

SUPREME COURT OF NIGERIA
17TH FEBRUARY, 2006. SC. 220/2001
CORAM:- S. U. ONU, A. I. KATSINA-ALU, N. TOBI,
M. A. MUKHTAR, M. MOHAMMED, JJSC

| | | |
|------------------------|-------|-----------------------|
| HELP (NIGERIA) LIMITED | | PLAINTIFF/APPELLANT |
| AND | | |
| SILVER ANCHOR | | DEFENDANT/RESPONDENT/ |
| (NIGERIA) LIMITED | | CROSS-APPELLANT |

CONTRACTS - Specific performance - Basis for the grant - It may be refused - In case of severe hardship to defendant (H1)

CONTRACTS - Specific performance - Damages - Where claimed in the alternative - Claim for specific performance is jettisoned (H2)

DAMAGES - Specific performance - Refusal of the decree - Is proper - Where damages will be an adequate compensation (H3)

PLEADINGS - Evidence - Damages - Where no evidence is led - In support of the averments - They will be deemed as abandoned - As pleadings per se cannot constitute evidence (H4)

FACTS

Before the trial High Court, the plaintiff/appellant sued the defendant/respondent claiming inter alia, entitlement to the land in dispute situate at No. 84 Ozumba Mbadiwe Street, Victoria Island, Lagos, and an order for specific performance of the sale agreement between the parties in respect of the said property. Appellant in the alternative claimed the sum of N6 million being special and general damages for breach of contract. And refund of the sum of N320,000.00 being the part payment made for the purchase of the property. Apart from averments made in the pleadings, appellant led no evidence in proof of the N6 million damages it claimed in the alternative. The cheque it gave for the deposit payment of N320,000.00

was returned twice before it was finally cleared. Some meetings called by the parties to review the terms of the contract could not hold. Respondent finally wrote the appellant repudiating the contract, hence the reason for this action.

The trial court dismissed the claim for want of proof but ordered that the sum of N320,000.00 deposited by the appellant be refunded with interest at the rate of 21%. Appellant's appeal to the Court of Appeal was partially successful but this court failed to order specific performance of the contract nor did it award the N6 million damages claimed in the alternative. Still dissatisfied, appellant has further appealed to the Supreme Court.

ISSUE FOR DETERMINATION

"1. Whether in the proper exercise of its discretion, it is right, proper, fair and just for the lower court to refuse a decree of specific performance, in the light of its findings, particularly at pages 221 (line 8) to 224 (lines 1-34) and in view of the evidence on record."

HELD (Unanimously dismissing the appeal per **KATSINA-ALU JSC**)
Specific performance - Basis for the grant

1. The general principle of law is that specific performance is a discretionary remedy. The discretion is judicial discretion and is exercised on well settled principles. The jurisdiction to order specific performance is based on the existence of a valid, enforceable contract. The courts will not decree specific performance if the contract suffers from some defect such as informality, mistake or illegality which makes the contract invalid or unenforceable: See Chitty on Contracts Vol. 1, 26 Ed. P. 1202. Specific performance may also be refused in case of severe hardship to defendant. (p. 756 A)

Specific performance - Damages - Where claimed in the alternative

2. The plaintiff claimed in the alternative a refund of the part payment of N320,000.00 and both courts below ordered the defendant to return the said sum to the plaintiff. The claim for the refund of the part payment in my view, negated the claim for an order of specific performance. By this

singular act the plaintiff in my considered opinion had jettisoned his claim for an order of specific performance. What the plaintiff, in effect, is saying is that if he could not successfully insist on the defendant performing his part of the contract, he would accept the repudiation and ask for damages. I am in agreement with the Court of Appeal that in the circumstances of this case it was not in a position to aid the plaintiff. It was right when it refused to order specific performance. The plaintiffs best bet was to fall back on the common law remedy of damages. (p. 759 A)

Specific performance - Refusal of the decree

3. Now, to the issue of damages. It is a fundamental rule that specific performance will not be decreed where the plaintiff would be compensated by the common law remedy of damages. See *Afrotech Tech. Services (Nigeria) Limited v. Mia & Sons Ltd. & Anor.* (supra). It seems obvious to me that from the plaintiffs amended claim it was aware of this position of the law. This is because it had an alternative claim in damages and the refund of the part payment of the sum of N320,000.00 with interest for the purchase of the parcel of land in question. The refund was ordered by the two lower courts. As regards the other items of the claim for damages, the court was “*unable to award damages or to grant specific performance.*” (p. 759 D)

Damages - Where no evidence is led

4. I must say that I have read through the evidence of the plaintiffs witnesses. It will be seen clearly that none of them gave evidence in proof of the facts pleaded on damages. It must be said that pleadings in themselves cannot constitute evidence. Mere averment without evidence in proof of the facts pleaded is no proof of the facts averred therein when they have not been admitted. If a party to an action fails to or does not lead evidence in support of the averments in his pleading, the averments would be taken as having been abandoned.

