

COURT OF APPEAL  
JOS DIVISION  
13TH DECEMBER, 2004, CA/J/68/97  
CORAM:- O. O. OBADINA, I. C. NZEAKO, I. F. OGBUAGU, JJCA

1. ALHAJIM.C. DAHIRU

2. BABA YOHANNA ..... APPELLANTS

AND

ALHAJIMUSA BUBAKARE KAMALE ..... RESPONDENT

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APPEALS - Issues - Grounds of appeal - Where the issues are not formulated - Based upon and related to competent grounds of appeal - They are liable to be struck out (H1)

APPEALS - Grounds of appeal - Competence of - Where a ground alleges error in law and on the facts - It is incompetent (H2)

CONTRACTS - Courts - Delay in judgment - Evidence - Consensus ad idem - Where the trial court properly evaluated the evidence - And found there was no consensus ad idem - He did not lose his impression - Due to delay in delivering judgment (H3)

JUDGMENTS - Delay - S. 258(4) 1979 Constitution - Where judgment was given after over 6 months - From date of final addresses - It will not be nullified - If the delay did not lead to loss of impression - Made by witnesses on the trial judge (H4)

LAND LAW - Sale - Governor's consent - Where there was no completed contract of sale - The issue of who is to obtain Governor's consent - Is not relevant (H5)

LAND LAW - Sale agreement - Memorandum, s. 4 Statutes of Fraud 1677 - The fact that there was no written document - Confirms the findings - That there was no confirmed agreement of sale (H6)

COURTS - Judgments - Principles of law - Where abandoned by counsel  
- Or not referred to at all - The judge has liberty to apply them (H7)

CONTRACTS - Validity - Offer when accepted - Creates consensus ad idem - Counter offer by the offeree - Or qualified acceptance - Does not give rise to a binding contract (H8)

LAND LAW - Sale - Title - Equitable interest - Payment of purchase price and possession - Is not evidence of equitable interest in all cases (H9)

APPEALS - Interference - Trial court's finding - Is presumed to be correct - Burden of proving that the judgment is wrong - Is on the appellant (H10)

LAND LAW - Damages - Trespass - Exemplary damages - Award of N200,000.00 as general damages - Will not be interfered with - Where exemplary damages - Would have been granted if claimed (H11)

ACTIONS - Counter claims - Land matters - Counter claims are cross actions - Not merely a defence - Where not established - They were rightly dismissed (H12)

APPEALS - Issues - Argument - Grounds of appeal - In respect of which no issue - Or argument is raised - Are deemed abandoned (H13)

### **FACTS**

Before the Adamawa State High Court Yola, the plaintiff/respondent filed an action against the defendants/appellants. 2nd appellant asked the respondent whether he had a house for sale. On receiving an affirmative answer, he undertook to find a buyer. He collected the title documents from the respondent to enable him convince any prospective buyer that there were no encumbrances in respect of the property. 2nd appellant later informed the respondent that the 1st appellant had offered to

buy the property for N800,000.00 (Eight hundred thousand naira) and respondent agreed to sell at this price/offer. Respondent later received from the 2nd appellant a cheque for the sum of N600,000.00 issued by the 1st appellant and 2nd appellant told him that the balance of N200,000.00 would be paid by the 1st appellant in a week's time. At the expiration of the one week, rather than receiving the said balance, respondent was handed over exhibit 1 written by the 1st respondent. The document stated that the balance was N50,000.00 and contained some other conditions respondent should fulfil before that balance would be paid.

Respondent vide exh. 2 denied the claim in exh. 1 that the agreed purchase price was N650,000.00, demanded for the return of his title documents which 2nd appellant had handed over to the 1st appellant and demanded that the deposit of N600,000.00 paid to him be collected back. Instead of complying, 1st appellant embarked on renovation work on the property which he entered forcefully. Respondent reported the matter to the Police, 1st appellant's father and some other people for their intervention. As 1st respondent persisted in his acts of trespass, respondent sued the appellants before the trial court. Appellants who filed two separate statements of defence, counter claimed separately against the respondent, denied the assertions and claims of the respondent. In a considered judgment delivered after about 6 months from close of proceedings, the trial court found in favour of the respondent and dismissed the appellants counter claims. Being dissatisfied, the appellants have jointly appealed to the Court of Appeal.

### **ISSUES FOR DETERMINATION**

(i) Whether the appellants suffered miscarriage of Justice by the unexplained period of over six months from the date of final addresses to date of judgment to warrant the Court of Appeal invoke the provisions of section 258(4) of the 1979 Constitution as amended by Decree No. 17 of 1985 to nullify the entire proceedings.

(ii) Whether upon a calm view of the pleadings, evidence, relevant statutory provisions, equities and judicial authorities, the trial court was right in holding that it was the duty of the first defendant to obtain Governor's consent in the contract for sale of landed property in which

title was vested in the plaintiff.

(iii) Whether upon a calm view of the pleadings, evidence, law and equities the plaintiff was entitled to succeed in his claims against the defendants.

B (iv) Whether upon a calm view of the pleadings, evidence, the equities the trial court was right in dismissing the defendants' counter-claim.

C **HELD** (Unanimously dismissing the appeal per OGBUAGU JCA)

*Need to relate issues to grounds of appeal*

1. Before proceeding to deal with the merits of this appeal, I observe firstly, that both parties, did not relate any of their respective issues for determination, to any of the nine (9) grounds of appeal including the incompetent ground. It is now firmly established in many decided authorities of the Supreme Court and this court, that every issue for determination must be formulated from, based upon and related to/distilled from, a competent ground of appeal. Thus, all the said issues of the parties, and this is settled, no matter how eminently framed and formulated, cannot be competent for determination in the appeal. They are therefore, liable to and must be struck out and also discountenanced by this court. There are too many authorities in this regard. But see Owhonda v. Ekpechi (2003) 17 NWLR (Pt.849) 326; (2003) 9 SCNJ 1 at 20; Oladele v. Anibi (1998) 9 NWLR (Pt. 567) 559. (p. 1639 E)

*Grounds of appeal - Competence of*

2. Secondly, ground 4 of the grounds of appeal, complains of "Error in law and facts". Now, Order 3 rule 2(2) of the Court of Appeal Act 1981, permits/allows only a ground of appeal which alleges/complains of either 'error in law or "misdirection" or "error on fact(s)". It is never one of "error in law and on the fact(s)" or (as appears in this ground 4) "error in law and facts". By their nature, one ground of appeal, cannot be the two. It will be an incongruity. In other words, the said provisions, are in the alternative, adjunctive and never conjunctive. It is now settled law, that a ground of appeal, which alleges both error in law and misdirection or error

in law and on the facts (as appears in ground 4) at the same time, is incompetent. Thus an incompetent ground, cannot give life to any issue/ issues formulated therefrom. I therefore, hold that ground 4 is incompetent and it is accordingly struck out. (p. 1640 B)

B

***CONTRACTS - Courts - Delay in judgment***

3. I wish to state that from the said judgment of the lower court, in my respectful view, the learned trial Judge, painstakingly, reviewed and evaluated the evidence of the parties, the witnesses and the exhibits, and came to a conclusion that the parties - i.e. the 1st appellant and the respondent were not at consensus ad idem in respect of the sale transaction. I agree with the learned counsel for the respondent, that the flowing of the judgment (so to speak), eloquently, shows that the learned trial Judge, was in total control of the facts of the case and the evidence before him. C D

I am satisfied that the learned trial Judge, properly observed the principle enunciated in the case of *Mogaji v. Odofin* (1978) 4 SC 91. He preferred (as he was entitled to do), the evidence of the respondent to that of the appellants after correctly, in my view, identifying the central issue in controversy - i.e. whether there was a completed contract of sale between the 1st appellant and the respondent or steps in negotiations for the sale transaction. I have myself read/perused the record of proceedings, and the judgment of the learned trial Judge particularly from pages 71 to 76 of the records, and with humility and respect, I see nothing whatsoever, to show that he either did not take a proper advantage of having seen or heard the parties and the said witnesses or that he had lost his impression of the trial due to such delay in the delivery of the said judgment. F G

(p. 1642 G)

***JUDGMENTS - Delay - S. 258(4) 1979 Constitution***

4. Now, in the case of *Dibiamaka & 2 Ors. v. Osakwe & Anor* (1989) 3 H NWLR (Pt.107) 101 at 114 -115; (1989) 5 SCNJ 30 at 38, also cited by Okafor, Esq. (SAN) in their additional authorities and relied on and partly reproduced by the learned counsel for the respondent, the Supreme Court

- per Oputa, JSC had this to say, inter alia at page 114 of the NWLR:

“And the law is that if inordinate delay between the end of the trial and the writing of the judgment apparently and obviously affected the trial Judge’s *perception, appreciation and evaluation of the evidence so that it can be easily seen that he has lost the impression made on him by the witnesses*, then in such a case, there might be some fear of a possible miscarriage of justice and there, but only there, will an appellate court interfere. *The emphasis is not on the length of time simpliciter but on the effect it produced in the mind of the trial Judge.*” (The italics mine)

The learned and erudite justice, after reproducing the provisions of the said section 258(4) of the 1979 Constitution, at page 115 of the NWLR went on thus:

“The learned trial Judge was *effectively in charge all the time*. He was *dominus litis magnus*. His evaluation of the evidence bears the mark of freshness which, dismisses the argument that he has forgotten the impressions made on him by the witnesses. *His findings of fact were all supported by available credible evidence*. Why should this court now interfere? I see no reason for such interference”. (The Italics mine)

The delay in the above case, was nine (9) months.

The above, in my respectful view, are in all fours with and apply to the instant case leading to this appeal. To be emphasized again, is that the emphasis is not on the length of time simpliciter, but on the effect the delay produced in the mind of the trial Judge.

As his Lordship did in the case of Chief Egbo & Ors. v. Chief Agbara & Ors. at pages 110 - 111 of the SCNJ, report, and as I said earlier in this judgment, from the records, I can find nothing whatsoever, to show that the learned trial Judge, had at any point in time in his said judgment, lost control of the trial or that he had not taken a proper advantage of his having seen or heard the witnesses that testified before him.

I therefore, agree with the learned counsel for the respondent, that all the submissions of the learned counsel for the appellants in respect of this issue, are, with respect, completely misconceived. Issue No. 1 of the appellants together with ground (1) one of the grounds of appeal fail. They are accordingly dismissed (pp. 1643F & 1647D)

**LAND LAW - Sale - Governor's consent**

5. The big question is, is this issue really or actually relevant for determination, in view of the finding of the learned trial Judge, that there was no concluded contract of sale of the property the subject-matter of the suit between the 1st appellant the respondent? I or one may ask.

