

SUPREME COURT OF NIGERIA

24TH FEBRUARY, 2006. SC. 235/2001

**CORAM:- S. M. A. BELGORE, I. L. KUTIGI, U. A. KALGO,
D. MUSDAPHER, W. S. N. ONNOGHEN, JJSC**

ALHAJI MUSTAPHER KACHALLA APPELLANT
AND
ALHAJITI JANIBANKI
ALHAJI UMARU NGELZARMA RESPONDENTS
MALLAM AHMED IMAM

APPEALS - Issues - Striking out of - Where an issue for determination
- Is not derived from the grounds of appeal - It will be struck out (H1)

LAND LAW - Title - Interests that can be acquired - Are either legal or
equitable - But under the Land Use Act - Maximum interest any person
can hold - Is a right of occupation (H2)

LAND LAW - Title - Existing rights - Where a party acquires right of
occupancy - In respect of a land already assigned to another - He has to
take the property subject to the existing rights (H3)

LAND LAW - Priority of interests - Rival conveyances or competing
interests - Will rank according to the order of their creation (H4)

LAND LAW - Title - Auction sale of land - By court in levying execution
of judgment - Is null and void - Where the land had been validly assigned
- To the purchaser's and court's knowledge (H5)

FACTS

Before the Borno State High Court, the plaintiff/appellant filed an
action against the defendants/respondents claiming inter alia, bona fide
ownership of the land in dispute and a declaration that the purported
auction sale of the said property in levying execution of court's judgment

is null and void. The land in dispute belonged to Alhaji Kumshe vide a Statutory Right of Occupancy. The property which had a 24 bedroom storey building was sold to the appellant for the sum N1,200,000.00 on the 6-3-1994, the Right of Occupancy and possession were handed over to him. The tenants were told of the change in ownership. On 22-8-1994, 1st respondent secured judgment in the sum of N1,680,000.00 against the said Alhaji Kumshe in respect of payment of a debt. 1st respondent applied to levy execution on the landed property of Alhaji Kumshe. On the 18-4-1995, 2nd respondent at a public auction conducted by the Registrar of the Upper Area Court 1, purchased the property as the highest bidder at the rate of N520,000.00.

At the end of hearing, the trial court felt that what the appellant secured was an equitable interest while the 2nd respondent secured a legal interest in respect of the property in dispute. It therefore, dismissed the appellant's claim. On appeal to the Court of Appeal, it found no fault with the trial court's reasoning and upheld its judgment. Being dissatisfied, appellant has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether the learned justices of the Court of Appeal were right in holding that the title and interest in the property did not pass to the appellant after sale of the house in question by Alhaji Bukar Kumshe to the appellant.

2. Whether the 2nd respondent acquires legal title over the property through his purchase of the property by an auction sale conducted by the Upper Area Court.

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

Issues - Striking out of

1. The learned counsel for the 2nd respondent on the other hand had formulated two issues for the determination of the appeal which I have earlier reproduced. In my view, the second issue formulated by the 2nd respondent is not relevant and does not arise from the grounds of appeal, I therefore strike it out. An issue for determination must arise and derive from the grounds of appeal. There is no ground of appeal attacking the

“*erroneous findings*” or “*slip or irregularity*”. I shall accordingly ignore all the arguments canvassed under issue No. 2 of the 2nd respondent. (p. 804 G)

Title - Interests that can be acquired

2. Now, there is no doubt that a distinction exists between a legal estate “*or fee simple*” as opposed to an equitable interest in land, but that distinction cannot apply in a situation such as this and where the disputed land is governed by the provisions of the Land Use Act, in which the maximum interest any person can hold is a right of occupation, the legal estate or Legal interest is vested in the Governor of the State. See NKWOCHA VS. GOVERNOR OF ANAMBRA STATE 1984 6 SC 362. The tenor of the Land Use Act was to “*nationalize*” all lands in the country by vesting its ownership in the State. The maximum interest preserved in private individual hands is a right of occupancy. See SAVANNAH BANK VS. AJILO [1989] 1 NWLR (Pt.97) 305. The nature of interest any person can acquire is a right of occupation and no more. So the distinction between “*a legal estate in land*” and “*an equitable interest in land*” under the circumstances of this case cannot arise. In my view, the interest the appellant had acquired cannot be inferior to the interest acquired by the 2nd respondent. (p. 806 E)