For this reason therefore I, too, am unable to award damages.
(p. 760 A)

NOTABLE POINTS OF INTEREST

TOBI JSC

1. Specific performance - Basis for the grant

At common law, the only remedy available for breach of contract is award
 B of damages. As this may not always meet the justice of the case, equity
 comes with its hands of sympathy, fairness and fair play to ameliorate the
 rigidity of the common law, by moving further a distance from the
 common law by granting specific performance in deserving cases. And so
 C the equitable jurisdiction of the court in specific performance is based on
 the inadequacy of the award of damages at common law. Therefore the
 principles of equity will fold their arms and refuse to interfere where the
 award of damages is adequate compensation to the aggrieved party. And
 so, Fry in his book titled, *Specific Performance*, 6th edition, correctly said
 D that the orbit of the equitable remedy of specific performance in respect
 of a contract is not identical with the orbit of the common law remedy for
 damages.

Specific performance, like every other equitable remedy, is discre-
 E tionary. It confers some discretionary power on the court, which must be
 exercised judicially and judiciously. (p. 764 G)

2. Court can only decree enforceable specific performance

F This Court can only decree specific performance for a purpose which can
 be achieved or enforced. It cannot decree specific performance in vain.
 In other words, this Court cannot decree specific performance which
 cannot be achieved or enforced.

G In the circumstances, I am at one with the Court of Appeal that the
 “land has since lost its original character.” With a shopping complex of
 four floors, a specific performance is impossible because in law there is
 nothing to perform specifically. Plot B2 is no more. (pp. 765 H/ 766 G)

H **REPRESENTATION**

Olusina R. Sofola, Esq. for Appellant.

Olayemi Peters, Esq. for Respondent/Cross-Appellant

CASES REFERRED TO

English case of Pated v. Ali (1984) ch. 283

In International Textile Industries (Nigeria) Limited v. Dr. Aderemi & Ors (1999) 8 NWLR (Pt.614) 268

Kalio v. Woluchem (1985) 1 N.W.L.R. (pt.4) 610

B

Adegbite v. Ogunfaolu (1990) 4 NWLR (Pt.146) 578 at 590.

Bioku v. Light Machine (1986) 5 NWLR (Pt.39) 42

Ngwu v. Nnaji (1991) 5 NWLR (Pt.189) 18

Nigerian Land and Seafood Co. Ltd. v. Roadside Engineering Foundry Ltd.

& Anor (1987) 1 NWLR (Pt.48) 191 at 197

C

BOOKS REFERRED TO

Chitty on Contract Vol .1, 26 Ed. p.1202

Fry - Specific Performance 6th Ed

D

Snell's Principles of Equity, 26th Ed. p. 641 & 642, 27 Ed. para 5 p.575

Keeton - Introduction to Equity 6th Ed. p. 237

LEAD JUDGMENT BY KATSINA-ALU JSC

E

This is an appeal by Help (Nigeria) Limited from a judgment of the Court of Appeal given on 12 December 2000.

The appellant company Help (Nigeria) Limited as plaintiff sued the respondent Company Silver Anchor (Nigeria) Limited as the defendant claiming against it the following reliefs:-

F

“1. A declaration that the plaintiffs are entitled to the assignment of the property known as Plot B2 at No. 84 Ozumba Mbadiwe Street, Victoria Island, Lagos and comprised in a certificate of occupancy registered as No. 19 at page 19 in Volume 1981C at the Lands Registry, Ikeja.

G

2. An order for specific performance of the sale Agreement dated July 22, 1988 and order directing the defendants to execute a Deed of Assignment in plaintiffs' favour and to take all necessary steps by obtaining the consent of the Military Governor of Lagos State to the assignment of the said property known as Plot B2 at; No. 84 Ozumba Mbadiwe Street, Victoria Island, Lagos and registered as No. 19 at page

H

19 in Volume 1981C at the Lands Registry, Ikeja.

3. A declaration that the purported termination of the contract of sale of the aforesaid property vide the Defendants' Solicitors letter of 25th November, 1988 by the defendants is wrongful, null, void and of no effect
B whatsoever.

4. A declaration that any purported sale, transfer, assignment or alienation to any person/s is equally null, void and of no effect.

5. A perpetual injunction restraining the defendants, their servants, agents, privies or otherwise from selling, leasing, assigning or dealing or
C alienating the said property to any other persons.

6. The sum of N500.00 for every day of default by the defendants commencing from 25th November, 1988 when the ultimatum given in plaintiffs former Solicitor's letter of 17th November 1988 expired to the
D date of compilation, representing agreed liquidated damages i.e. pre-estimated damages for non-completion of the said contract.

IN THE ALTERNATIVE

7. The sum of N6,000,000.00 being special and general damages
E for breach of contract.

8. The plaintiffs claim the sum of N320,000.00 being the refund of the part payment/deposit made by the plaintiffs for the purchase of the said property, N600,000.00 loss of rent, N5,000,000.00 escalation cost, and
F other refunds as contained in the particulars herein together with interest at the rate of 35% per annum."