As rightly stated by the learned counsel for the respondent, that the respondent in paragraph 21 of his statement of claim at page of the records, pleaded as follows:

“There was no written agreement entered into between the plaintiff and the 1st defendant *and no consent of Governor of Adamawa State was obtained as the parties had reached no agreement at all.*” (Italics mine)

The learned trial Judge, at page 72 lines 9 to 45 and page 73 lines 1 to 45, made far reaching findings of fact. For the avoidance of doubt, I proceed to reproduce the relevant/material portions.

“*As long as a necessary term of an agreement or a contract like the one under consideration has not been agreed to, the matter rests in negotiation and there is no concluded contract.*”

He went on and on and in the end, he concluded as follows:

“Having found that there was no agreed certain sum, representing the price of the property, between the contracting parties, I hold that the transaction between the parties did not result into a valid contract. I find and hold that there was no agreement between the parties as regards the selling price of the property, the subject of the suit.

It follows therefore that there is no contract for sale of land (landed property) (House) capable of satisfying the provisions of section 4 of the statute of frauds of 1677.

In a word, I am satisfied that the transaction relied upon *were nothing but steps in negotiation between the parties. There was no concluded contract*”. (Italics mine)

I have gone this far, in order to put this issue beyond any controversy, that in view of these findings of fact, the question or issue of obtaining Governor's consent, did not arise and was therefore, of no moment. Going into it, with respect, amounted to an academic exercise

and an exercise in futility.

However, the learned trial Judge, in his wisdom, dealt with the issue and stated that it was common ground that consent was not obtained by the 1st appellant. He gave his reasons and also made crucial findings of fact B at pages 75 and 76 of the records.

Having held that the issue of Governor's consent in the circumstances of the evidence before the trial court, was of no consequence and was not relevant to the matter in issue - i.e. whether there was a completed, valid and binding contract between the parties - particularly the 1st C appellant and the respondent, I hold that this issue is otiose and therefore, discountenanced by me. The result is that ground 6 and the issue distilled from it fail and they are accordingly dismissed by me.  
(pp. 1649F/1650F & 1651 C)

D

#### ***LAND LAW - Sale agreement - Memorandum***

6. So, with all these evidence in court, the finding of the learned trial Judge that there is/was no credible evidence to show that there was a completed E agreement of sale between the 1st appellant and the respondent - i.e. that there was an offer and an acceptance as to the purchase price between them, cannot be faulted. I myself, see no such consensus ad idem between them. More importantly, there is section 4 of the statute of frauds 1677 F also referred to by the learned trial Judge. There is no document or evidence in writing/ memorandum signed by the parties in respect of the property which relates to house/land. It provides as follows:

“No contract to which this section applies shall be *enforceable by action unless the contract or some memorandum or note in respect thereof* G *is in writing and is signed by the party to be charged therewith* or by some other person lawfully authorized by him.” (Italics by me)

There is the evidence of the DW3 that the respondent refused to sign the sale agreement he prepared at the instance of the 1st appellant. H (p. 1655 G)

#### ***Judgments - Principles of law***

7. I will pause here to observe that Mr. G. Okafor, Esq. (SAN) under issue



one in their statute of fraud, has submitted that the issue of fraud, was abandoned by the plaintiff/respondent but was taken up by the trial court.

Firstly, in the case of Lt. Col. Mrs. Finnih v. Imade (1992) 1 NWLR (Pt.219) 511 at 537; (1992) 1 SCNJ 87 at 107 -108 - Karibi-Whyte, J.S.C. had this to say:

*“It is strange to say that the Judge cannot apply principles not referred to by counsel. The day such a principle of law is accepted, the true demise of the independence of the Judge in deciding cases before him is assured. The oath of the judge is to do justice according to law and to all manner of people without fear or favour, affection or ill-will.”*

See also Inua v. Nta Asuquo (1961) 1 ANLR 576 - per Idigbe, J.S.C. In other words, a Judge can refer to and rely on a principle or statement of law, even if not referred to by counsel or even abandoned by a counsel so long as the justice of the case demands it.

Secondly, even in Ow Honda v. Ekpechi case (supra), it was held at page 20 of the SCNJ report, that it is not every mistake or error in a judgment that will result in the appeal being allowed (and I will add dismissed). It is only when the error, is substantial in that it had occasioned a miscarriage of justice that an appellate court, is bound to interfere.

In the instant case, the statute of frauds was not only germane to the case, but very relevant and applicable. It was in my respectful view, rightly and properly referred to and relied on by the learned trial Judge. (p. 1656 C/F )

### ***CONTRACTS - Validity - Offer when accepted***

8. When is a contract said to be validly completed? One or I may ask. It is now firmly established that for a contract to exist, there must be an offer, an unqualified acceptance of that offer and of course, a legal consideration. There must be a mutuality of purpose and an intention, the two contracting parties, must agree. In other words, there must be an offer and acceptance.

An “offer” it is also settled, is an expression of readiness to contract on the terms specified by the offeror which if accepted by the offeree, will give rise to a binding contract. In other words, it is by acceptance that the

offer is converted into a contract.

It is stated that when there is mutual ascent, the parties are said to be ad idem. See Norwich Union Fire Insurance Society v. Price (1943) A.C. 4 55 at 4 63. The test of mutuality, is said to be objective.

B Thus, a counter - offer by the offeree, operates as a rejection of the original offer, thus terminating it. Therefore, for the purpose of ascertaining the intention of the parties, regard must be had to the terms of the contract, the conduct of the parties and the circumstances of the case. This is why, it is now also settled, that where there is a counter-offer or C qualified acceptance, it does not give rise to a binding contract between the parties. (pp. 1657D/G &1658 B)

***Sale - Title - Equitable interest***

D 9. As to the submission by Mr. Okafor (SAN), payment of purchase price and possession which he says are evidence of equitable interest and citing and relying on cases Nos. 10 and 11 of their additional list of authorities - i.e. Obijuru v. Ozims (1985) 2 NWLR (Pt. 6) 167 and Thompson v. E Arowolo (2003) 7 NWLR (Pt. 818) 163 at 210, I wish to say once again, that this issue, with respect, is irrelevant, again, having regard to the finding of the learned trial Judge, that there is/was no valid completed contract of sale between the 1st appellant and the respondent.

F However, the respondent said that the N600,000.00 (six hundred thousand naira), was a deposit. There is settled law as regards the consequence or effect of making a deposit and a part-payment in a contract of sale.

G I have already noted in this judgment, the circumstances of the 1st appellant being in possession. He was a trespasser and cannot acquire a better title than the respondent over the said property. (p. 1659B)

***APPEALS - Interference - Trial court's finding***

H 10. The attitude of an appellate court and when it can interfere or not interfere with the findings of fact by a trial court, has been stated and restated in a string of decided authorities. See Ehimua v. National Oil & Chemical Marketing Co. Ltd. (1995) 5 SCNJ 88 at 95, 97; (1995) 5 NWLR

(Pt.398) 642 .

Afterwards, and this is also settled, there is a presumption that the Judgment of a trial court, is correct and therefore, the burden of proof, is always on the appellant to establish that the judgment appealed against, is wrong. See Onasanya v. Sopitan (1975) (1) NMLR 30 and Folorunso v. Adeyemi (1975) 1 NMLR (Pt.1) 128; (1975) 2 WSCA 196 at 202 and many others. The appellants have woefully failed to prove to the satisfaction of this court, that the said judgment of the trial court is wrong. I so hold. (p. 1660 E/H)

### ***Damages - Trespass - Exemplary damages***

11. Although the respondent, did not make the claim as exemplary damages which are awarded usually, whenever the defendant's conduct, is adjudged by the court, as outrageous, to merit punishment" as where it discloses malice, fraud, cruelly, insolence. Flagrant disregard of the law and like - See Eliochin (Nig.) Ltd. & Ors v Mbadiwe (1986) 1 NWLR (Pt. 14) 47; (1986) ANLR 1, if it had been claimed, in my respectful view, it was made out in the instance case. But as I have said, it was not claimed I will however, not disturb the exercise of that discretion in awarding half of the amount claimed by the respondent. As at the time the judgment was delivered, the 1st appellant oblivious of the action in court, was occupying and I believe, up till now, he is occupying the property in spite of the subsisting judgment which has not yet been set aside by this court.

The learned trial Judge had this to say at page 76 lines 29 to 39 of the records;

'it is beyond argument that any person who without the consent of the owner of a house or building *forcibly enters the same commits a trespass*

It follows therefore that the forcible entry of a property in the exercise of *a non-existent right under a non-existent contract of sale* is liable for damages for forcible entry.

In the face of my finding on this score *supra*, it is my view that the 1st and 2nd defendant (sic) have clearly exposed themselves to an action in trespass for damages *for forcible entry for which* they will be liable.

(*italics mine*)

I agree.

In respect of award of general damages by a trial court, it has been stated and restated in a long line of decided authorities, as to when an appellate court can interfere with such an award. See at least, the case of *Ndinwa v. Igbinedon* (2001) 5 NWLR (Pt. 705) 140 CA. I maintain that in the circumstances of this case, this court will not interfere with the said award. (p. 1661 H)

**C ACTIONS - Counter claims - Land matters**

12. Quickly, in respect of the counter-claim, it is now settled that it is, in substance, a cross-action and not merely a defence to the plaintiff's claim. It is an independent action and not part of the original action though for convenience, the two are lied together.

Surely, and this is settled, a defendant in a counter-claim, assumes the position of a plaintiff and the plaintiff in the original action, assumes the position of a defendant.

The learned trial Judge, having in my respectful view, come to the conclusion that there was no valid contract existing between the 1st appellant and the respondent, certainly, the appellant, cannot and have not, any propriety right in the said property either legal or equitable as rightly submitted by the learned counsel for the respondent. The 1st appellant's trespass to the house, became a continuing trespass, especially, after the respondent in exh. 2. made it abundantly clear, that he has never sold his property to him. So, there is no way, he could have succeeded in his counter-claim which, in my humble view, was rightly dismissed. Moreso, by virtue or in view of the provisions of section 4 of the Statute of Fraud 1677 aforementioned.

As for the counter-claim of the 2nd appellant, to put it mildly, he was the confusionist or perhaps a crook so to say. He pretended to be an illiterate. On his own admission as already stated by me, he was never an agent to the respondent. Assuming that he was, he could not have earned any commission in a transaction or contract that has/had been held to be inconclusive. He said he was a witness in the transaction and that the

parties sold and bought by themselves. See page 42 lines 33 and 38 of the records. The learned trial Judge, rightly in my view, properly and rightly indicted him and dismissed his counter-claim. Ground 4 of the grounds of appeal, fails and it is accordingly dismissed. (pp. 1662 G & 1663 B)

B

***APPEALS - Issues - Argument***

13. Finally, it is observed by me, that no issues were raised/distilled from grounds 3, 5 and 7 of the grounds of appeal. It is now settled that a ground of appeal in respect of which no issue has been formulated, is deemed to have been abandoned and such must be struck out. So also, it is an established practice of the appellate court that grounds of appeal for which no arguments are advanced either in the brief of argument or in oral argument, are deemed to have been abandoned and will accordingly, be struck out. The said grounds are accordingly struck out.