Title - Existing rights

3. In my view, there was no difference except -as to priority between the appellant and the 2nd respondent, who also purported to “*buy*” the same property at a public auction conducted by a court and who also did not obtain the governor’s consent nor had his interest registered. In other words both of them bought the property lawfully and none of them was the registered holder of the right of occupancy in question. It was evident that the appellant was put in possession of the property, since the 10/3/ 1994, while the 2nd respondent purported to “*purchase*” the right of occupancy at a public auction in April 1995. In my view, even if the 2nd respondent had acquired legal estate or the property was properly conveyed to him, he had to take the property subject to the existing rights

and interest of the appellant. In the Case of OGUMBAMBI VS. ABOWABA (supra), the OLOTO family in Lagos sold a portion of its family property to X who paid the purchase price and .was given a receipt. There was implied agreement, to execute a conveyance on demand. X went into possession and remained in possession, but no conveyance was executed in his favour. Subsequently the Oloto family sold and conveyed the same land to the defendant after the defendant had unsuccessfully sought to purchase the same land from X. It was held that even though the defendant had a conveyance, he was bound by the equitable interest vested in X . (p. 807 C)

LAND LAW - Priority of interests

4. Both the trial Court and the Court of Appeal had found as a fact that the appellant had an equitable interest in the property, in my view equitable interest under the circumstances must be treated as having the same incidents as the corresponding legal estate. Equity follows the law.

In property law many different question of priority may arise, these may concern rival conveyances of property or as in this case competing interests in the holding of the right of occupancy. The fundamental rule is that competing interests will generally rank according to the order of their creation. (p. 808 B)

Auction sale of land - By court in levying execution

5. In AWOSHO VS. DADA 1984 7 SC 149. This Court per ANIAGOLU JSC said at 173:-

“The law has been well and long settled, that where a person pays for land and obtains receipt for the payment followed by his going, into possession and remaining in possession, equitable interest is created for him in the land such as which can defeat the title of a subsequent legal estate purchaser with knowledge of the equitable estate in the land, that was affirmed to be the state of the law in ORASAMI VS. IDOWO [1959] 4 FSC 40 xxxxxxxx.”

The mere fact that there were tenants in the property coupled with the fact that the Upper Area Court and the 1st respondent were aware of

the desire of Alhaji Bukar Kumshe to sell the right of occupancy was sufficient to alert the respondents of the interest of the appellant. On this question of prior notice see the evidence of DW2 and DW3.

At the end of the day, I resolve issues 1 and 2 in favour of the appellant. In the result no useful purpose will be achieved in considering issues 3 and 4. I accordingly allow the appeal of the appellant. I set aside the decisions of the lower courts and I enter judgment in favour of the plaintiff as follows:-

(a) I declare that the plaintiff is the bona fide owner of the property the subject matter of this suit. C

(b) I declare that the sale of the property-conducted by the Upper Area Court at a public auction is null and void and was of no effect. I set it aside and I restore the property to the plaintiff/appellant. (p. 808 E) D

NOTABLE POINT OF INTEREST

ONNOGHENJSC

1. Sold landed property cannot be validly attached in execution of court's judgment E

It is therefore clear that appellant having bought the property, the original owner ceased to have any interest therein, whether equitable or legal which could subsequently be attached and sold in execution of any judgment of the court. That being the case, the man who bought by auction bought nothing at all; there being nothing left to be sold to him, in satisfaction of the judgment of that court. F

When looked at in this light, it becomes very clear that the issue of the two equities being equal does not arise. (p. 813 A) G

REPRESENTATION

S. I. Ameh with him A. A. Ibrahim and O.I. Ogunnnika for appellant.
R.O. Yusuf with him, C. I. Nwako Miss. M. N. Longjam for 1st Respondent. H

Uche I. Obi for the 2nd Respondent.

3rd Respondent absent and not represented.

CASES REFERRED TO

- KANO TESTILE PRINTERS LTD VS. GLOEDE AND HOFF [NIG] LTD. [2005] 5 SCNJ 256
- OKPALA VS. IBEME [1989] 2 NWLR (Pt 102) 208
- B NKWOCHA VS. GOVERNOR OF ANAMBRA STATE 1984 6 SC 362
- SAVANNAH BANK VS. AJILO [1989] 1 NWLR (Pt.97) 305
- OLOWO VS. OSHINUBI [1958] LLR 211
- ARDBAYS BANK LTD VS. BIRD [1954] CH. 274
- AWOSHO VS. DADA 1984 7 SC 149
- C ORASAMI VS. IDOWO [1959] 4 FSC 40
- Labode V Otubu (2001) 7 NWLR (pt. 712) 256 at 281 -282
- Okoye V. Dumez (Nig.) Ltd (1985) 1 NWLR (pt. 4) 783
- Adekeye V. Akin-Olugbode (1987) 3 NWLR (pt. 60) 214
- D Odiete vs Oketie (1972) 6 S.C 49 at 55
- Yusufu vs ACB (1980) 1 S.C 31 at 36.
- Animashoun V. Olojo (1990) 6 NWLR (pt. 154) 111
- Ojo V. Azama (2001) 4 NWLR (pt. 702) 57
- E Bello V. Eweka (1981) 1 SC 101

STATUTES & RULES REFERRED TO

- Land Use Act s. 22
- F Sheriffs and Civil Process Act s. 16
- Judgment Enforcement Rules r. 22