The trial court in its judgment held that the plaintiff failed to prove its case and consequently dismissed the plaintiffs claim. The trial court however directed that the sum of N320,000.00 which the plaintiff had paid
G as a deposit be refunded with interest at the rate of 21% per annum from the date of judgment till full liquidation.

On appeal to the Court of Appeal that court found that:

"The conclusion to be arrived at on the evidence is that there was
H indeed a firm agreement between the parties that the defendant would sell and the plaintiff would buy an area of land depicted as B2 on exhibit B1 which said area measured 1924.930 sq. metres. I also hold that it was for this area of land that the Plaintiff made the deposit of N320,000.00. I also

hold that the plaintiff remained willing and ready to conclude the contract by paying the balance of N1.18m until the defendant improperly brought the contract to an end."

The court below then allowed the appeal and set aside the judgment of the trial court. The court below proceeded to order as follows: B

"I order that defendant shall refund to the plaintiff the sum of N320,000.00 deposited for the purchase of the property. The defendant/respondent shall pay interest on the said amount at the rate of 21 % per annum with effect from 18/1/89 when the case was filed to the date of this judgment and thereafter at 6% per annum until the judgment debt is fully liquidated." C

The plaintiff has further appealed to this court against the refusal of the Court of Appeal to make an order of specific performance.

Both parties filed their respective briefs of argument. The plaintiff D on page 2 of its Brief of argument submitted two issues for determination in this appeal. These read:

"1. Whether in the proper exercise of its discretion, it is right, proper, fair and just for the lower court to refuse a decree of specific E performance, in the light of its findings, particularly at pages 221 (line 8) to 224 (lines 1-34) and in view of the evidence on record.

2. Whether the Court of Appeal's refusal to award the N500.00 per day claim for default is justified having regards to the state of evidence on F record.

The defendant adopted the plaintiffs above stated issues for the determination of this court.

I will deal with issue No. 1 first. In its brief of argument the plaintiff G contended in a nutshell that the Court of Appeal was in grave error when it failed to order specific performance after holding that the defendant breached the contract. The plaintiff criticized, at some length, the reasons the Court of Appeal gave for not ordering specific performance.

For its part, the defendant submitted that the plaintiff was not H entitled to an order of specific performance on the main ground that the plaintiff had claimed in the alternative the refund of N320,000.00 with interest as well as damages. It was pointed out that the trial court as well

as the lower court did order the refund of the said sum with interest. The lower court, however, noted that it was not in a position to order damages on the ground that the plaintiff did not lead any evidence in respect of damages.

B The general principle of law is that specific performance is a discretionary remedy. The discretion is judicial discretion and is exercised on well settled principles. The jurisdiction to order specific performance is based on the existence of a valid, enforceable contract. The courts will not decree specific performance if the contract suffers from some defect such as informality, mistake or illegality which makes the contract invalid or unenforceable: See Chitty on Contracts Vol. 1, 26 Ed. P. 1202. Specific performance may also be refused in case of severe hardship to defendant.

D In the English case of Pated v. Ali (1984) ch. 283, specific performance of a contract for the sale of a house was refused after a 4 year delay. In International Textile Industries (Nigeria) Limited v. Dr. Aderemi & Ors (1999)8 NWLR (Pt.614) 268 this court held that:

E *“To sue for specific performance is to assume that a contract is still subsisting and therefore to insist that it should be performed. That would mean that the plaintiff would not want it repudiated unless for any reason the court was unable to aid him to enforce specific performance of it. He may then fall back on the remedy at common law for damages.”*

F *In Afrotech Tech. Services (Nigeria) Limited v. Mia & Sons Limited & Anor (2000) 15 NWLR (Pt.692) 730 at 790 this court held that:*

G *“The fundamental rule is that specific performance will not be decreed if there is an absolute remedy at law in answer to the plaintiffs claim, that is to say where the plaintiff would be adequately compensated by the common law remedy of damages.”*

In the present case, the Court of Appeal in the course of its judgment, stated as follows:

H “ In cases where there is a contract for the sale of land, the Court is always inclined to grant specific performance This is because the land being sold may have a peculiar value or significance to the purchaser or lessee. This is the more so in a case as this where the land appears to be

choice and abutting the coastal lagoon.