C

D

In the final result or analysis, I find as a fact and hold that this appeal is unmeritorious. It fails and it is accordingly dismissed. The said judgment of Gwam, J. delivered on 20th June, 1991 is hereby and accordingly affirmed by me. (p. 1664C/ G)

E

**REPRESENTATION**

Appellants not represented

Umoh, Solomon, Esq (with him, Adewole A. Esq.); Eke S. Esq. - for the Respondent

F

**CASES REFERRED TO**

Onifade v. Olayiwola (1990) 7 NWLR (Pt. 161) 130; (1990) 11 SCNJ 10  
 Ndiwe v. Okocha (1992) 7 NWLR (Pt. 252) 129; (1992) 7 SCNJ 252  
 Aromolaran v. Kupoluyi (1994) 2 NWLR (Pt. 325) 221  
 Alhaji Are & Anor. v. Ipaye & Anor. (1986) 3 NWLR (Pt. 29) 416  
 Chukwuogor v. Obuora (1987) 3 NWLR (Pt. 61) 454 at 479 SCNJ 191  
 Owihonda v. Ekpechi (2003) 17 NWLR (Pt.849) 326; (2003) 9  
 Oladele v. Anibi (1998) 9 NWLR (Pt. 567) 559  
 Alhaji Animashaun v. University College Hospital (1996) 10  
 First Bank of Nig. Ltd. v. Njoku (1995) 3 NWLR (Pt. 384) 457

G

H

Alhaji Akanbi v. Mallam Salawu Anor. (2003) 13 NWLR (Pt.838) 637  
Nwokoro & Ors. v. Onuma & Anor (1990) 3 NWLR (Pt.136) 22  
Dr. Oshodi & Ors. v. Eyifunmi (spelt as Eyifumi) (2000) 13 NWLR (Pt.684) 298 at 352  
B United Bank For Africa Ltd. v. Tejumola & Sons Ltd. (1988) 2 NWLR (Pt.79) 662; (1988) 5 SCNJ 173  
Sparkling Breweries Ltd. & 5 Ors. v. Union Bank of Nig. Ltd. (2001) 15 Adebajo v. Brown (1990) 3 NWLR (Pt. 141) 661; (1990) 6 SCNJ 1

C **STATUTE REFERRED TO**

Constitution of Nigeria 1979 s. 258(4) as amended by Decree no. 17 of 1985

D **LEAD JUDGEMENT BY OGBUAGU JCA**

This is an appeal against the judgment/decision of the Adamawa State High Court sitting at Yola dated 15th May, 1996, but delivered on 20th June, 1996, by Gwam, J. in favour of the plaintiff/respondent and  
E dismissing the counter-claims of the defendants/appellants.

Dissatisfied with the said decision, the appellants have appealed on nine (9) grounds of appeal which without their particulars, read as follows;  
“Ground 1: Error in Law

F The learned trial court Judge erred in law when he delivered judgment in the suit on the 15th day of May, . 1996, a period over six months from the day of final address by counsel.

Ground 2: Error in Law

G The learned trial court Judge erred in law when he found that on the evidence evidence and documentary evidence adduced by the parties did not arrive at a consensus ad idem as to the sale price (sic).

Ground 3: Error in Law

H The learned trial court Judge erred in law when he held that the plaintiff did not accept the 1st defendant’s counter offer.

Ground 4: Error in Law and Facts

The learned trial court Judge erred in law and on the facts when he held that the plaintiff did not appoint the 2nd defendant his agent for the

sale of the sale transaction on condition that he would be paid 5% of the purchase price as commission.

**Ground 5: Error in Law**

The learned trial court Judge erred in law when he found that “the evidential reasons explaining the surrender of the title deeds of the property by the plaintiff and the tendering of the sum of N600,000.00 as put by the plaintiff is not only more plausible but also more convincing. I believe it.” B

**Ground 6: Error in Law**

The learned trial court Judge erred in law when he found that it was the duty of the 1st defendant to obtain the Governor’s consent in the sale of land transaction in which title was vested in the plaintiff. C

**Ground 7: Error in Law**

The learned trial court Judge erred in law when he held/found that - “the forcible entry of a property in the exercise of a non existing right under a non existing contract of sale is liable for damages for forcible entry.” D

**Ground 8: Error in Law**

The learned trial court Judge erred in law when he granted the plaintiff reliefs (sic) claimed in paragraph 23, (a), (b), (c), (d) and (e) the sum of N200,000.00 for trespass and (f) of the statement of claim. E

**Ground 9: Error in Law**

The learned trial court Judge erred in law when he dismissed the defendants counter-claims. F

The facts of this case briefly stated, are, that according to the plaintiff/respondent, that on the inquiry of the 2nd defendant/appellant from him whether he had a house for sale, the 2nd defendant undertook to find a buyer when the plaintiff hereinafter called “the respondent”) answered in the affirmative. The 2nd defendant (hereinafter called “the 2nd appellant”) requested from the respondent to give to him the title documents of the said property/house (hereinafter called “the property”) which would enable him use the same to convince any prospective buyer, H that there were no encumbrances in respect of the property. The respondent obliged. The respondent informed the 2nd appellant that the selling price would be one (1) million naira. But when the 2nd appellant later

came to brief the respondent, he informed the respondent, that the 1st defendant (hereinafter called the “1st appellant”), had offered to buy, the property for N800,000.00 (eight hundred thousand naira). The respondent agreed to sell at this price/offer.

B The respondent later, received from the 2nd appellant, a cheque for the sum of N600,000.00 (six hundred thousand naira) issued by the 1st appellant. The 2nd appellant also told respondent that the balance of N200,000.00 (two hundred thousand naira) would be paid by the 1st appellant, in a week’s time from the date of the receipt of the said cheque  
C afore-mentioned. At the expiration of the one week, rather than receiving the said balance, the respondent was handed over exh. 1 by the 2nd defendant written by the 1st appellant claiming therein, that the balance was N50,000.00 (fifty thousand naira). Exh. 1 also contained some other  
D conditions which the respondent was asked to meet/fulfill before the N50,000.00 (fifty thousand naira) would be paid.

In exh. 2, the respondent denied the claim in exh. 1 that the agreed purchase price was N650,000.00 (six hundred and fifty thousand naira).  
E He categorically, refused/rejected to accept the said conditions in exh. 1 and demanded for the return of his title document which the 2nd appellant, had handed over to the 1st appellant and for the collection from him-the respondent, of the said sum of N600,000.00 (six hundred thousand naira)  
F either in cash or in cheque.

The respondent noticed that the 1st appellant, was carrying on some renovation work on the property without responding to the respondent’s said demand for the return of his title document and the collection of the said N600,000.00 (six hundred thousand naira). This act  
G of entry into the property without the consent of the respondent, led to his reporting the matter to the Police and the writing of exh, 2. When the 1st appellant would not stop his acts of trespass on the property, the respondent, reported the matter to the father of the 1st appellant and some  
H other people for their intervention. As the 1st appellant persisted in his said acts of trespass, even after his report to the Police, he sued the appellants at the lower court.

The appellants who filed two separate statements of defence and



counter-claimed separately against the respondent, denied the assertions and claims of the respondent. It is their case, that the agreed purchase price was N650,000.00 (six hundred and fifty thousand naira) and that this agreement, led to the respondent, surrendering his said title deeds to the 1st appellant through the 2nd appellant. That as a result, the 1st appellant B went into possession of the property not as a trespasser, but as the owner.

At the trial, the respondent testified personally and closed his case. The appellants also testified in person and called two (2) witnesses and closed their case. A total of four (4) exhibits, were tendered in evidence C - two (2) by the respondent and two (2) by the appellants through the respondent under cross-examination. The learned counsel for the parties, addressed the court on separate dates the learned counsel for the appellants on 26th October, 1995 (typed as 1996) and that of the respondent, on 13th November, 1995. Thereafter, judgment was reserved till 18th January, D 1996.

In a considered Judgment dated 15th May, 1996 but delivered on 20th June, 1996, the learned trial Judge, found in favour of the respondent. He awarded all the reliefs sought by him in paragraph 23 of his statement E of claim and dismissed the counter-claims of the Appellants .

I note that there is/was no explanation/reason given by the learned trial Judge in the said Judgment for the delay in not delivering the Judgment on 18th, January, 1996, and for the discrepancy in the date of 15th May, F 1996, appearing at the top of the Judgment and the date he actually delivered the said Judgment now the subject-matter of this appeal.

Aggrieved by the said decision the appellants have jointly appealed to this court. The parties, pursuant to Order 6 of the Court of Appeal Rules, 2002, filed and exchanged their respective brief of argument. G The appellants, formulated four (4) issues for determination, namely,

(i) Whether the appellants suffered miscarriage of Justice by the unexplained period of over six months from the date of final addresses to date of judgment to warrant : the Court of Appeal invoke the provisions of H section 258(4) of the 1979 Constitution as amended by Decree No. 17 of 1985 to nullify the entire proceedings.

(ii) Whether upon a calm view of the pleadings, evidence, relevant

statutory provisions, equities and judicial authorities, the trial court was right in holding that it was the duty of the first defendant to obtain Governor's consent in the contract for sale of landed property in which title was vested in the plaintiff.

B (iii) Whether upon a calm view of the pleadings, evidence, law and equities the plaintiff was entitled to succeed in his claims against the defendants.

C (iv) Whether upon a calm view of the pleadings, evidence, the equities the trial court was right in dismissing the defendants' counter-claim.

On his part, the respondent, also formulated four (4) issues for determination, namely:

D 1. Whether despite the lapse of time between the final addresses of counsel and the delivery of judgment, the appellants can be said to have suffered a miscarriage of justice that would lead to the judgment of the trial court being declared a nullity.

E 2. Whether on the evidence before the trial court, the trial Judge was right in finding for the respondent in respect of the reliefs claimed and in dismissing the appellants' counter-claims. .

F 3. Whether the learned trial Judge was wrong in law in declaring the transaction between the parties null and void for lack of the Governor's consent and in holding that the 1st appellant had the responsibility of obtaining the consent and whether in spite of the error of law (if any) the decision of the trial court should be allowed to stand.

G 4. Whether the learned trial Judge was right in awarding the sum of two hundred thousand naira damages in favour of the respondent.

