payments made.

6. Letter inviting 3rd defendant to sign sales agreement Ref. RSL./11328/109 dated 2/7/86 and sales agreement entered into between the 3rd defendant and the Rivers State Housing and Property Development Authority registered as No.26 at Page 6 in Volume 121 of the Lands Registry in Port Harcourt.”

At the trial, the plaintiff testified in support of his case. He also tendered some documents. Exhibit ‘A’ is a deed by which the plaintiff claimed to have derived his interest in the land in dispute from his predecessor Iwejua. I think that Exhibit ‘A’ deserves special comments. It is a deed registered as No.26 page 26 in Volume 387 of the Lands Registry Enugu. It is dated 10-4-64.

In tendering Exhibit ‘A’, the plaintiff who testified as P.W.1 said:  
*“I acquired the property by purchase of land from John Iwejua. The vendor Mr. John Iwejua gave me an assignment. I can recognise the assignment if shown. This is the assignment.”*

Now under Exhibit ‘A’ John Iwejua was described as the vendor and the plaintiff was described as the purchaser. Strangely however, the said John Iwejua did not append his signature to Exhibit ‘A’. The plaintiff/respondent signed Exhibit ‘A’ as the vendor and also the purchaser. In Exhibit ‘A’, there is a recital that John Iwejua acquired a 7 year lease from the Government of Eastern Nigeria with effect from 1st January, 1957. Although in Exhibit ‘A’ it was expressed that the plaintiff signed as the vendor’s agent (i.e. for Iwejua) under a Power of Attorney, the said power of attorney was not tendered in evidence. If indeed Iwejua had a seven year lease with effect from 1-1-57, that lease would expire on 31-12-63. The position is that as at the time Exhibit ‘A’ was executed on 10-4-64, Iwejua had no interest any longer in the land to transfer to the plaintiff/respondent. At the highest, Iwejua became a tenant at sufferance to the Government of Eastern Nigeria.

The learned authors of ‘The Law of Real Property’ 4th edition at pages 640-641 describe the position of a tenant et sufferance thus:

*“(a) Creation. A tenancy at sufferance arises where a tenant, having entered under a valid tenancy, holds over without the landlord’s*

*assent or dissent. Such a tenant differs from a trespasser in that his original entry was lawful, and from a tenant at will in that his tenancy exists without the landlord's consent. A tenancy at sufferance can arise only by operation of law, and not by express grant, for it assumes an absence of agreement between landlord and tenant. Indeed, it is strictly incorrect to call it 'tenancy' at all, for there is no 'privity,' i.e., tenure between the parties. But since it normally arises between parties who have been landlord and tenant it has acquired the title of tenancy; and the tenant is liable to a claim for 'use and occupation,' which properly lies against a tenant, rather than to an action for damages for trespass. There can, of course, be no claim for rent as such, for rent is a service which depends upon a proper tenure by consent. The landlord may eject the tenant, or sue for possession, at any time, and the tenant will have no right to emblements."* B C

And writing on the same situation, the learned author of Halsbury's D Laws of England, 4th editions, volume 27(1) at paragraph 176 page 163 writes:

*"176. Nature of tenancy at sufferance. A person who enters on land by a lawful title and after his title has ended, continues in possession without statutory authority and without obtaining the consent of the person then entitled, is said to be a tenant at sufferance, as distinct from a tenant at will who is in possession with the landlord's consent. This is so whatever the nature of the tenants original estate, whether he was tenant for years, or the subtenant of a tenant for years, or tenant at will. A tenancy at sufferance arises by implication of law and may not be created by contract between the parties."* E F

*A tenancy at sufferance does not arise upon the holding over by one whose title was created by act of law, and there can be no tenancy at sufferance against the Crown, in these cases the person holding over is a mere trespasser. One tenant at sufferance cannot make another; but it seems that, on the death of a tenant at sufferance, the like tenancy will continue in favour of a person claiming under him. A release from the landlord to the tenant at sufferance does not operate to enlarge the tenant's estate."* G H

If as at 10-4-64, Iwejua had no transmissible interest to transfer to

the plaintiff/respondent, the plaintiff became a trespasser on the land and has no cognisable interest which could be relied upon exclusively to sustain the claims he made. Further in *LCC v. Agricultural Food Products Ltd.* (1955) 2 All ER 229 at 232-233, the Court of Appeal in England recognized B that anyone authorized to execute a deed could do so on behalf of another. But it cannot be disputed that the authorization ought to be in writing. That being the position, the plaintiff, having failed to produce the power of attorney which enabled him to execute Exhibit 'A' as both vendor and C purchaser could not rely on Exhibit 'A' as the foundation of his interest in land in dispute. If plaintiff's case hinged alone on Exhibit A, I would have no hesitation in allowing the appeal.

The plaintiff/respondent however tendered in evidence Exhibit B written by the Government of Eastern Nigeria. Exhibit 'B' written on 14-D 11-66 reads:

"Sir,

*Renewal of Lease of Plot 5 in Block 254 Orije Layout, PH.*

*I have to inform you that the Military Governor of Eastern Nigeria*

E *has approved the renewal of the above lease on the terms set out below:-*

*Lessee - Godwin E. Okoyi*

*Term - 99 years from 1/1/64*

*Rent - 8.15/-from 1/1/64*

F *Revision Periods - Every ten years*

*Improvement - 6,000 already effected*

*Purpose - Residential and Commercial*

*2. The following fees are payable before deed is engrossed:*

G *Preparation - 3 : = : = d*

*Registration - 1 : 10: = d*

*Stamping - 1 : 10: = d*

*1964-1966 rents- 26: 5: = d*

*32: 5: = d*

H *I am, Sir,*

*Your obedient servant*

*(Sgd.)*

*M. J. I. Ilona*

*Land Officer  
Port Harcourt*

*Mr. Godwin E. Ekoye,  
Ministry of Works,  
Owerri.”*

B

The plaintiff after tendering Exhibit ‘B’ gave evidence that he made all the payments he was asked for in Exhibit ‘A’. The plaintiff tendered in evidence the relevant receipts. The evidence of the plaintiff on the fact that he paid all the requisite fees was not challenged.