However, there is a problem to the grant of an order for specific performance. The land has since lost its original character. The evidence of D.W.1 at page 108 of the record of proceedings goes thus:

“There is a shopping complex on exhibit B2. I think four floors. It was built in 1996. The Defendants own the buildings on the land.” B

The first reaction I have is that perhaps it should serve ; as a lesson to the defendant to decree specific performance for it was not a wise thing for it to have developed such a mighty structure on a land subject to a litigation in Court. The redeeming feature is that fact that this dispute had arisen in 1988 and the case had dragged on in Court for at lease eight years till 1996 when the structure on the land was put up. Perhaps both frustration and desperation set in and impelled the defendant to adopt an unwise approach. This is the more understandable from the angle that the defendant had wanted to sell the land to raise money and been indebted to First Bank Nig. Ltd. to which the initial deposit of N320,000.00 was paid to secure the release of the title documents. In all the circumstances I think it too harsh on the defendant to order specific performance. D E

So, how does one compensate the plaintiff. The Plaintiff had alternatively to specific performance claimed pecuniary damages. It is certainly entitled to the refund of N320,000.00 which was initially deposited against the purchase. All the other item of the claim for damages were not supported by any evidence. I am aware that in exhibit ‘J’ the parties had agreed that any party in default resulting in liability to conclude the contract at the agreed completion date will pay to the other a sum of N500.00 per day “for such number of days of such default until same is determined”. It seems to me that the agreed N500.00 per diem was not fixed by way of compensation or damages payable to either of the parties in the event of inability to conclude the contract or breach. Rather, it was a provision to ensure compliance with the agreement on date of completion. It cannot therefore be a safe basis for the calculation of H damages.” F G

I cannot agree more. The facts of this case are largely not in dispute. The defendant who owned a landed property at 84 Ozumba Mbadiwe

Street, Victoria Island wished to sell a portion of it. There were two bungalows on the property. The property was partitioned into two for the purpose of the proposed sale. One portion was described as B1 and the other B2. The plaintiff employed PW1 an estate agent and valuer to find a buyer for it. The plaintiff showed interest in purchasing the area described as B2. Its dimension was 1924.930 sq. metres. The purchase price was agreed at N1.5m. The plaintiff paid a deposit of N320,000.00 leaving a balance of N1.18m to be paid on completion. The completion date was 20/9/88. Earlier an Agreement of Sale exhibit C was prepared and signed by both parties on 22/7/88. The completion date of 20/9/88 was embodied in exhibit 'C'.

The plaintiffs cheque for N320,000.00 upon presentation on two occasions was dishonoured. Later however the cheque was paid. The first meeting did not hold and it became necessary to shift the completion date to 27/9/88. The plaintiff carried out an inspection of the property after relocation and it was discovered that the relocated office had encroached on the land offered for sale. The result was that the plaintiff had an area of land less by 300m than he had bargained for. The plaintiff insisted on the whole property offered to it. The parties called a meeting but it did not hold.

On 17/11/88, however, the plaintiffs lawyers in a letter exhibit J to the defendant's lawyers served a notice that the transaction be concluded within 7 days. That was when the defendant's solicitors vide a letter exhibit J2 dated 25/11/88 to the plaintiffs Solicitors said that the contract was determined because of the failure of the parties to conclude the transaction. It was in these circumstances that the plaintiff brought this action.

It can be seen clearly that both parties contributed to the failure to complete the transaction. First, the plaintiff issued a cheque for the sum of N320,000.00 and twice it was dishonoured. Secondly, when the defendant discovered that the partitioning was not done according to plan, it informed the plaintiff with a view to reach a compromise. In order to do that another meeting was fixed for 27/9/88. The plaintiff failed to attend. Thirdly, it will also be seen clearly that as a result of the intransigence of the parties, this case needlessly dragged on for 6 years before the

commencement of this action. Fourthly, **the plaintiff claimed in the alternative a refund of the part payment of N320,000.00 and both courts below ordered the defendant to return the said sum to the plaintiff. The claim for the refund of the part payment in my view, negated the claim for an order of specific performance. By this singular act the plaintiff in my considered opinion had jettisoned his claim for an order of specific performance. What the plaintiff, in effect, is saying is that if he could not successfully insist on the defendant performing his part of the contract, he would accept the repudiation and ask for damages. I am in agreement with the Court of Appeal that in the circumstances of this case it was not in a position to aid the plaintiff. It was right when it refused to order specific performance. The plaintiffs best bet was to fall back on the common law remedy of damages.**

Now, to the issue of damages. It is a fundamental rule that specific performance will not be decreed where the plaintiff would be compensated by the common law remedy of damages. See Afrotech Tech. Services (Nigeria) Limited v. Mia & Sons Ltd. & Anor. (supra). It seems obvious to me that from the plaintiffs amended claim it was aware of this position of the law. This is because it had an alternative claim in damages and the refund of the part payment of the sum of N320,000.00 with interest for the purchase of the parcel of land in question. The refund was ordered by the two lower courts. As regards the other items of the claim for damages, the court was “unable to award damages or to grant specific performance.”

Perhaps it is necessary to read again the alternative claim for damages for ease of reference. The claim reads:

“vii. The sum of N6,000,000.00 being special and general damages for breach of contract.

viii. The plaintiffs claim the sum of N320,000.00 being the refund of the part payment/deposit made by the plaintiffs for the purchase of the said property, N600,000.00 loss of rent, N5,000,000.00 escalation cost, and other refunds as contained in the particulars herein together with interest at the rate of 35% per annum.”