LEAD JUDGMENT BY MUSDAPHER JSC

- G This is an appeal against the judgment of the Court of Appeal Jos Division, delivered on the 13th of March, 2001 whereby the decision of the High Court of Borno State dismissing the appellant's claim was affirmed. Before the trial court, the appellant as the plaintiff in his Amended Statement of Claim as per paragraph 9 thereof claimed thus:-
- H *“(a) A declaration that he is the bona fide owner of the property, the subject matter of this suit.*
- (b) A declaration that the sale of his property is null and void and of no effect, and it be set aside and the property restored to him.*

(c) *A declaration that the judgment debtor before the above trial court has no interest or right in plaintiffs property.*

(d) *A perpetual injunction restraining all the defendants from interfering with the plaintiffs property including their agents, servants and privies.*

(e) *An award of N5,000.00 as damages against the defendants for trespass.*

(f) *Costs of this suit."*

Pleadings were ordered filed and exchanged. At the hearing the parties testified and called other witnesses. Documentary evidence was also tendered. After the address of counsel and in his judgment delivered on the 18/11/1996, the learned trial judge dismissed the claims of the plaintiff having found them devoid of substance. The plaintiff felt unhappy and appealed to the Court of Appeal. The Court of Appeal in its judgment delivered on the 13th day of March 2001, dismissed the plaintiffs appeal. This is a further appeal to this Court by the plaintiff, hereinafter referred to as the appellant. The defendants shall be referred to as the respondents. In the amended Notice of Appeal filed with leave of Court; the appellant filed 4 grounds of appeal. Distilled from the grounds of appeal, the appellant has identified, formulated and submitted the following issues for the determination of the appeal:-

"1. Whether the learned justices of the Court of Appeal were right in holding that the title and interest in the property did not pass to the appellant after sale of the house in question by Alhaji Bukar Kumshe to the appellant.

2. Whether the 2nd respondent acquires legal title over the property through his purchase of the property by an auction sale conducted by the Upper Area Court.

3. Whether the decision of the Court of Appeal is correct having regard to the nature of oral/documentary evidence adduced before the lower court.

4. Whether the Court of Appeal was right to have affirmed the decision of the trial-judge to dismiss plaintiffs claim as it failed in its entirety when an order of non-suit is appropriate and accordingly ought

to have been made in the circumstance”.

The first respondent on the other hand has formulated two issues arising for the determination of the appeal:-

“ 1. *Whether the appellant proved his title to the land in dispute to*
B *entitle him to the reliefs claimed in his Amended Statement of Claim.*

2. *Whether the lower court was right in affirming the judgment of the trial court which dismissed the appellant’s case.*

The second respondent has submitted the following two issues arising for the determination of the appeal:-

C “(1) *Whether from the evidence available to courts below the equities of the appellant and second respondent are equal.*

(2) *Whether the erroneous findings or slip or irregularities (if any) of the lower courts have occasioned miscarriage of justice”.*

D Before discussing the relevant issues properly arising for the determination of the appeal, it is appropriate at this stage to set out the facts. The facts put shortly are not disputed or complicated. Alhaji A. Bulama, or as he is sometimes known. Alhaji Bukar Kumshe was the
E holder of a Statutory Right of Occupancy No BO/12220 in respect of a plot of land containing a 24 bedroom storey building of burnt bricks located at Kumshe ward; Maiduguri. Sometimes in March 1994, Alhaji Bukar Kumshe approached an estate agent, Alhaji Lawal Baaji (PW1
F herein) and informed him of his desire to sell the property. Alhaji Lawal Baaji introduced him to the appellant, Alhaji Mustapha Kachalla who purchased the property in the sum of N1,200,000.00. The sale was evidenced by a written agreement (exhibit M.K 2) dated the 16th day of
G March 1994. The appellant had earlier satisfied himself on the ownership of the property by the vendor, by conducting a search at the Lands Registry Maiduguri. After the payment, the appellant was handed over the Certificate of Occupancy and was given possession of the property, and the tenants therein were told of the change of ownership. In the
H meanwhile Alhaji Tijani Banki, the first respondent herein, in suit No BUAC/CVF/107/94 claimed against the said Alhaji Bukar Kumshe payment for a debt in the sum of N1,680,000.00. Judgment was given in favour of the claimant against the defendant in the terms of the claim and

costs on the 22/8/1994. It is also noteworthy that the appellant was unable to register the assignment to him of the Right of Occupancy because of a letter written to the Land Registry by the registrar of the Upper Area court directing the Land Registry to “*stay any further transaction or change of ownership*” in respect of the Right of Occupancy. In the meanwhile, attempts were made to execute the judgment against the movable assets of Alhaji Bukar Kumshe, when no movable assets were found to satisfy the judgment debt, Alhaji Tijani Banki, through his lawyers, applied to execute the judgment on the immovable assets of the judgment debtor, Alhaji Bukar Kumshe. On the 18/4/1995 at a public auction conducted by the Registrar of the Upper Area Court I, after due advertisement, Alhaji Umaru Ngelzarma, the second respondent herein as the highest bidder, purchased the property at the rate of N520,000.00. In his judgment the learned trial judge held:-