When this appeal came up for hearing on 14th October, 2004, Umoh, Solomon, Esq. - learned counsel for the respondent with Adewole, A. Esq., and Eke S. Esq., told the court, that his learned friend for the appellant, was in court on 28th June, 2004, when this appeal was H adjourned to the 14th October, 2004. He applied to the court, to allow him go on with the appeal. The application was granted. Mr. Umoh, then told the court, that the respondent's brief, was filed on 26th May, 1998. He adopted the same and urged the court, to dismiss the appeal.

The court being satisfied from the records that the learned counsel for the appellants was present in court on the last adjourned date and there was no reason for his absence in court with or without his client who was also absent, pursuant to Order 6 rule 9(5) of the Court of Appeal Rules, 2002 the court treated the appeal, as having been duly argued. It then reserved judgment till today. B

On 21st October, 2004, Okafor, G. Ofodile, Esq. (SAN) filed on behalf of the appellant a motion/application seeking for either of the following reliefs:

“1. An order granting the appellants/applicants leave to present oral argument before judgment is entered in the appeal. C

OR

Alternatively: To receive exhibits 1 and 2 hereto as further oral argument in addition to the appellants’ brief. D

On 17th November, 2004 when the application came up for hearing, the court after hearing arguments from both learned counsel for the parties - i.e. Okafor, Esq. (SAN) with him Egwuatu, Ogechi (Mrs.) for the appellants/applicants and Umoh, Solomon, Esq., with him, Jibrin, A. Esq., for the respondent, opposing the court on the bench Ruling, granted the alternative prayer/relief for reasons that appear in the said ruling. E

**Before proceeding to deal with the merits of this appeal, I observe firstly, that both parties, did not relate any of their respective issues for determination, to any of the nine (9) grounds of appeal including the incompetent ground. It is now firmly established in many decided authorities of the Supreme Court and this court, that every issue for determination must be formulated from, based upon and related to/distilled from, a competent ground of appeal. Thus, all the said issues of the parties, and this is settled, no matter how eminently framed and formulated, cannot be competent for determination in the appeal. They are therefore, liable to and must be struck out and also discountenanced by this court. There are too many authorities in this regard. But see *Owhonda v. Ekpechi* (2003) 17 NWLR (Pt.849) 326; (2003) 9 SCNJ 1 at 20; *Oladele v. Anibi* (1998) 9 NWLR (Pt. 567) 559; *Alhaji Animashaun v. University College*** F G H

*Hospital* (1996) 10 NWLR (Pt. 476) 65; (1996) 12 SCNJ 179; *Godwin v The Christ Apostolic Church* (1998) 12 SC 1; (1998) 12 SCNJ 215; (1998) 14 NWLR (Pt. 584) 162 and recently, *Kalu Mark & Anor. v. Gabriel Eke* (2004) 5 NWLR (Pt.865) 54; (2004) 1 SCNJ 245 at 267 - 268 and many

B others.

**Secondly, ground 4 of the grounds of appeal, complains of “Error in law and facts”. Now, Order 3 rule 2(2) of the Court of Appeal Act 1981, permits/allows only a ground of appeal which alleges/complains of either ‘error in law or “misdirection” or “error on fact(s)”. It is never one of “error in law and on the fact(s)” or (as appears in this ground 4) “error in law and facts”. By their nature, one ground of appeal, cannot be the two. It will be an incongruity. In other words, the said provisions, are in the alternative, adjunctive and never conjunctive. It is now settled law, that a ground of appeal, which alleges both error in law and misdirection or error in law and on the facts (as appears in ground 4) at the same time, is incompetent. Thus an incompetent ground, cannot give life to any issue/ issues formulated therefrom.**

**I therefore, hold that ground 4 is incompetent and it is accordingly struck out.** See *Nwadike & 2 Ors. v. Ibekwe & 2 Ors.* (1987) 4 NWLR (Pt. 67) 718 at 744 - 745; (1987) 11 - 12 SCNJ 72 and *First Bank of Nig. Ltd. v. Njoku* (1995) 3 NWLR (Pt. 384) 457 at 472 - 473 CA citing the case of *Amadi v. Okoli* (1977) 7 SC 57 at 58.

I am aware that order 6 of the Court of Appeal rules, 2002, does not provide for the formulation of issues by the court. I have decided, in the interest of justice, to deal with the said issues, more so, as it is also firmly established, that this court, is free to either adopt the issues formulated by any of the parties or by both parties or to formulate its own issue/issues that are based on or consistent with the grounds of appeal. This is said to be in order to give it/ them, precision and clarity. See *Alhaji Dahiru Saude v. Alhaji Halliru Abdullahi* (1989) 4 NWLR (Pt.116) 387; (1989) 7 SCNJ 216; *Labiya & Ors. v. Alhaji Anretiola* (1992) 8 NWLR (Pt.258) 139 at 159; (1992) 10 SCNJ 1; *Ogunbiyi v. Ishola* (1996) 5 SCNJ 143; (1996) 6 NWLR (Pt.452) 12 and just recently, *Emeka Nwana v. Federal Capital*

*Dev. Authority & 5 Ors.* (2004) 7 SCNJ 90 at 99; (2004) 13 NWLR (Pt.889) 128 at 142.

Issue No. 1 of both the appellants and the respondent (distilled from ground 1 of the grounds of appeal).

It is submitted that there was an unexplained delay of over six (6) months from the date of final addresses of learned counsel for the parties to the date of the judgment and that this, adversely affected the appellants in the manner the learned trial Judge considered the evidence adduced, submissions of learned counsel for the parties and the findings of the trial court. That from the records, no reason, was given for the long delay in the delivery of the said judgment.

It is further submitted that this delay, has occasioned a miscarriage of justice on the part of the appellants because, according to them, very substantial points of law canvassed by them at the trial, were not resolved by the learned trial Judge. The issue of equitable interest coupled with possession, was referred to and the case of *Obijuru v. Ozims* (1985) 2 NWLR (Pt.6) 167 at 169 has been cited and relied on. That this case which was cited in the lower court at page 50 line 49, page 51 lines 1-4, was never mentioned in the judgment appealed against. That also referred to the trial court, is the case of *Solanke v. Abed* (1962) 1 SCNLR 371; (1962) 1 All NLR 230 which it is submitted, has not been overruled by the Supreme Court.

In summary, that the appellants suffered miscarriage of justice, according to the learned counsel for the appellants by the refusal or neglect by the trial court, to give the two cases (*supra*), the desirable considerations. The court, is urged, to declare the entire proceedings, a nullity pursuant to section 258(4) of the 1979 Constitution (as amended).

On the part of the respondent, it is conceded that even though there was some delay between the final addresses and the delivery of the judgment, that the appellants, did not suffer any miscarriage of justice as would entitle them to have the said judgment set aside or declared a nullity. That the onus is on the appellants to establish that the said delay, occasioned them a miscarriage of justice.

The provision of section 258(1) of the 1979 Constitution (as

amended), I am aware, is/was designed to save some judgments which have not occasioned any miscarriage of justice to the appellant. It was also meant to alleviate the anxieties of litigants by ensuring the delivery of judgment within a reasonable time. This provision has been judicially dealt with in some decided authorities by the apex court of the land.

There is no doubt that it is mandatory for a High Court and other courts established by the Constitution, to deliver its/their judgment(s) not later than three (3) months from the date of the conclusion of evidence and final addresses. See *Chief Ifezue v. Mbadugha & Anor*, (1984) 5 SC 79; (1984) 1 SCNLR 427 at 456-457; 15 NSCC 314; (1985) L.R.C. (Const.) 141; *Odi & Ors. v. Osafile & Anor*. (1985) 1 NWLR (Pt.1) 17; (1985) 1 SC 37; *Chief Sodipo v. Lemminkainen OY & Anor* (1985) 2 NWLR (Pt.8) 547 at 557; *Awoyale v. Ogunbiyi* (1985) 2 NWLR (Pt.10) 861 at 867 - 868 and *Chukwuogor v. Obuora* (1987) 3 NWLR (Pt.61) 454 at 465; (1987) 7 SCNJ 191.

However, by inserting a new sub-section (4) to section 258 of the Constitution of the Federal Republic of Nigeria, 1979, which provides, thus:

“The decision of a court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of this section unless the court exercising jurisdiction by way of appeal from or review of that decision is satisfied that the party complaining of such compliance has suffered a miscarriage of justice by reason thereof.”

See the cases of *The Registered Trustees & Anor. v. Adeosun & Anor* (1986) 3 NWLR (Pt.30) 561 CA; *Ojokolobo v. Alamu* (1987) 3 NWLR (Pt.61) 377; (1987) 7 SCNJ 17. In other words, *Ifezue's case* (*supra*), no longer applies.

**I wish to state that from the said judgment of the lower court, in my respectful view, the learned trial Judge, painstakingly, reviewed and evaluated the evidence of the parties, the witnesses and the exhibits, and came to a conclusion that the parties - i.e. the 1st appellant and the respondent were not at consensus ad idem in respect of the sale transaction. I agree with the learned counsel for the respondent, that the flowing of the judgment (so to speak),**

eloquently, shows that the learned trial Judge, was in total control of the facts of the case and the evidence before him.

I am satisfied that the learned trial Judge, properly observed the principle enunciated in the case of *Mogaji v. Odofin* (1978) 4 SC 91. He preferred (as he was entitled to do), the evidence of the respondent to that of the appellants after correctly, in my view, identifying the central issue in controversy - i.e. whether there was a completed contract of sale between the 1st appellant and the respondent or steps in negotiations for the sale transaction. I have myself read/perused the record of proceedings, and the judgment of the learned trial Judge particularly from pages 71 to 76 of the records, and with humility and respect, I see nothing whatsoever, to show that he either did not take a proper advantage of having seen or heard the parties and the said witnesses or that he had lost his impression of the trial due to such delay in the delivery of the said judgment.

In respect of the said complaint in the submission of the learned counsel for the appellants as regards the cases of *Obijuru v. Ozims and Solanke v. Abed* (*supra*), I observe that at page 75 lines 30 to 45 and page 76 lines 1 to 28, the learned trial Judge, referred to and distinguished the cases of *Awojugbagbe v. Chinukwe* (1995) 4 NWLR (Pt.390) 379; (1995) 4 SCNJ 162 and *Savannah Bank Nig. Ltd. & Anor. v. Ajilo & Anor.* (1989) 1 NWLR (Pt.97) 305; (1989) 1 SCNJ 169.