I must say that I have read through the evidence of the plaintiffs witnesses. It will be seen clearly that none of them gave evidence in proof of the facts pleaded on damages. It must be said that pleadings in themselves cannot constitute evidence. Mere averment without evidence in proof of the facts pleaded is no proof of the facts averred therein when they have not been admitted. See *Kalio v. Woluchem* (1985) 1 N.W.L.R. (pt.4) 610 and *Adegbite v. Ogunfaolu* (1990)4 NWLR (Pt.146) 578 at 590. If a party to an action fails to or does not lead evidence in support of the averments in his pleading, the averments would be taken as having been abandoned.

For this reason therefore I, too, am unable to award damages.

The first issue in my view disposes of the appeal. I consider it unnecessary to consider the second issue as well as the cross-appeal.

D

ONU JSC

Having had the privilege to read in draft the judgment just delivered by my learned brother Katsina-Alu, JSC. I agree with him that the appeal must perform fail.

I wish to add by way of emphasis as follows: -The Plaintiff (now Appellant) had claimed in the trial court against the Defendant (now Respondent) in its amended statement of claim thus:

"1. A declaration that the plaintiffs are entitled to the assignment of the property known as plot B2, at No. 84, Ozumba Mbadiwe Street, Victoria Island, Lagos and comprised in a certificate of occupancy registered as No. 19 at page 19 in Volume 1981C at the Lands Registry, Ikeja.

2. An order for specific performance of the sale agreement dated July 22, 1988 and order directing the defendants to execute a Deed of assignment in plaintiffs' favour and to take all necessary steps by obtaining the consent of the Military Governor of Lagos State to the assignment of the said property known as plot B2 at No. 84 Ozumba Mbadiwe Street, Victoria Island, Lagos and registered as No. 19 at page 19 in Volume 1981C at the Land Registry, Ikeja.

- 3. *A declaration that the purported termination of the contract of sale of the aforesaid property vide the defendant’s solicitors’ letter of 25th November, 1988 by the defendants is wrongful, null, void and of no effect whatsoever.*
- 4. *A declamation that any purported sale, transfer, assignment or alienation to any persons is equally null, void and of no effect.*
- 5.
- 6.

IN THE ALTERNATIVE

The sum of N6,000,000.00 being special damages for breach of contract, the plaintiff claims the sum of N320,000.00 being the refund of the part payment/deposit made by the plaintiffs for the purchase of the said property, N600,000.00 loss of rent, N5,000,000.00 escalation cost and other refunds as contained in the particulars herein together with interest at the rate of 25% per annum.”

The learned trial judge upon consideration of evidence adduced before him and evaluating the same, found the plaintiffs claim not made out and so dismissed it. Unhappy about the dismissal, plaintiff/appellant appealed to the Court below which there upon proceeded to allow it. Dissatisfied with the judgment of the Court of Appeal, the plaintiff appealed to this Court on four grounds of appeal. The defendant/ respondent cross-appealed. Counsel for the parties exchanged and later adopted their briefs at the hearing of the appeal.

The two issues distilled for our determination are:

- “i. Whether in the proper exercise of its discretion it is right, proper, fair and just for the lower court to refuse a decree of specific performance in the light of its findings, particularly at pages 221 (line 8) to 224 (lines 1 - 34) and in view of the evidence or record.*
- ii Whether the Court of Appeal’s refusal to award the N500.00 per day claim for default is justified having regards to the state of evidence on record.”*

In its own brief of argument, the respondent adopted appellant’s issues set out above. It is pertinent to point out that the lower court in discussing the relief of specific performance called in aid Snell’s Principles

of Equity, 27th Edition paragraph 5, page 575, where the learned authors stated as follows: -

“5. Specific Performance a discretionary remedy: -

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

It is also pertinent to point out how the court below after considering the above principles, observed as follows: -

“However, there is a problem to the grant of an order for specific performance. The land has since lost its original character. The evidence of DW1 at page 108 of the record of proceeding goes thus: -

There is a shopping complex on Exhibit B2. I think four floors. It was built in 1991. The defendants own the buildings on the land.”

The appellant’s grouse as can be seen from the above piece of evidence is that it was not pleaded by the defendant/respondent, nor does it form part of its defence. But as can also be seen in the reliefs sought by the plaintiff, its claim was made in the alternative, any of which would satisfactorily answer his prayer. However, since the decision of the Court below cannot, in my opinion, be impeached, the main appeal has no substance and should accordingly fail; the same thing goes for the cross-appeal. See by analogy the two decisions of the Court of Appeal in 1. Bioku v. Light Machine (1986) 5 NWLR (Pt.39) 42 at page 56 where Nnaemeka-H Agu, JCA as he then was held as follows:

“Where a plaintiff has wholly or in part executed his own part of the parol agreement or has paid purchase money and been let into possession even though no deed of sale or assignment has been executed,

a court of equity will order specific performance on the ground that it would be fraud on the defendant's part not to carry out his own part of the contract."

and 2. Nigerian Land and Seafood Co. Ltd. v. Roadside Engineering Foundry Ltd. & Anor (1987) 1 NWLR (Pt.48) 191 at 197 (per Ademola, B JCA) as follows: -

"A contract to be specifically enforced by the court must, as a general rule, be mutual, that is to say, such that it might at the time it was entered into have been enforced by either of the parties against the other..."