“At all material times the Certificate of Occupancy was vested in Alhaji Bukar Kumshe [otherwise called Alhaji Bukar A. Bulama] to whom the same was issued as No. BO/12220 [exhibit “M.K.”] dated 17th July 1985. From the plaintiffs view point, he bought the land from Alhaji Bukar Kumshe on the 16th March, 1994 for N1.2 million. xxxxxxxxxxxxxxxxxxxx Having set out the provisions of the agreement, one appreciate that it does not convey any legal right or interests to the plaintiff, Alhaji Mustapha Kachalla. At best it is only a receipt as pleaded, evidencing the sale for the purchase price therein. And at best, it could possibly vest equitable right or interest in the purchaser. The learned justice later in the judgment added:-

“xxxxxx I take it that Alhaji Bukar Kumshe rightly and lawfully sold the house without collusion nor as an after thought. Among other things the plaintiff produced and tendered Exhibit “M K 1” as good evidence of his equitable right to the house. However at the time of the alleged sale, and thereafter, it was Alhaji Bukar Kumshe who has the legal right to the Certificate of Occupancy. Again up to the time and after the public auction sale of the house to the 2nd defendant, the Certificate of Occupancy was in favour of Alhaji Bukar Kumshe. But the 2nd defendant by due legal process, as it was the trial court that ordered the

public auction sale of the house, became the lawful purchaser. Thus the 2nd defendant has a legal estate, right and interest with greater and better force and effect than those of the plaintiff whose are equitable. xxxxxxxxxx”

B At the end of the day, the learned trial judge dismissed the appellant’s claims, because he had only “*an equitable interest*” while the 2nd appellant had “*a legal estate*” because he purchased the property at a public auction conducted on the orders of a court of law. The Court of Appeal found no fault with the reasoning of the trial Court and
C confirmed the finding that the appellant merely acquired equitable interest as against the legal estate, the 2nd respondent acquired through the auction sale conducted by a court in execution of a valid judgment.

I shall in this judgment deal with the issues as contained in the
D appellant’s brief.

ISSUE NO 1 and 2

These can conveniently be dealt with together. It is submitted that the Court of Appeal was in error after confirming that the appellant had
E lawfully acquired an earlier equitable interest when he purchased the property, yet to proceed to hold that the later interest acquired by the 2nd respondent through the public auction conducted by the Upper Area Court prevailed over the interests of the appellant.

F It is submitted equitable interests rate and rank in order of their creation, “he who is earlier in time is stronger in law. QUI PRIOR EST TEMPORE POTIORE EST JURE. See BARCLAYS BANK LTD VS. BIRD [1954] CH. 274. See also UGBO VS. ABURIME [1994] 9 SCNJ 23 at 42.
G It Is again argued that since the 2nd respondent also did not obtain the “*Governor’s consent*”, whatever interest he acquired cannot amount to a “*legal estate*”. At best he also acquired equitable interest over the property. It is submitted that where there are two competing equitable
H interests, the general rule of equity is that the one whose equity attached to the property first will be entitled priority over the other. Where the equities are equal, the first in time prevails. See LAB ODE VS. DR. OTUTU [2001] FWLR (Pt.43) 297 at 235, OKOYE VS. DUMEZ [NIG] LTD [1985] 1 NWLR (Pt.4) 783 at 790. See also OGUNBAMBI VS.

ABOWAB [1951] 13 WACA 222, ORASANMI VS. IDOWU [1959] 4 FSC 40. Where it was held that where a person paid for land and was issued with a receipt and was given possession of the land, an equitable interest was created for him which defeated the title of a subsequent legal estate purchaser with the knowledge of the equitable interest. It is argued that on the facts of this case particularly the evidence of DW2 and DW3 at pages 24 and 28 of the printed record, the respondents had prior knowledge of the equitable interest created in favour of the appellant. It is further submitted that as at 16/3/1994, when Alhaji Kumshe Bukar ‘sold the property to the appellant, there was no longer any existing interest in the property in Question in favour of Alhaji Bukar Kumshe to be sold on the 18/4/1995 to satisfy the judgment debt. See TALABI VS. ADESEYE 1972 NSCC (Vol.7) 498, CHIDIAK VS. COKER [1954] 14 WACA 506. ADEKEYE VS. AKIN OLUGBADE [1987] 3 NWLR (Pt 60) 214.