Now, in the case of *Dibiamaka & 2 Ors. v. Osakwe & Anor* (1989) 3 NWLR (Pt.107) 101 at 114 -115; (1989) 5 SCNJ 30 at 38, also cited by Okafor, Esq. (SAN) in their additional authorities and relied on and partly reproduced by the learned counsel for the respondent, the Supreme Court - per Oputa, JSC had this to say, inter alia at page 114 of the NWLR:

“And the law is that if inordinate delay between the end of the trial and the writing of the judgment apparently and obviously affected the trial Judge’s *perception, appreciation and evaluation of the evidence so that it can be easily seen that he has lost the impression made on him by the witnesses*, then in such a case, there might be

some fear of a possible miscarriage of justice and there, but only there, will an appellate court interfere. *The emphasis is not on the length of time simpliciter but on the effect it produced in the mind of the trial Judge.*"

B (The italics mine)

The learned and erudite justice, after reproducing the provisions of the said section 258(4) of the 1979 Constitution, at page 115 of the NWLR went on thus:

C "The learned trial Judge was *effectively in charge all the time. He was dominus litis magnus*. His evaluation of the evidence bears the mark of freshness which, dismisses the argument that he has forgotten the impressions made on him by the witnesses. *His findings of fact were all supported by available credible evidence*. Why D should this court now interfere? I see no reason saw for such interference".

(The Italics mine)

The delay in the above case, was nine (9) months.

E The above, in my respectful view, are in all fours with and apply to the instant case leading to this appeal. To be emphasized again, is that the emphasis is not on the length of time simpliciter, but on the effect the delay produced in the mind of the trial Judge.

F Compare the above case with the case of *Emenimaya & Ors. v. Okorji & Ors.* (1987) 3 NWLR (Pt.59) 6; (1987) 5 SC 354 at 359,368-373; 11987) 5 SCNJ 47- where the delay in delivering the judgment was more than one (1) year after the final addresses. It was held that the trial Judge, must have lost the grip over the whole case that he could not properly evaluate the evidence adduced before him. That the inordinate delay, between the hearing of the case and the delivery of the judgment thereof would have blurred the memory of the learned judge and militated against his coming to the right decision.

G H In the recent case of *Otumba Owoyemi v. Prince Adekoya & 2 Ors.* (2003) 18 NWLR (Pt.852) 307; (2003) 12 SCNJ 131 at 151, 153, 156, it was stated that the original provision, was simply a mandatory Constitutional directive to the courts to ensure delivering of judgments within the



time stipulated. That there was no saving grace for non-compliance. That it was the hardship likely to be suffered by either a party from a strict interpretation of that provision, that gave rise to the amendment. It is further stated that an otherwise well-considered judgment in which either party could be the winner, must be set aside even if the judgment was given one (1) day outside three (3) months. That in that case, all that a party who did not like the judgment (as in the instant case), needed to do as an appellant (and as has been done in the instant appeal), was simply, to point out that there was non-compliance with the three (3) months period.

I am wondering or doubt if/whether the appellants and their learned counsel, would have complained of non-compliance with the three (3) months period and for the said judgment to be set aside as a nullity, if they had won in the lower court. In the above case, it was also held that it is not right to say that by the said amendment, “the onus was shifted to the appellant” who relied on non-compliance, to show a miscarriage of justice. That it may be said that a burden has now been placed on him and not “shifted to him” It was finally held that the position now, is that a party should not just go on appeal merely on the ground that the judgment he wants to be set aside, was given outside the three (3) months’ period. That he would have to fight the appeal on all known grounds which can render the judgment unsustainable and not merely on the assessment of facts.

That an appellant with good grounds of appeal, may have no need at all to canvass a ground on non-compliance with the three months period, except for the purpose of having the Judge (or Justices) disciplined by drawing attention of the breach to the court hearing the appeal in view of sub-section (6) of section 294 of the 1999 Constitution (formerly sub-section (5) of section 258 of the 1979 Constitution).

Before I am done with this issue, in the case of *Chief Egbo & 16 Ors v. Chief Agbara & 4 Ors.* (1997) 1 SCNJ. 91, (1997) 1 NWLR (Pt. 481) 293, 293 at 315 also cited and relied on by both learned counsel for the parties (and it is a case that took seven (7) years to conclude and although the case did not relate to or border on delay in delivering judgment after final addresses as such, but it is the pronouncement of what constitutes delay that would amount to a miscarriage of Justice) and as

rightly submitted by the learned counsel for the respondent it is quite relevant and I would add, very instructive.

The Supreme Court - per Iguh, J.S.C. at page 109 of the SCNJ, report and page 314 of the NWLR stated *inter alia*, as follows:-

B "...Where there has been an inordinate delay between the commencement of the taking of evidence and the judgment in the suit, an appellate court may, in an appropriate case, interfere with and set aside any judgment given after such a delay. Such appropriate cases may include proceedings in which from their peculiar circumstances, the  
C appellate court is satisfied that the trial judge had lost his impressions of the trial or much of the advantage which he might otherwise be supposed to have derived from seeing and hearing the witnesses and assessing their credibility. See *Ekeri and Ors. v. Edo Kimisede and Others* (1976) 9 and  
D 10 SC 61 and *Awobiyi and Sons v. Igbalaiye Brothers* (1965) 1 All NLR 163 at 166. *Chief Yakubu Kakarah v. Chief Okere Imonikhe* (1974) 4 SC 151, *Akinmolarinle and Others v. Abigail Yeyebinu and Another* (1975) 1 NMLR 45 and *Chief Justus Uduedo Akpor v. Odhogu Iguoriguo and  
E Others* (1978) 2 SC 115."

(*Italics mine*)

The learned Jurist went on at page 315 thus:

F "Learned counsel for the appellants in the present case has submitted that once inordinate delay in the determination of a suit is established, that must *ipso facto* nullify the proceedings. He argued that what matters is whether the delay has been established and that once this is done, the proceedings must be nullified and an order of retrial made.

G "With profound respect, I cannot accept that once delay is established, an appeal becomes liable to be allowed and an order of retrial made. No doubt, undue delay and/or long intervals between the reception of the evidence of witnesses in the proceedings and the delivery of judgment there can *ipso facto* raise before an appellate court a strong  
H presumption that the trial court could not have made use of its advantage of seeing and observing the demeanour of the witnesses who testified before it. The matter, however, does not go any higher than that. It must be pointed out that the said presumption that attaches to proof of inordinate

delay is neither a presumption of law nor is it irrebuttable. In an appropriate case, the presumption may be rebutted in which case the delay complained of would not have occasioned any miscarriage of justice and must consequently be regarded as inconsequential.” At page 110 of the SCNJ report, and page 316 of the NWLR, his Lordship, held inter alia, as follows: B

“...It therefore seems to me that delay per se is not sufficient reason for the interference with the judgment of a trial court. For the complaint to succeed, it has to be further established that the delay occasioned a miscarriage of justice *in that the trial Judge did not take a proper advantage of having seen or heard the witnesses testify or that he had lost his impression of the trial due to such inordinate delay.* “ C

*(italics mine)*

His Lordship referred to and reproduced the pronouncement of Idigbe, J.S.C. in the case of Chief Justus Udoedo Akpor v. Iguoriguo & others D (*supra*) and maintained the above holding/view.

**As his Lordship did in the case of Chief Egbo & Ors. v. Chief Agbara & Ors. at pages 110 - 111 of the SCNJ, report, and as I said earlier in this judgment, from the records, I can find nothing whatsoever, to show that the learned trial Judge, had at any point in time in his said judgment, lost control of the trial or that he had not taken a proper advantage of his having seen or heard the witnesses that testified before him.** E

**I therefore, agree with the learned counsel for the respondent, that all the submissions of the learned counsel for the appellants in respect of this issue, are, with respect, completely misconceived. Issue No. 1 of the appellants together with ground (1) one of the grounds of appeal fail. They are accordingly dismissed** F G

But compare with the recent decision/case of *Alhaji Akanbi v. Mallam Salawu Anor.* (2003) 13 NWLR (Pt.838) 637; (2003) 6 SCNJ 246 at 254 - Per Uwaifo JSC, where it is/was held that such a ground, is not ipso facto incompetent. That it normally, raises a ground of mixed law and fact. But that particulars, must be adequate in order to show the real complaint in the ground. Some decided cases were/ are cited/referred to therein. H

In effect, there are conflicting decisions of the apex court in respect of this issue/point. However, since it is the latest, this court is bound by it or it may decide to choose which one to follow having regard to the circumstances. I will in the alternative, in the course of this judgment, refer  
B to and deal with the said ground.

Issue No. 2 of the appellants and issue No. 3 of the respondent (distilled from ground 6 of the grounds of appeal)

It is submitted on behalf of the appellant, that the task of obtaining  
C the Governor's consent in respect of a statutory right of occupancy, is that of the holder. Section 22 of the Land Use Decree, 1978 is referred to and reproduced as follows:

*"It shall not be lawful for the holder of a statutory right of occupancy granted by the Military Governor to alienate his right of  
D occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise howsoever without the consent of the Military Governor first had and obtained."*

It is therefore, submitted that common sense dictates that a non-  
E holder of statutory right of occupancy, cannot transact or purport to exercise any rights or privileges not conferred by law.

The learned counsel for the appellants submitted that though the provisions of the law, imposes a 'duty on a holder of statutory right of  
F occupancy, to obtain the Governor's consent before dealing howsoever therein, that the law cannot and should not be used to perpetrate wrongful act so as to allege as against the appellants, that the requirement of the law, was not complied with and the contract reached by the parties, is illegal, null and void.

G It is further submitted that the kernel of injustice sought to be perpetrated in Solanke. Abed (supra) which the Supreme Court resisted. That the respondent, after benefiting substantially, from the agreement by instantly collecting the first appellant's N600,000.00 (six hundred thou-  
H sand naira) and utilizing same immediately, suddenly somersaulted and sought to rely on the said section 22 of the Land Use Decree, 1978 to profit from his wrong doing in neglecting or refusing to obtain the Governor's consent. Reliance is placed on the case of *Adedeji v. National Bank of*

*Nigeria Ltd* (1989) 1 NWLR (Pt. 96) 212 at 215 ratio 9 CA, which is reproduced thus:

“A transaction will not be declared null and void for failure to obtain approval at the instance of the party, be he the plaintiff or defendant, whose responsibility it is to seek obtain the approval (*Solanke v. Abed* (1962) 1 All NLR 230 (followed). It follows therefore ad) that the Appellant herein cannot rely upon and benefit from his own wrongful act (in not obtaining the required consent to the Mortgage Deed) so as to allege that the Deed of Mortgage was null and void and unenforceable under Section 22 of the Land Use Act. That cannot reasonably be supposed to have been the intention of those that promulgated the Act.”

It is finally submitted that the issue for determination at the trial court, were (sic) not confined to the narrow interpretation of section 22 of the Land Use Decree, 1978 as was the case in *Savannah Bank of Nigeria Ltd. v. Ajilo* (1989) 1 NWLR (Pt. 97) 305, (it is also reported in (1989) 1 SCNJ. 169). That on the contrary, all the equities, were canvassed especially *Solanke v. Abed* (supra).