In none of the above two cases did specific performance avail the plaintiff as in the instant case.

It is for these reasons and the more comprehensive ones proffered in the leading judgment of my learned brother Katsina-Alu, JSC that I too accordingly dismiss both the main appeal and the cross-appeal. I subscribe to the consequential orders made in the leading judgment inclusive of costs therein awarded.

TOBI JSC

This appeal has to do with the equitable remedy of specific performance. It arose from a claim of the appellant/plaintiff. The second relief is on the equitable remedy and it reads:

"An order for specific performance of the sale agreement dated July 22, 1988 and order ' directing the defendants to execute a Deed of assignment in plaintiff's favour and to take all necessary steps by obtaining the consent of the Military Governor of Lagos State to the assignment of the said property known as Plot B2 at No. 84 Ozumba Mbadiwe Street, Victoria Island, Lagos and registered as No. 19 at page 19 in Volume 1931 C at the Land Registry, Ikeja."

The learned trial Judge held that there was no consensus ad idem H between the parties and that no completion meeting was held. The Judge accordingly dismissed the claim of the plaintiff/appellant. The Judge said at page 169 of the Record:

“The summary is that the basis of the agreement; was a misrepresentation; and when the actual figure was ascertained, the plaintiffs refused instantly on the earlier figure. It cannot therefore be said that the two parties were consensus ad idem with regard to the essential terms and conditions of the sale... It is settled that where a plaintiff fails to prove his case, the proper order to make is that of dismissal. I have found the case of the plaintiff unproved. I dismissed it.”

The Court of Appeal thought differently. That court overturned the decision of the learned trial Judge, holding that there was a firm agreement between the parties that the defendant would sell and the plaintiff would buy an area of land depicted as B2 on Exhibit B1 which said area measured 1924,930 sq. meters.

The Court of Appeal however did not grant the relief of specific performance. The Court said at page 226 of the Record:

“It seems to me that since it is well established that the grant of an order of specific performance is in the discretion of the court, a party claiming it should have called evidence on damages claimed or suffered in the event the court for some reasons is unable to grant specific performance. Regrettably therefore I am unable to award damages or to grant specific performance.”

Dissatisfied, the appellant has appealed on the above. Counsel for the appellant formulated two issues for determination; one on the refusal of the Court of Appeal to order specific performance and the other on the refusal of the Court to award the sum of N500.00 per day claimed by the appellant. I shall take only the issue of specific performance.

While learned counsel for the appellant submitted that the Court of Appeal was wrong in refusing a decree of specific performance, learned counsel for the respondent submitted that the Court was right in not granting the relief. Who is right and who is wrong?

At common law, the only remedy available for breach of contract is award of damages. As this may not always meet the justice of the case, equity comes with its hands of sympathy, fairness and fair play to ameliorate the rigidity of the common law, by moving further a distance from the common law by granting specific performance in deserving

cases. And so the equitable jurisdiction of the court in specific performance is based on the inadequacy of the award of damages at common law. Therefore the principles of equity will fold their arms and refuse to interfere where the award of damages is adequate compensation to the aggrieved party. And so, Fry in his book titled, *Specific Performance*, 6th B edition, correctly said that the orbit of the equitable remedy of specific performance in respect of a contract is not identical with the orbit of the common law remedy for damages.

Specific performance, like every other equitable remedy, is discretionary. It confers some discretionary power on the court, which must be exercised judicially and judiciously. Dealing with the discretionary nature of the remedy, Megarry and Baker in *Snell's Principles of Equity*, 26th C edition, said at page 641 and 642:

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

Keeton in his book titled, *Introduction to Equity*, sixth edition, also G dealt with the discretionary nature of the remedy. He said at page 237.

"The remedy is discretionary, but the discretion is exercised in accordance with well-settled equitable principles."

See also *Ngwu v. Nnaji* (1991) 5 NWLR (Pt.189) 18, where the Court of Appeal held that a decree of specific performance by a court is H a discretionary power, which like all discretionary powers, must be exercised judicially and judiciously.

This Court can only decree specific performance for a purpose

which can be achieved or enforced. It cannot decree specific performance in vain. In other words, this Court cannot decree specific performance which cannot be achieved or enforced.