It is further argued that the second respondent did not as at 18/4/1995 acquire better title than the appellant. It is stressed that for the 2nd respondent to have a better title than the appellant, there must not only be the governor’s consent, but also the due registration of his interest. Learned Counsel referred to BEST [NIGERIA] LTD VS. BLACKWOOD HODGE [NIG] LTD {2001} 10 NWLR (Pt 720) 35. SAVANNAH BANK VS. AJILO [1989] 1 NWLR (Pt 77) 305, AWOJUGBAGBE LIGHT INDUSTRIES LTD VS. CHINOKWE [1995] 4 NWLR (Pt 390) 379 at 438. OKUSANYA VS. OGUNFOWORA [1997] 9 NWLR (Pt 520) 347, FMB of NIGERIA VS. BABATUNDE [1999] 12 NWLR (Pt 632) 683. It is argued that the lower courts were in error to have held that the 2nd respondent had acquired legal estate, when there was no evidence of the governor’s consent and also no evidence of registration. It is argued that at best the 2nd respondent acquired only equitable interest and not legal estate. It is submitted, that the appellant has priority of interest vide AWOYEGBE VS. OGEIBE (1988) 1 NWLR (Pt 73) 695, TEWOGBADE VS. OBADERIA (1994) 4 SCNJ 16, OWIE VS. IGHIWI [2005] FWLR (Pt 248) 1762 at 1780, See also OWONIBOYS TECHNICAL SERVICES LTD VS. UNION BANK OF NIG. LTD [2003] FWLR (Pt 180) 1529 at 1549.

It is further argued that the finding of the two lower courts, that the 2nd respondent acquired a legal estate, though concurrent is yet perverse and should be set aside see MOJEKWE VS. IWUCHUKWU [2004] 11 NWLR (Pt, 883) 196 at 219. ENANG VS. ADU [1981] 11 - 12 SC 25.

For the 1st respondent it is argued that the appellant as claimant for declaration of title to land failed to adduce credible and sufficient evidence to entitle him to the declaration sought Learned Counsel referred to the case of KOKORO-OWO VS. OGUNBAMBI [1993] 8 NWLR (Pt 313) 627. It is argued that the interest of the appellant was equitable while the interest of the 2nd respondent was legal estate. It is submitted further that the 2nd respondent being a bona fide purchaser for value without notice of the prior equitable interest of the appellant had acquired legal estate or interest in the property. It is submitted that the 2nd respondent acquired legal estate and that S. 22 of the Land Use Act and the OWONIBOY'S case supra do not apply. It is further submitted that since the 2nd respondent had applied for the requisite governor's consent for the alienation of the property in dispute to himself the 2nd respondent did all that was necessary under the law to acquire the legal estate. The finding that the 2nd respondent had acquired legal estate is a concurrent finding of fact which should not ordinarily be disturbed by an appellate court such as this court. Learned counsel referred to the case of MOTONWASE vs. SOROGBE (1995) 5 NWLR (pt 92) 90 NGENE vs IBO (2000) 4 NWLR (pt.651) 131.

It is further submitted that the appellant had woefully failed to lead credible evidence which will entitle him to .his claims of declaration of title.

The learned counsel for the 2nd respondent on the other hand had formulated two issues for the determination of the appeal which I have earlier reproduced. In my view, the second issue formulated by the 2nd respondent is not relevant and does not arise from the grounds of appeal, I therefore strike it out. An issue for determination must arise and derive from the grounds of appeal. There is no ground of appeal attacking the “erroneous findings” or “slip or

irregularity”. I shall accordingly ignore all the arguments canvassed under issue No. 2 of the 2nd respondent. See KANO TESTILE PRINTERS LTD VS. GLOEDE AND HOFF [NIG] LTD, [2005] 5 SCNJ 256 OKPALA VS. IBEME [1989] 2 NWLR (Pt 102) 208. I shall only deal with the Issue No. 1 of the 2nd respondent. B

It is argued that this issue arose from the argument of counsel for the appellant that “*his equity, created by virtue of his purported purchase receipt*” “*is first in time*” and so gains priority, in law over that of the 2nd respondent”. It is submitted that the equities of the appellant and that of the 2nd respondent cannot be equal. It is argued that the appellant was not vigilant in his purported purchase of the property. It was evident that as early as 2/3/1994, the Upper ‘ Area Court, had ordered that the property shall not be sold and a caveat was entered at the Bureau of Land and Survey, Maidugari, the village Head was also alerted by a letter dated 8/ 3/1994. It is submitted for the equities to be equal, the purchase by the appellant must be valid, it cannot apply when, the appellant’s purchase was not valid. Learned Counsel referred to GANKON VS. UGOCHUKWU CHEMICAL INDUSTRIES LTD. [1993] 6 NWLR (Pt. 297) 55 where E one of the interests created was declared invalid and the court held that the priority of interest doctrine shall not apply. D

It is again argued that the appellant is guilty of laches and acquiescence when he failed to inform the Court of his interest on time before the sale. See section 16 of the Sherriffs and Civil Process Act and Rule 22 of the Judgment Enforcement Rules. Learned Counsel also referred to IKPE VS. OKE [2001] 10 NWLR (Pt 721) 341. F