On the part of the respondent, lengthy submissions have been made by his learned counsel in their brief. In summary however, it is submitted that there was no error of law committed by the learned trial Judge with regard to whose responsibility it was, to obtain the requisite consent. Mr. Okafor (SAN), has cited/referred to several other decided authorities in their additional list of authorities in respect of this issue.

**The big question is, this issue really or actually relevant for determination, in view of the finding of the learned trial Judge, that there was no concluded contract of sale of the property the subject-matter of the suit between the 1st appellant the respondent? I or one may ask.**

As rightly stated by the learned counsel for the respondent, that the respondent in paragraph 21 of his statement of claim at page of the records, pleaded as follows:

“There was no written agreement entered into between the plaintiff and the 1st defendant *and no consent of Governor of Adamawa State was obtained as the parties had reached no agreement*

at all.”

*(Italics mine)*

In his evidence in-chief, the respondent testified, inter alia, as follows:

B “It was on the 28/1/94 that I received the cheque. I received exhibit  
1 on 4/2/94. Exhibit 1 is dated 28/1/ 94. I read exih. 1 in the presence of  
the 2nd defendant. I was surprised at the content because the issue of price  
which was discussed was not N650,000.00 as claimed in the letter,  
C moreover the stringent conditions which were up to 9 were not acceptable  
to me. When I read the letter to the hearing of the 2nd defendant, he said  
he was not literate. I read it out to him in Hausa. After & had translated the  
contents to him, he started apologizing to me saying that the 1st defendant  
D said he offered N800,000.00 to me because he saw the property at night  
and after seeing it in day time he now offered N650,000.00. He said he was  
sorry the 1st defendant did not convey this message in his exhibit 1. I made  
it clear to him that my house was not for N650,000.00. I requested him to  
return my title documents which I had earlier passed to him (i.e. the 2nd  
E defendant) so that he could come and collect the money deposited. I had  
never even till now discussed the house buying and price with the 1st  
defendant, it is not true that I, the 1st and 2nd to defendants ever sat down  
to discuss the price of the property as claimed by the 1st and 2nd  
F defendants.”

*(Italics mine)*

See page 25 lines 32 to 46 and page 26 lines 1 to 8 of the records.

**The learned trial Judge, at page 72 lines 9 to 45 and page 73  
lines 1 to 45, made far reaching findings of fact. For the avoidance  
G of doubt, I proceed to reproduce the relevant/material portions.**

**“As long as a necessary term of an agreement or a contract  
like the one under consideration has not been agreed to, the matter  
rests in negotiation and there is no concluded contract.**

H An agreement for the sale of land like a contract according to the  
general principles of Laws of Contract *will not be binding on the parties  
until their minds are ad idem upon the matters which are considered  
essential elements of the contract e.g. price to be paid.*

I have carefully read the exhs. (1-4) tendered in these proceedings by the parties and considered the totality of evidence tendered but alas *I failed to see in them where the parties to the bargain arrived at a consensus ad idem as to the sale price of the property in controversy*. I have had cause therefore to have recourse to my rules of evidence which I had examined B and scrutinized painstakingly *but must confess that I did not succeed in finding that there was a certain sum agreed as the sale price between the parties. In sum I must hold that there is no concluded contract in this case.*"

He went on and on and in the end, he concluded as follows: C

**"Having found that there was no agreed certain sum, representing the price of the property, between the contracting parties, I hold that the transaction between the parties did not result into a valid contract. I find and hold that there was no agreement between D the parties as regards the selling price of the property, the subject of the suit**

**It follows therefore that there is no contract for sale of land (landed property) (House) capable of satisfying the provisions of E section 4 of the statute of frauds of 1677.**

**In a word, I am satisfied that the transaction relied upon *were nothing but steps in negotiation between the parties. There was no concluded contract*".**

*(Italics mine)* F

**I have gone this far, in order to put this issue beyond any controversy, that in view of these findings of fact, the question or issue of obtaining Governor's consent, did not arise and was therefore, of no moment. Going into it, with respect, amounted to an academic exercise and an exercise in futility.** G

**However, the learned trial Judge, in his wisdom, dealt with the issue and stated that it was common ground that consent was not obtained by the 1st appellant. He gave his reasons and also made H crucial findings of fact at pages 75 and 76 of the records.**

**Having held that the issue of Governor's consent in the circumstances of the evidence before the trial court, was of no**

**consequence and was not relevant to the matter in issue - i.e whether there was a completed, valid and binding contract between the parties - particularly the 1st appellant and the respondent, I hold that this issue is otiose and therefore, discountenanced by me. The result is that ground 6 and the issue distilled from it fail and they are accordingly dismissed by me.** I also hold that the cases cited and relied on by Okafor, Esq. (SAN) in respect of this issue are of no moment. So, I discountenance them.

*Issues Nos (iii)/3 and iv/4 of the appellants and issues Nos.2 and 4 of the respondent (distilled from grounds 2, 4, 8 and 9 of the grounds of appeal).*

At the expense of repetition, the central/main issue before the learned trial Judge faced with the conflicting testimonies of the appellants and the respondent, was whether there was a completed valid contract between the 1st appellant and the respondent. In other words, whether the two persons were at consensus ad idem in respect of the sale of the property of the respondent to the 1st appellant at an agreed purchase price.

As stated hereinabove, the learned trial Judge found as a fact and held that there was no such consensus ad idem between them. A reading of the pleadings and the evidence of the parties, reveal or show the following facts:

(a) While the respondent pleaded and gave evidence as to the reason or circumstances which persuaded him to handover his title documents to the 2nd appellant at his request, the 2nd appellant on the other hand, pleaded and testified that the respondent handed over the said title deeds to him, only after he the respondent, had received the money or cheque of N600,000.00 (six mall hundred thousand naira) from him and had cashed the same. As rightly pointed out by the learned counsel to the respondent, under cross-examination at pages 42 lines 23-35 of the records, he testified that:

“It is true that plaintiff did not received (sic) art) kobo from the 1st defendant before handing over the certificate of occupancy.”

(b) Both the appellants and D.W.3 mentioned at various stages of their respective evidence, about the respondent informing the 2nd appel-



lant of his wanting N800,000.00 (Eight hundred thousand naira) as the price of his property. At page 34 lines 4 and 5 of the records, the 1st appellant as D.W.1 swore as follows:

“I asked him (i.e. the 2nd appellant) for the selling price. He (the 2nd appellant), said the owner wanted N800,000.00.”

B

At his guest house, he swore at page 34 lines 21 to 25 thus:

“After a week the 2nd defendant and the plaintiff came to my guest house in Demsawo Jimeta. The plaintiff said he would like me to increase the offer. I told him I was not ready to increase the offer by a kobo.” The 2nd appellant as the D.W.2 at page 39 lines 13 to 18, testified as follows:

C

“I reported the amount offered to the plaintiff. He (the plaintiff/respondent) asked me to go back to the 1st defendant and persuade him to increase his offer. I refused knowing that the 1st defendant will not go back to his words.”

D

At times 26 to 29, he stated:

“The plaintiff asked the 1st defendant to please add some more money to the offer. 1st defendant told the plaintiff whether the 2nd defendant did not tell him that that was his last offer.”

E

At page 41 lines 4 to 8, he testified in-chief thus:

“.. Later, I saw that things were going zig - zag I had to go to one counsel called Jerry Dzarma. I told him that I would like him to document the sale transaction between the plaintiff, 1st defendant and myself and prepare a sale agreement.”

F

It is noted by me and agreed by the parties, that it was the respondent, who reported the matter to the police and to the 1st appellant's father.

At lines 25 to 31, the following appear:

G

“I asked the plaintiff why he reported the matter to the police; was it not him who sold the house to the 1<sup>st</sup> defendant? He said he sold the house to the 1st defendant at the rate of N800,000.00 and the 1st defendant has not balanced him the whole sum. He (meaning the 1st appellant) therefore has no right to start renovating because the sale is not completed.”

*(Italics by me)*

I note that the 2nd defendant who opted not to swear by the Holy

Bible, but chose (as he was free/entitled to do) to affirm, at lines 40 stated:

“.. .I swear in the names of God...”

Under cross-examination at page 42 lines 40 and 41, he told the court: ‘

“Plaintiff told me he wanted N800,000.00 at the beginning....”

B At page 43 lines 22 to 26 still under cross-examination, he stated: “

*“Because I notice (sic) that the plaintiff was dragging his feet I decided to consult a counsel to draw up an agreement to strengthen things.*

C *I know that it is only when the sale has taken place successfully that I can claim my commission.”*

*(Italics mine)*

Lastly, at page 44 lines 11 and 12, he testified thus:

D “The plaintiff and the 1st defendant did not meet face to face after the meeting at the guest house.”

Now, although the 2nd appellant testified that it was he himself who personally engaged the services of the legal practitioner - Jerry the DW3 swore on the Holy Bible under cross-examination at page 46 lines 18 to 20

E as follows:-

“The 1st defendant gave me the money (fees) in my office. The 1st defendant was the one who asked me to draft the agreement. ...”

F At pages 46 lines 6 to 10, he testified as follows as to what happened at the police station.

“Plaintiff narrated before the police that he offered his property for sale for (One Million Naira). Between him, the defendants (sic) it was beaten down to N800,000.00 out of the sum he was paid N600,000 remaining N200,000.”

G It can be seen, that throughout the transaction, the defence witnesses, clearly, demonstrated that the respondent never shifted his stand in respect of the price of N800,000.00 he fixed as the sale price. I note that the DW3, had under cross-examination, testified that the H respondent refused to sign the agreement. I note that there is evidence by the 2nd appellant and his son DW4, that even up to the time the trial went on, the sum of N50,000.00 (fifty thousand naira), which is part of the sum of N650,000.00, they and the 1st appellant claim to be the agreed purchase

price, is still in the custody of the 2nd appellant and his said son. See page 36 lines 27 to 37 of the records. Why the 1st appellant swore that the 2nd appellant told him that he did not pay to the respondent, was because the respondent, did not comply with the conditions in exh. 1, the 2nd appellant testified that it was the respondent, who asked him to keep it in order to get his alleged commission. B

I will pause here to touch briefly, on agency which is not really part of the issue or specifically, canvassed under issue iv/4 by the appellants. But raised by the parties in their respective brief, but in order to test the credibility of the 2nd appellant in respect of his counter-claim, while the 2nd appellant assert that he was appointed by the respondent as his agent, here is the evidence of the 2nd appellant and D.W.3 in this regard. C

At page 42 lines 37 to 41, under cross-examination, the 2nd appellant stated: D

*“I said I merely acted as a witness to the parties. They sold and bought by themselves. I said that I kept pressuring (sic) (pressurizing) the 1st defendant to increase the offer.*

*Plaintiff told me he wanted N800,000.00 at the beginning.”* E

At page 46 line 45 and page 47 lines 1 and 2, DW3 swore as follows:

*“...I left the copy of the sale agreement with the 2nd defendant. The 2nd defendant said he was agent for both plaintiff and 1st defendant.* F  
“

(Italics mine)

The respondent, even in his evidence at page 30 lines 5 to 10 of the records, denied the 2nd appellant being his agent.