In dealing with the changed character of the land, the Court of Appeal said B at page 225:

“However, there is a problem to the grant of an order of specific, performance. The land has since lost its original character. The evidence of D.W.1 at page 108 of the record of proceedings goes thus:

C *There is a shopping complex on exhibit B2. I think four floors. It was built in 1996. The defendants own the buildings on the land’.... In all the circumstances I think it too hard on the defendant to order specific performance.”*

D Learned counsel for the appellant submitted that the evidence led by DW1 was not pleaded. Learned counsel for the respondent submitted that the evidence arose out of cross-examination and that made it an issue. He did not stop there. He went further and stated in paragraph 5.07 as follows:

E *“The appellant has also filed an application before this court dated 31st May 2002 to adduce further evidence on this issue. The respondent has filed a counter affidavit to the said application to which it attached pictures of the 4 elevations of the property on the land in issue. It is submitted that the Respondent would suffer severe hardship if the court orders specific performance.”*

F Learned counsel for the appellant in his reply brief did not deal specifically with the issues raised in paragraph 5.07 of the respondent’s brief but merely disagreed with him and insisted that the position of the law is that facts need to be pleaded to be admissible. I think counsel needed G more to drown the submission in paragraph 5.07 of the respondent’s brief

In the circumstances, I am at one with the Court of Appeal that the *“land has since lost its original character.”* With a shopping complex of four floors, a specific performance is impossible because in law there is H nothing to perform specifically. Plot B2 is no more.

In *Ngwu v. Nnaji* (1991) 5 NWLR (Pt.189) 18, the Court of Appeal, in considering the competing interests of the parties said at page 34:

“In determining whether specific performance must be decreed or

not, the court should examine very carefully the competing interests of the parties. These are the interest of the party who wants the relief or benefit from the raw terms of the contract and that of the opponent to pay damages in lieu. In the balancing exercise, the court is exercising its equitable jurisdiction and this it must invoke to the egalitarian advantage of the parties. Let the only discrimination in the matter be the factual position which the court cannot manufacture in favour of one of the parties to the disadvantage of the other party. In determining the competing interests, the court should take into consideration the very nature of the contract in terms of its compelling character and whether from the entire transaction, the contract could be specifically performed."

I have closely examined the facts of this case vis-a-vis the contract. I have also closely examined the competing interests of the parties and I cannot see my way clearly in disagreeing with the decision of the Court of Appeal. The Court of Appeal, in my view, correctly held that hardship will be caused to the respondent if an order of specific performance is decreed.

In sum, I agree entirely with the judgment of my learned brother, Katsina-Alu, JSC. I also dismiss both the main appeal and the cross appeal. I abide by the costs awarded in the judgment of my learned brother.

MUKHTARJSC

I have had the advantage of reading in draft the judgment just delivered by my learned brother Katsina-Alu, J.S.C., and will add the following by way of emphasis. The reliefs sought by plaintiff (who is now the appellant) in the trial court, as per its amended statement of claim are as follows :-

"1. A declaration that the plaintiffs are entitled to the assignment of the property known as plot B2, at No. 84, Ozumba Mbadiwe street, Victoria Island, Lagos and comprised in a Certificate of Occupancy registered as No. 19 at page 19 in Volume 1981C at the lands Registry, Ikeja.

2. An order for specific performance of the sale agreement dated

July 22, 1988 and order directing the defendants to execute a Deed of assignment in plaintiffs’ favour and to take all necessary steps by obtaining the consent of the Military Governor of Lagos State to the assignment of the said property known as plot B2 at No. 84. Ozumba Mbadiwe street, Victoria Island, Lagos and registered as No. 19 at page 19 in volume 1981C at the lands Registry, Ikeja.

3. A declaration that the purported termination of the contract of sale of the afore said property vide the defendant’s solicitors’ letter of 25th November, 1988 by the defendants is wrongful, null, void and of no effect whatsoever.

4. A declaration that any purported sale, transfer, assignment or alienation to any persons is equally null, void and of no effect.

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IN THE ALTERNATIVE

The sum of N6,000,000.00 being special and general damages for breach of contract.

The plaintiff claim the sum of N320,000.00 being the refund of the part payment/deposit made by the plaintiffs for the purchase of the aid property, N600,000.00 loss of rent, N5,000,000.00 escalation cost, and other refunds as contained in the particulars herein together with interest at the rate of 25% per annum.”

The learned trial judge after evaluating the evidence before him found the plaintiffs claim not proved and dismissed it. The plaintiff was dissatisfied with the dismissal, and appealed to the Court of Appeal. The appeal was allowed. Dissatisfied with the judgment of the Court of Appeal the plaintiff/appellant appealed to this court on four grounds of appeal. The defendant/respondent also cross-appealed. Briefs of argument were exchanged and these were adopted at the hearing of the appeal. Two issues for determination were formulated in the appellant’s brief of argument, and these issues are:-

“(i) Whether in the proper exercise of its discretion it is right, proper, fair and just for the lower court to refuse a decree of specific performance in the light of its findings, particularly at pages 221 (line 8)

to 224 (lines 1 - 34) and in view of the evidence on record.