Now, it shall be necessary to recap on how the lower courts treated the sale of the property to the appellant. Both the trial court and the lower court below found as a fact, that the appellant had lawfully purchased the property from Alhaji Bukar Kumshe and that there was no collusion between them and that the sale to the appellant was not done to commit fraud on the respondents or any body or at all. Indeed the sale to the appellant by Alhaji Bukar Kumshe, the undoubted holder of the right of occupancy, was concluded months before the Upper Area Court entered judgment against Alhaji Bukar Kumshe, that is to say, the right to execute G H

the judgment against the immovable property of the judgment debtor, Alhaji Bukar Kumshe did not crystallise until many months later. In her lead judgment Muhktar JCA [as she then was] which was concurred to by Obadina and Nzeako JJ.C.A agreed with the learned trial judge when she opined in her judgment thus:-

“Having set out the provisions of the agreement one appreciates that it does not pass or convey a legal right or interest to the plaintiff. At best, it is only a receipt as pleaded, evidencing the sale for the purchase price therein. And at best it could possibly vest equitable right or interest in the purchaser”

The learned justice, like the trial court proceeded to hold that because the appellant did not succeed in registering the deed of assignment executed in his favour by Alhaji Bukar Kumshe, he was bound to fail in his action because, the Certificate of Occupancy was still in the name of the said Alhaji Bukar Kumshe, judgment debtor of the 1st respondent. At the end of the day, the learned Justice held that the appellant had merely an equitable interest while the 2nd respondent had superior legal estate in the disputed land, therefore the equities were not equal.

Now, there is no doubt that a distinction exists between a legal estate “or fee simple” as opposed to an equitable interest in land, but that distinction cannot apply in a situation such as this and where the disputed land is governed by the provisions of the Land Use Act, in which the maximum interest any person can hold is a right of occupation, the legal estate or Legal interest is vested in the Governor of the State. See NKWOCHA VS. GOVERNOR OF ANAMBRA STATE 1984 6 SC 362. The tenor of the Land Use Act was to “nationalize” all lands in the country by vesting its ownership in the State. The maximum interest preserved in private individual hands is a right of occupancy. See SAVANNAH BANK VS. AJILO [1989] 1 NWLR (Pt.97) 305. The nature of interest any person can acquire is a right of occupation and no more. So the distinction between “a legal estate in land” and “an equitable interest in land ” under the circumstances of this case cannot arise. In my view, the interest the appellant had acquired cannot be inferior to the interest

acquired by the 2nd respondent. It is common ground and that there was no dispute about it, that the appellant purchased the land in dispute from the holder of the Statutory Right of Occupancy, Alhaji Bukar Kumshe, who issued him with a Purchase receipt, put him in possession of the property and executed in his favour a deed of assignment. The appellant proceeded to register the deed of assignment, but was frustrated by the letter written to the land office by the Upper Area Court. It should be noted that the suit before the Upper Area Court was about a debt and had nothing to do with the land and the buildings on it. It should also be noted that the interest of the 1st respondent who filed the suit did not crystallise until over a year later. In other-words there was no judgment debt to execute when the letter was written.

In my view, there was no difference except -as to priority between the appellant and the 2nd respondent, who also purported to “buy” the same property at a public auction conducted by a court and who also did not obtain the governor’s consent nor had his interest registered. In otherwords both of them bought the property lawfully and none of them was the registered holder of the right of occupancy in question. It was evident that the appellant was put in possession of the property, since the 10/3/1994, while the 2nd respondent purported to “purchase” the right of occupancy at a public auction in April 1995. In my view, even if the 2nd respondent had acquired legal estate or the property was properly conveyed to him, he had to take the property subject to the existing rights and interest of the appellant. In the Case of OGUMBAMBI VS. ABOWABA (supra), the OLOTO family in Lagos sold a portion of its family property to X who paid the purchase price and .was given a receipt. There was implied agreement, to execute a conveyance on demand. X went into possession and remained in possession, but no conveyance was executed in his favour. Subsequently the Oloto family sold and conveyed the same land to the defendant after the defendant had unsuccessfully sought to purchase the same land from X. It was held that even though the defendant had a conveyance, he was bound by the equitable interest vested in X see also

OLOWO VS. OSHINUBI [1958] LLR 211. From the evidence in the instant case, it is common ground that the respondents were aware of the sale of the right of occupancy. That was why the letter to the Land Department, Maiduguri with a direction “*not to complete the transaction,*” was issued.

In any event, **both the trial Court and the Court of Appeal had found as a fact that the appellant had an equitable interest in the property, in my view equitable interest under the circumstances must be treated as having the same incidents as the corresponding legal estate. Equity follows the law.**

In property law many different question of priority may arise, these may concern rival conveyances of property or as in this case competing interests in the holding of the right of occupancy. The fundamental rule is that competing interests will generally rank according to the order of their creation. See BARDAYS BANK LTD VS. BIRD [1954] CH. 274, UGBO VS. ABURIME [supra] LABODE VS. OTUTU supra and OKOYE VS. DUMEZ supra.