C

Now the 3rd defendant/appellant testified that he bought the land from the 1st defendant/respondent. He tendered a sales agreement made on 4/8/86 between him and his vendors. In his evidence he said:

*“Before these transaction, I tried to find out if the property belonged to any other person and a search was conducted as to the history of the property. I found out that the property was free for sale.”*

D

The evidence of the plaintiff/respondent on the other hand was that he had erected a building consisting of 35 rooms on the land before the outbreak of the civil war and was collecting rents therefrom. So the 1st defendant/respondent sold plaintiff/respondent’s building built before 1970 to the 3rd defendant/appellant in 1986.

Even if the interest of the plaintiff/respondent was equitable following his compliance with the terms of Exhibit ‘B’, was the 1st defendant/respondent right to assign the legal estate in the property to the 3rd defendant/appellant?

F

In answering this question, the consideration must be whether or not the 3rd defendant/appellant was aware of plaintiff/respondent’s equitable interest. The evidence of the 3rd defendant/appellant was that the searches he conducted at the land registry did not reveal to him that there was a prior owner of the property. This evidence in my view does not accord with common sense. There was a building on the land. There were tenants in the property. There is therefore no doubt that the plaintiff/respondent was therefore an equitable owner in possession. See *Omosanya v. Anifowshe* (1959) 4 FSC 94. The trial court held that the plaintiff/respondent was in possession. At page 131 of the record, the trial Judge

G

H

said:

*“From all these premises, the plaintiff has an equitable interest that entitles him to his claim and only if there had not been the subsequent legal interest thus created by Exhibit ‘M’. Therefore the plaintiff shall be only entitled to compensatory damages to the tune and extent of the sale price of the property whilst the title still rests and on the third party who is purchaser for value.”*

I think that the trial Judge fell into an error by not considering whether the 3rd defendant/appellant, no doubt a purchaser for value bought the property without notice of the plaintiff/respondent’s interest. It is my view that the court below was right to hold that on the facts, the plaintiff must be deemed to have actual or constructive notice of the plaintiff/respondents’ equitable interest having regard to the fact that there was a building with sitting tenants on the land and this ought to have put the 3rd defendant/ appellant in notice.

In *Animashaun v. Olojo* (1990) 6 NWLR (Pt. 154) 111 at 121, this court considering a similar situation observed:

*“It is only a subsequent bona fide purchaser of the legal estate for value without notice that can take priority over someone who had acquired equitable interest over the same property. It is the absence of notice of the prior equitable interest that provides a haven which seems to protect the interest of the subsequent purchaser from the eroding forces of knowledge of the prior purchaser’s equity. The notice could be either actual, constructive or imputed. In the instant case, the finding that the appellant was not a bona fide purchaser of the legal estate without notice of the equitable interest of the respondent dealt, the final blow to the appellant’s case.”*

I think that it would amount to monumental injustice to deny the plaintiff/respondent the property on which he had erected a building before 1970 and after which he had met the conditions set by the old eastern Nigeria Government in order to be granted a 99 year lease. See *Olowu v. Oshinnubi* (1958) LLR 21 and *Oransunmi v. Idowu* (1959) 4 FSC 40.

The plaintiff/respondent was seeking specific performance which is an equitable remedy. It is also discretionary. The trial Judge recognised

plaintiff's right but elected to award to him compensatory damages. The court below however was of the view that it would be unjust to take plaintiff/respondent's house from him and give him damages as compensation. The learned authors of SNELL'S Principles of Equity, 27th edition at page 575 paragraph 5 write:

“5. *Specific performance a discretionary remedy.*

*Although the court will not order specific performance where damages would fully compensate the plaintiff, the converse of this proposition is not true. There are many cases in which the court will not grant specific performance even if the remedy in damages is insufficient; for specific performance is a discretionary remedy. This does not mean that it will be granted or withheld arbitrarily; the discretion is judicial discretion, and is exercised on well-settled principles. It means that in an action for the specific performance of a contract of the class usually enforced, the court may take into account circumstances which could not be taken into account in an action for damages for breach of contract, such as the conduct of the plaintiff, or the hardship which an order for specific performance would inflict on the defendant.”*

I am satisfied that the court below was right in its decision. The 3rd defendant/appellant was in my view properly denied the privilege of reaping the fruit of another's labour.

My learned brother Kutigi, JSC., is of the view that the order of injunction granted by the court below even if it was not claimed before the court of trial, must be viewed in this case as a consequential relief granted at the discretion of the court below. I agree with him. The court below made the pronouncement that the sale of the property in dispute to the 3rd defendant/appellant was null and void and that no property passed to the 3rd defendant/appellant. It was by the force of the sale of the property to him that the 3rd defendant/appellant went thereon to collect rents. If the sale was set aside, the 3rd defendant/appellant had no business going on the property. With or without an order of injunction against him, the 3rd defendant/appellant would be flouting an extant order of the court below if he went to the property in dispute. The order for injunction made by the court below was therefore no more than an effort to give bite and efficacy

to the order declaring the sale of the property to the 3rd defendant/appellant a nullity. It is therefore consequential in the circumstances.

In the final conclusion, I would agree with the lead judgment by my learned brother, Kutigi, JSC. I dismiss the appeal and affirm the judgment B of the court below. I award costs as in the lead judgment.

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