**So, with all these evidence in court, the finding of the learned trial Judge that there is/was no credible evidence to show that there was a completed agreement of sale between the 1st appellant and the respondent - i.e. that there was an offer and an acceptance as to the purchase price between them, cannot be faulted. I myself, see no such consensus ad idem between them. More importantly, there is section 4 of the statute of frauds 1677 also referred to by the learned trial Judge. There is no document or evidence in writing/ memoran-** G  
H

dum signed by the parties in respect of the property which relates to house/land. It provides as follows:

“No contract to which this section applies shall be *enforceable by action unless the contract or some memorandum or note in respect thereof is in writing and is signed by the party to be charged therewith or by some other person lawfully authorized by him.*”

*(Italics by me)*

There is the evidence of the DW3 that the respondent refused to sign the sale agreement he prepared at the instance of the 1st appellant.

I will pause here to observe that Mr. G. Okafor, Esq. (SAN) under issue one in their statute of fraud, has submitted that the issue of fraud, was abandoned by the plaintiff/respondent but was taken up by the trial court. He cited and relied on cases Nos. 6, 7, 8 and 9 in their additional list of authorities - i.e. *Ajero & Anor. v. Ugorji & Ors.* (1999) 10 NWLR (Pt.621) 1 (it is also reported in (1999) 7 SCNJ 40; *Nwokoro & Ors. v. Onuma & Anor* (1990) 3 NWLR (Pt.136) 22 at 33 (it is or vice versa and reported also in (1990) 5 SCNJ 93); *Dr. Oshodi & Ors. v. Eyifunmi* (spelt as Eyifumi) (2000) 13 NWLR (Pt.684) 298 at 352 (it is also reported in (2000) 7 SCNJ 295) and *Owhonda v. Ekpechi* (2003) 17 NWLR (Pt.849) 326 at 355 - 356 (it is also reported in (2003) 9 SCNJ 1).

Firstly, in the case of *Lt. Col. Mrs. Finnih v. Imade* (1992) 1 NWLR (Pt.219) 511 at 537; (1992) 1 SCNJ 87 at 107 -108 - Karibi-Whyte, J.S.C. had this to say:

“It is strange to say that the Judge cannot apply principles not referred to by counsel. The day such a principle of law is accepted, the true demise of the independence of the Judge in deciding cases before him is assured. The oath of the judge is to do justice according to law and to all manner of people without fear or favour, affection or ill-will.”

See also *Inua v. Nta Asuquo* (1961) 1 ANLR 576 - per Idigbe, J.S.C.

In other words, a Judge can refer to and rely on a principle or

statement of law, even if not referred to by counsel or even abandoned by a counsel so long as the justice of the case demands it.

Secondly, even in *Owhonda v. Ekpechi* case (supra), it was held at page 20 of the SCNJ report, that it is not every mistake or error in a judgment that will result in the appeal being allowed (and I will add dismissed). It is only when the error, is substantial in that it had occasioned a miscarriage of justice that an appellate court, is bound to interfere.

In the instant case, the statute of frauds was not only germane to the case, but very relevant and applicable. It was in my respectful view, rightly and properly referred to and relied on by the learned trial Judge.

When is a contract said to be validly completed? One or I may ask. It is now firmly established that for a contract to exist, there must be an offer, an unqualified acceptance of that offer and of course, a legal consideration. There must be a mutuality of purpose and an intention, the two contracting parties, must agree. In other words, there must be an offer and acceptance. See *Ajayi-Obe v. Executive Secretary* (1975) 3 SC 1 at 6-7; *Alfotrin Ltd. (the owners of M.V. Fotini) v. The A-G., Federation & Anor.* (1996) 9 NWLR (Pt.475) 634 at 638; (1996) 12 SCNJ 236 at 256 cited, relied upon and partly reproduced by the learned counsel for the respondent; *Tsokwa Motors (Nig.) Ltd. v. Union Bank of Nig. Ltd.* (1996) 9 NWLR (Pt.471) 129 at 145; (1996) 9 - 10 SCNJ 294 (both per Iguh, JSC) and recently *Neka B.B.B. Manufacturing Co. Ltd. v. A.C.B. Ltd.* (2004) 2 NWLR (Pt.858) 521; (2004) 1 SCNJ 193 at 215 - per Onu, C. See Cheshire & Fifoot Law of Contract 9th Edit. Pages 27 and 31.

An "offer" it is also settled, is an expression of readiness to contract on the terms specified by the offeror which if accepted by the offeree, will give rise to a binding contract. In other words, it is by acceptance that the offer is converted into a contract. See *United Bank For Africa Ltd. v. Tejumola & Sons Ltd.* (1988) 2 NWLR (Pt.79) 662; (1988) 5 SCNJ 173 and recently *Sparkling Breweries Ltd. & 5 Ors.*

*v. Union Bank of Nig. Ltd.* (2001) 15 NWLR (Pt.737) 539; (2001) 7 SCNJ 321 at 342; - per Achike, JSC. See also *Adebanjo v. Brown* (1990) 3 NWLR (Pt. 141) 661; (1990) 6 SCNJ 1 and *Union Bank of Nig. Ltd. v. Sax (Nig) Ltd. & 2 Ors.* (1994) 8 NWLR (Pt.361) 150; (1994) 9 SCNJ 1 B at 18 - per Adio, JSC.

**It is stated that when there is mutual ascent, the parties are said to be ad idem. See *Norwich Union Fire Insurance Society v. Price* (1943) A.C. 4 55 at 4 63. The test of mutuality, is said to be objective.**

**Thus, a counter - offer by the offeree, operates as a rejection of the original offer, thus terminating it. Therefore, for the purpose of ascertaining the intention of the parties, regard must be had to the terms of the contract, the conduct of the parties and the circumstances of the case. This is why, it is now also settled, that where there is a counter-offer or qualified acceptance, it does not give rise to a binding contract between the parties. See *Lowed v. Union Bank of Nigeria Plc.* (1995) 2 NWLR (Pt.378) 407; (1995) 2 SCNJ 132 at 134, 143 cited and relied on by the learned counsel for the respondent.**

Exh. 2 - i.e. the letter of the respondent to the 1st appellant, is quite clear and unambiguous. It reads inter alia, as follows:

“To my utter embarrassment and contrary to Baba Yohanna’s (i.e. the 2nd appellant) representations that the balance of N200,000 will be paid by Thursday 3/27 1994, Baba Yohanna came with your letter dated 28/1/94 on 4/2/94 in an attempt to renege on our original agreement. He did apologize when I drew his attention to price differentials and his excuse was that you visited the house at night when you offered N800,000.00 and that having now seen it in the day time you can only pay N650,000.00. I immediately requested him to bring my documents and collect the money deposited... Having said that, I wish to confirm my earlier representations to Baba Yohanna on 4/2/1994 and my position expressed at the Karewa Police Station, on Thursday 21/4/94 in your presence, which to date still represents my position; and for the avoidance of doubt I never intended and do not agree to sell my property i for N650,000.00. I cannot and will not fulfill the conditions listed in your letter of 28/1/1994 as I indicated to Baba Yohanna and yourself.

Therefore, your money (six hundred thousand naira) in cash or cheque is readily available for collection when the title documents of my house are returned to me.”

(italics mine)

It is noted by me, that the 1st appellant, never denied the receipt of this letter. Remarkably also, he never replied to it. The letter was copied to the 2nd appellant and the DPO Karewa division.

**As to the submission by Mr. Okafor (SAN), payment of purchase price and possession which he says are evidence of equitable interest and citing and relying on cases Nos. 10 and 11 of their additional list of authorities - i.e. *Obijuru v. Ozims* (1985) 2 NWLR (Pt. 6) 167 and *Thompson v. Arowolo* (2003) 7 NWLR (Pt. 818) 163 at 210, I wish to say once again, that this issue, with respect, is irrelevant, again, having regard to the finding of the learned trial Judge, that there is/was no valid completed contract of sale between the 1st appellant and the respondent.**

However, the respondent said that the N600,000.00 (six hundred thousand naira), was a deposit. There is settled law as regards the consequence or effect of making a deposit and a part-payment in a contract of sale. Perhaps, see the cases of *Howe v. Smith* (1884) 27 Ch.D. 89; *May son v. Clouet* (1924) AC 980 at 985 and *Oloto v. Administrator-General & Ors.* (1946)12 WACA 76.

I have already noted in this judgment, the circumstances of the 1st appellant being in possession. He was a trespasser and cannot acquire a better title than the respondent over the said property. I therefore, also discountenance the cases of Nos. 10, 20, 21 to 27, 27(a), 30 and 31 in their additional list of authorities cited and relied on by Mr. Okafor, (SAN) in respect of their issue iii/3 of their additional list of authorities, as with respect, they are irrelevant.

Let me also dismiss the contention that the respondent did not react or write exh. 2 until April, 1994 and since he kept the money paid to him in the bank, that he cannot benefit from his own wrong. There is evidence that the 2nd appellant had informed him that the balance of N200,000.00 (two hundred thousand naira) would be paid to him by Thursday 3rd

February, 1994 but this was not done. The respondent reported the matter or complained to the 1st appellant's father who could not persuade the 1st appellant to pay up. There is also the evidence that he was obliged to report the matter to the police. See his evidence at page 27 lines 29 to 35 of the B records.

I note that the DPO from the records, had some good relationship with the 1st appellant, hence he knew the telephone number of the 1st appellant and therefore, phoned to persuade him to come to the police station. He even encouraged him according to the 1st appellant, to go ahead C in the renovation of the house and that if the respondent was still aggrieved, he could go to court. See the evidence of the 1st appellant as the D.W.I at page 35 lines 23 to 40 of the records. The respondent, in paragraph 23 of his statement of claim and in his evidence in-chief at page 29 lines 8 and D 9, claimed for a declaration and offered even to deposit the said N600,000.00 (six hundred thousand naira) in court.

I am satisfied that there is/was abundant evidence from the records, from which the learned trial Judge, came to the right conclusion that the E 1st appellant and the respondent, were not in consensus ad idem and therefore, that there was no valid contract between them.