In AWOSHO VS. DADA 1984 7 SC 149. This Court per ANIAGOLU JSC said at 173:-

“The law has been well and long settled, that where a person pays for land and obtains receipt for the payment followed by his going, into possession and remaining in possession, equitable interest is created for him in the land such as which can defeat the title of a subsequent legal estate purchaser with knowledge of the equitable estate in the land, that was affirmed to be the state of the law in ORASAMI VS. IDOWO [1959] 4 FSC 40 xxxxxxxx.”

The mere fact that there were tenants in the property coupled with the fact that the Upper Area Court and the 1st respondent were aware of the desire of Alhaji Bukar Kumshe to sell the right of occupancy was sufficient to alert the respondents of the interest of the appellant. On this question of prior notice see the evidence of DW2 and DW3.

At the end of the day, I resolve issues 1 and 2 in favour of the appellant. In the result no useful purpose will be achieved in

considering issues 3 and 4. I accordingly allow the appeal of the appellant. I set aside the decisions of the lower courts and I enter judgment infavour of the plaintiff as follows:-

(a) I declare that the plaintiff is the bona fide owner of the property the subject matter of this suit.

B

(b) I declare that the sale of the property-conducted by the Upper Area Court at a public auction is null and void and was of no effect. I set it aside and I restore the property to the plaintiff/appellant.

(c) I declare that the judgment debtor had no interest in the property which was sold to the plaintiff/appellant since 16/3/1993.

C

(d) A perpetual injunction is hereby granted restraining all the defendants/respondents from interfering with the rights of the plaintiff/appellant on the property.

D

(e) N5,000.00 damages for trespass.

The plaintiff /appellant is entitled to costs in both the two lower courts and in this court which I assess at N5,000.00, N7,000.00, and N10,000.00 respectively jointly and severally against the respondents.

E

BELGOREJSC

I read in advance the Judgment of my learned brother, Musdapher JSC and I agree with his reasoning and conclusions which I adopt as mine. I also allow the appeal and make the same orders as to costs.

F

KUTIGIJSC

G

I read in advance the judgment just delivered by my learned brother Musdapher, JSC. I agree totally with his conclusion to allow this appeal. Alhaji A. Bulama also known as Alhaji Bukar Kumshe was the holder of the Statutory Right of Occupancy No. BO/12220 which covers the plot of land on which the storey building stood. He sold the said plot of land or property to the Plaintiff/Appellant, Alhaji Mustapha Kachalla, for the sum of N1,200,000.00 vide a receipt dated the 16th day of March, 1994.

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After payment, the Appellant was given the Certificate of Occupancy as well as possession of the property. The sale to the Appellant was thus full and complete. Therefore when the 1st Respondent obtained judgment on 28th day of August, 1994 against Plaintiff/Appellant's vendor, Alhaji Bukar Kumshe, and on 18th April, 1995 the property was purportedly sold at a public auction to the 2nd Respondent who was the highest bidder, he (the 2nd Respondent), bought nothing. The plot or property no longer belonged to Alhaji Bukar Kumshe the judgment debtor, the property having been sold to the Appellant as far back as 16/3/1994. The 2nd Respondent therefore clearly bought nothing on 18/4/1995 when the property was purportedly sold to him at the auction.

It is for the above reason that I agree with the lead judgment to allow the appeal. The appeal therefore succeeds and it is hereby allowed. The judgments of the Court of Appeal and as well as that of the trial High Court are set aside. I enter judgment in favour of the Plaintiff/Appellant in terms set out in the lead judgment. I endorse the order for costs.

E

KALGO JSC

I have read in advance the judgment just delivered by my learned brother Musdapher JSC in this appeal. I agree that there is merit in the appeal and it out to be allowed. My learned brother has fully considered all the relevant issues raised in the appeal adequately in my view and I entirely agree with his reasoning and conclusions reached thereon. I however wish to add a few words of mine by way of emphasis.

This action concerned the sale to or purchase of one landed property by two different people i.e. the appellant and the 2nd respondent. According to the evidence at the trial, the appellant bought the property from the sale agent (Pwl) at N1,200,000.00 (one million two hundred thousand naira) on 16th of March 1994. He paid the purchase price and was given a receipt, deed of assignment and the certificate of occupancy on the land. He was then put in possession of the property. He could not register his interest in the property with the land authority due to some intervening circumstances.