(ii) Whether the Court of Appeal's refusal to award the N500.00 per day claim for default is justified having regards to the ; state of evidence on record."

In its own brief of argument, the respondent adopted the above B issues raised by the appellant. It is on record that the lower court in discussing the relief of specific performance found solace in Snell's Principles of Equity 27th Edition paragraph 5 page 575, where the learned authors stated thus :-

"5. *Specific Performance a discretionary remedy:-* C

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

It is also on record that after considering the above principle the court below made the following observation :-

"However, there is a problem to the grant of an order for specific G performance. The land has since lost its original character. The evidence of D.W. 1 at page 108 of the record of proceeding goes thus :-

There is a shopping complex on exhibit B2. I think four floors. It was built in 1991. The defendants own the buildings on the land." The H grouse of the appellant is that the above piece of evidence was not pleaded by the defendant/respondent, nor was it part of its defence. It is instructive to note that the piece of evidence was elicited in the course of cross-examination, by the plaintiff/appellant.

At any rate, the plaintiff/appellant's claim in the trial court was in the alternative, as can be seen in the reproduced reliefs sought above. When a party makes a claim in the alternative, the belief is that he wants either of the reliefs sought, in which case when he is granted any of the reliefs it suffices for the purpose of satisfying his claim. The learned trial judge in the face of the evidence before him, deemed it just to grant the plaintiff/appellant the claim of refund of the sum of N320,000.00 as claimed. I see no reason for complaint in the circumstances, to make the plaintiff insist on the relief of specific performance. If that was all he wanted and nothing else, then it should have sought that only as relief, and not make an alternative claim. In affirming the judgment of the trial court I am of the view that the learned justices of the Court of Appeal were absolutely right in refusing the relief of specific performance sought in the notice of appeal.

The above reasoning in addition to the detailed ones in the lead judgment, which I entirely agree with, supports the fact that the main appeal has no substance and should fail. The same goes for the cross-appeal. In this vein, I also dismiss both the main appeal and cross-appeal. I abide by the consequential orders made in the lead judgment.

MOHAMMED JSC

I agree with the judgment of my learned brother Katsina-Alu, JSC which I have had the opportunity to read in draft before today in dismissing the appeal and ignoring the cross-appeal for being academic.

The appeal is against the judgment of the Court of Appeal Lagos Division delivered on 14-12-2000. The dispute between the parties started at the High Court of Justice of Lagos State where the appellant as plaintiff sued the respondent claiming against it as defendant, a declaration that the plaintiff is entitled to the assignment of a property known as B2, No. 84, Ozumba Mbadiwe Street, Victoria Island Lagos; specific performance of contract of sale; declaration that the purported termination of the contract by the defendant is null and void; declaration that any purported sale or transfer of the property is null and void; perpetual injunction restraining the

defendants from selling or alienating the property to any other person and N500.00 per day from 25-11-1988 as damages for delay in completion. In the alternative, the appellant as plaintiff claimed N6,000,000.00 as special and general damages.

In the course of the hearing at the trial court, that court found that the parties had not reached consensus in the agreement for the sale of the property and consequently dismissed the plaintiffs claims but ordered the refund of the sum of N320,000.00 deposit paid by the plaintiff with interest at the rate of 21% per annum from the date of the judgment until full liquidation. On appeal to the Court of Appeal, the court allowed the appeal but refused to grant the relief of specific performance and damages sought by the appellant, hence its further appeal to this court. The two issues submitted for determination in this court are-

“(i) *Whether in the proper exercise of its discretion, it is right, proper, fair and just for the lower court to refuse a decree of specific performance in the light of its findings, particularly at pages 221 (line 8) to 224 (lines 1-34) and in view of the evidence on record.*

(ii) *Whether the Court of Appeal’s refusal to award the N500.00 per day claim for default is justified having regards to the state of evidence on record.”*

The defendant/respondent in its respondent’s brief of argument had adopted the issues as identified in the appellant’s brief of argument. There is no doubt whatsoever that what is at the center of these two issues for determination in this appeal is the proof of the existence of a valid and binding contract of sale of the property B2 No. 84, Ozumba Mbadiwe Street, Victoria Island, Lagos between the parties. Having regard to the pleadings and the evidence on record, coupled with the nature of the claims of the appellant particularly the alternative claim, the fact that the appellant as plaintiff was not on a very firm ground in its action, is quite obvious. To this end I agree that the court below was quite right in refusing the appellant’s claims for specific performance and damages for breach of contract. Accordingly I also dismiss the appeal and abide by the order on costs in the lead judgment.

Taking into consideration the outcome of the appeal, the cross-

appeal has certainly become academic which in the absence of a real dispute between the parties, cannot now be determined. See Ezeanya v. Okeke (1995) 4 NWLR (pt.388) 142.

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