**The attitude of an appellate court and when it can interfere or not interfere with the findings of fact by a trial court, has been stated and restated in a string of decided authorities. See *Ehimua v. National Oil & Chemical Marketing Co. Ltd.* (1995) 5 SCNJ 88 at 95, 97; (1995) 5 NWLR (Pt.398) 642** citing several authorities therein; Insurance Brokers of Nig. v. *Atlantic Textiles Manufacturing Co. Ltd.* (1996) 9-10 SCNJ. 171 at 184 (it is also reported in (1996) 42 LRCN 1523 G and (1996) 8 NWLR (Pt. 466) 316 cited not quite properly, by the learned counsel for the respondent and recently, *Alhaji Mainagge v. Alhaji Gwamma* (2004) 14 NWLR (Pt.893) 323 at 338; (2004) 7 SCNJ 361 at 372 - per Akintan, JSC.

H Afterwards, and this is also settled, there is a presumption that the Judgment of a trial court, is correct and therefore, the burden of proof, is always on the appellant to establish that the judgment appealed against, is wrong. See *Onasanya v. Sopitan* (1975)



**(1) NMLR 30 and *Folorunso v. Adeyemi* (1975) 1 NMLR (Pt.1) 128; (1975) 2 WSCA 196 at 202 and many others. The appellants have woefully failed to prove to the satisfaction of this court, that the said judgment of the trial court is wrong. I so hold.**

I observe that in the course of argument in respect of the appellants' issue No. iii/3, learned counsel for the appellants, "squeezed in" so to speak, or included the award of general damages of N200,000.00 (two hundred thousand naira) by the learned trial Judge. Since the claim for damages for trespass, was one of the reliefs - i.e. relief (e) in paragraph 23 of the statement of claim, I will deal with it. Moreso, as the issue is covered by issue No. 4 of the respondent.

The learned Counsel for the appellant complains, that the award, was excessive (the respondent claimed N400.000.00 - four hundred thousand naira) and cited and relied on the case of *Imah v. Okogbe* (1993) 9 NWLR (Pt.316) 159; (1993) 12 SCNJ 57 at 76; (it is also reported in (1993) 9 NWLR (Pt.316) 159) - per Adio, JSC.

Now, apart from the fact that an award of general damages by a trial court, is, discretionary, and such discretion, must be exercised judicially and judiciously, the conduct of the appellants - especially, that of the 1st appellant, must also be considered in all the circumstance of this case. The pleading of the respondent in paragraphs 19 and 20 of his statement of claim, his evidence in court, and the paverment in paragraph 14 of the 1st appellant's statement of defence, are all pertinent.

Even if it amounts to "flogging" the point or a repetition, as Stated by me hereinabove in this judgment, in spite of exh.2 - which the 1st appellant received and did not reply to it, he intensified, on his own admission, by taking possession of the property by force of arms or self-help. He did not deny the pleading and evidence of the respondent, that he the respondent, bought big padlocks and other locking devices in order to secure the property/premises, but the 1st appellant, broke the same entered forcefully and caused extensive damage to the property.

**Although the respondent, did not make the claim as exemplary damages which are awarded usually, whenever the defendant's conduct, is adjudged by the court, as outrageous, to merit punish-**

ment” as where it discloses malice, fraud, cruelly, insolence. Flagrant disregard of the law and like - See *Eliochin (Nig.) Ltd. & Ors v Mbadiwe* (1986) 1 NWLR (Pt. 14) 47; (1986) ANLR 1, if it had been claimed, in my respectful view, it was made out in the instance case.

B But as I have said, it was not claimed I will however, not disturb the exercise of that discretion in awarding half of the amount claimed by the respondent. As at the time the judgment was delivered, the 1st appellant oblivious of the action in court, was occupying and I believe, up till now, he is occupying the property in spite of the  
C subsisting judgment which has not yet been set aside by this court.

The learned trial Judge had this to say at page 76 lines 29 to 39 of the records;

‘it is beyond argument that any person who without the  
D consent of the owner of a house or building *forcibly enters the same commits a trespass* .

It follows therefore that the forcible entry of a properly in the exercise of a non-existent right under a *non-existent contract of sale*  
E is liable for damages for forcible entry.

In the face of my finding on this score supra, it is my view that the 1st and 2nd defendant (sic) have clearly exposed themselves to an action in trespass for damages for *forcible entry for which* they will  
F be liable. (Italics mine)

I agree.

In respect of award of general damages by a trial court, it has been stated and restated in a long line of decided authorities, as to when an appellate court can interfere with such an award. See at  
G least, the case of *Ndinwa v. Igbinedon* (2001) 5 NWLR (Pt. 705) 140 CA. I maintain that in the circumstances of this case, this court will not interfere with the said award.

Quickly, in respect of the counter-claim, it is now settled that  
H it is, in substance, a cross-action and not merely a defence to the plaintiff’s claim. It is an independent action and not part of the original action though for convenience, the two are tied together. See *Oyegbola v. Esso West Africa* (1966) 2 SCNLR 35; (1966) I All NLR 170;

*Obala of Otan-Aiyegbaju & 5 Ors.v. Chief Adesina & 2 Ors.* (1999) 2 SCNJ 19;(1999) 2 NWLR (Pt.590) 163 and *Orianwo & 4 Ors. v. Okene & 2 Ors.* (2002) 14 NWLR (Pt.786) 1 56; (2002) 6 SCNJ 249 at 276

Surely, and this is settled, a defendant in a counter-claim, assumes the position of a plaintiff and the plaintiff in the original action, assumes the position of a defendant.( See *Orabade v. Chief Onitiju* (1962) 1 SCNLR 70; (1962) All NLR 32 and recently. *Air Via Ltd. v. Oriental Airlines Ltd.* (2004) 9 NWLR (Pt.878) 298', (2004) 4 SCNJ 208 C&. 222

**The learned trial Judge, having in my respectful view, come to the conclusion that there was no valid contract existing between the 1st appellant and the respondent, certainly, the appellant, cannot and have not, any propriety right in the said property either legal or equitable as rightly submitted by the learned counsel for the respondent. The 1st appellant's trespass to the house, became a continuing trespass, especially, after the respondent in exh. 2. made it abundantly clear, that he has never sold his property to him. So, there is no way, he could have succeeded in his counter-claim which, in my humble view, was rightly dismissed. Moreso, by virtue or in view of the provisions of section 4 of the Statute of Fraud 1677 aforementioned.**

**As for the counter-claim of the 2nd appellant, to put it mildly, he was the confusionist or perhaps a crook so to say. He pretended to be an illiterate. On his own admission as already stated by me, he was never an agent to the respondent. Assuming that he was, he could not have earned any commission in a transaction or contract that has/had been held to be inconclusive. He said he was a witness in the transaction and that the parties sold and bought by themselves. See page 42 lines 33 and 38 of the records. The learned trial Judge, rightly in my view, properly and rightly indicted him and dismissed his counter-claim. Ground 4 of the grounds of appeal, fails and it is accordingly dismissed.**

I note that the cases Nos. 28 to 30 cited and relied on by Mr, Okafor (SAN) in respect of Issue No. 4 in their additional list of authorities, relate to the counter-claim of the 1st appellant and not that of the 2nd appellant.

However, having regard to what I have stated hereinabove, the said cases and submissions with respect, are irrelevant and they are also discountenanced by me.

Therefore, my answer to the said issue (iii)/3 and (iv)/4 of the D appellants and issue Nos. 2 and 4 of the respondents, is in the affirmative. Grounds 2 and 8 as regards the reliefs claimed in paragraph 23(a), (b), (c), (d) and (f) of the statement of claim, and ground 9 of the grounds of appeal, fail and are accordingly dismissed.

C As regards relief (e), since the issue was not canvassed by the appellants in their brief under the above issues, it is deemed to have been abandoned and I accordingly discountenance it and also in consequence, dismiss/strike out the same.

**Finally, it is observed by me, that no issues were raised/**  
D **distilled from grounds 3, 5 and 7 of the grounds of appeal. It is now settled that a ground of appeal in respect of which no issue has been formulated, is deemed to have been abandoned and such must be struck out.** See *Onifade v. Olayiwola* (1990) 7 NWLR (Pt. 161) 130; E (1990) 11 SCNJ 10; *Ndiwe v. Okocha* (1992) 7 NWLR (Pt. 252) 129; (1992) 7 SCNJ 252; *Aromolaran v. Kupoluyi* (1994) 2 NWLR (Pt. 325) 221 and *Ngilari v. Mothercat Ltd.* (1993) 8 NWLR (Pt. 311) 370 just to mention but a few. So also, it is an established practice of the appellate F court that grounds of appeal for which no arguments are advanced either in the brief of argument or in oral argument, are deemed to have been abandoned and will accordingly, be struck out. see *Alhaji Are & Anor. v. Ipaye & Anor.* (1986) 3 NWLR (Pt. 29) 416 at 418 CA; *Chukwuogor v. Obuora* (1987) 3 NWLR (Pt. 61) 454 at 479; (1987) 7 SCNJ 191 and G *Lemboye & 3 Ors. v. Ogunsiu & 2 Ors.* (1990) 6 NWLR (Pt. 155) 210 at 232 CA and many others. **The said grounds are accordingly struck out.**

**In the final result or analysis, I find as a fact and hold that this appeal is unmeritorious. It fails and it is accordingly dismissed. The H said judgment of Gwam, J. delivered on 20th June, 1991 is hereby and accordingly affirmed by me**

Costs follow the event. The respondent is entitled to costs. Costs of N10,000.00 (ten thousand naira) are awarded in his favour payable to

him by the appellants.

### OBADINA JCA

I have been privileged to read in draft the lead judgment of my learned brother, Ogbuagu, JCA, just delivered. I agree with his reasoning and conclusion that there is no merit in the appeal and it should be dismissed.

A sober and careful consideration of the pleadings and evidence of the parties before the trial court clearly shows that there was no valid agreement between the parties in respect of sale of the property in dispute. The parties were not ad-idem in respect of the price of the said property. What the evidence clearly revealed were an offer and a counter-offer. The purported contract was in respect of a sale of land and it was not evidenced in writing. The totality of the evidence before the trial court seems to show that there was no valid contract between the parties in respect of the sale of the property, the subject matter of this appeal. For that reason and the fuller reasons set out in the lead judgment by my learned brother, Ogbuagu, JCA, I too will dismiss the appeal and I hereby dismiss the appeal. I abide by the consequential order as to costs.

### NZEAKOJCA

I have taken time to carefully consider the appeal of the appellant to this court. I hold the view that the appeal is without merit. The reasoning and conclusion of my learned brother Ogbuagu, JCA in his leading judgment accord with mine. The appeal ought to and is hereby dismissed. I also agree with the orders set out in the said leading judgment.

Appeal dismissed

H