On the 18th April 1995 the 2nd respondent bought the same property at an auction sale for the sum of N520,000.00 (five hundred and twenty thousand naira). From the above, it is very clear that the appellant bought the property on 16th March 1994 and the 2nd respondent bought the same on 18th April 1995 over one year later. There is no doubt B therefore that the sale to the appellant was first in time and ordinarily he should have priority over that of the 2nd respondent. Also the auction sale on 18th April 1995 could not be regarded as proper to the 2nd respondent as the innocent purchaser of the property for value without notice, since C there was evidence that the court which conducted the auction sale wrote to the land authority before the auction, stopping the registration of the interest of the appellant on the property. . In my view therefore the interest of the appellant whatever it may be (equitable or legal) is first in time to that of the 2nd respondent. The fact that the 2nd respondent bought by D auction on the purported execution of a judgment of a court, does not give him any priority over that of the appellant. See *Ojo V. Azama* (2001) 4 NWLR (pt. 702) 57; *Arase V. Arase* (1981) 5 SC 33; *Bello V. Eweka* (1981) 1 SC 101. E

In this case therefore, it is my view that the sale of the property concerned to the appellant is complete except that the appellant on his part has not perfected his interest in the property by obtaining the relevant consent and registering it in his own name. It would appear that his interest F now is only equitable. But the purported auction sale to the 2nd respondent has no validity at all and so the 2nd respondent gained nothing. Assuming without conceding however that the 2nd respondent acquired equitable interest in the land by way of the auction sale, his equity coming later in G time must be defeated. See the cases of *Labode V Otubu* (2001) 7 NWLR (pt. 712) 256 at 281 -282; *Okoye V. Dumez (Nig.) Ltd* (1985) 1 NWLR (pt. 4) 783; *Adekeye V. Akin-Olugbode* (1987) 3 NWLR (pt. 60) 214; *Animashoun V. Olojo* (1990) 6 NWLR (pt. 154) 111.

From what I said above and the more reasons given in the leading H judgment of Musdapher JSC, I find that there is merit in this appeal. I allow it and set aside the decision of the Court of Appeal and restore that of the trial court. I abide by the order of costs made in the leading judgment.

ONNOGHENJSC

I have had the benefit of reading in draft, the lead judgment of my learned brother, MUSDAPHER, JSC just delivered. I agree with his reasoning and conclusion that the appeal has merits and should be allowed.

The trial and lower courts found as a fact that Alhaji Bukar Kumshe, the vendor to the appellant, rightly and lawfully sold the property in issue to the appellant “*without collusion nor as an afterthought.*” The trial court also found and held that the receipt of purchase of the property which was tendered and admitted as exhibit MK1 is “*a good evidence of his (i.e appellants’) equitable right to the house.*” This finding and holding was confirmed by the lower court in its judgment. The findings clearly show that at the time of purchase, appellant had no knowledge of the interest, if any of any other person in the property. In fact from the evidence the sale by auction took place more than one year after appellant had purchased the property “*without collusion nor as an afterthought.*” As far as the law is concerned, that finding disposes of the case in favour of the appellant; the law being that he who is earlier in time is stronger in law.

From the facts of the case appellant acquired an equitable interest in the property when he paid for same and a receipt issued as evidence of such payment leaving the formality of a conveyance with its attendant consents.

The law is also settled that such equitable interest so acquired would defeat the title of any subsequent purchaser of the legal estate thereto with knowledge of the equitable interest in the property. In *Owosho vs. Dada* (1984) 7 S.C 149 at 173 the supreme Court stated the law thus:-

“*The law has been well and long settled, that where a person pays for land and obtains receipt for the payment followed by his going into possession and remaining in possession, equitable interest is created for him in the land, such as would defeat the title of a subsequent legal purchaser with knowledge of the equitable estate in the land. That was*

affirmed to be the state of the law in ORASAMU vs. IDOWU (1959) 4 FS.C 40 In the same case, prior knowledge by the Defendant of the interest of the plaintiff in the land would affect him even though he might have had actual formal notice.....”

It is therefore clear that appellant having bought the property, the original owner ceased to have any interest therein, whether equitable or legal which could subsequently be attached and sold in execution of any judgment of the court. That being the case, the man who bought by auction bought nothing at all; there being nothing left to be sold to him, in satisfaction of the judgment of that court.

When looked at in this light, it becomes very clear that the issue of the two equities being equal does not arise.

On issue No. 4 which raised the question as to whether an order of non-suit instead of dismissal would not have been better, it is very clear from the record that both counsel never addressed the lower court on the matter particularly as this issue was never raised before that court, it is trite law that the court will not award what was not asked for neither can it raise an issue and base its decision thereon without first and foremost requesting both counsel to address it on it. However, an order of non-suit is not employed for affording yet another opportunity to a party who has failed to discharge the onus of proof which lies on him but only when, in the interest of justice, the plaintiff has only failed to get judgment on account of a hitch of which the defence is not, in the opinion of the court, entitled to take an advantage - see *Odieta vs Oketie* (1972) 6 S.C 49 at 55; *Yusufu vs ACB* (1980) 1 S.C 31 at 36.

This clearly means that an order of non-suit should only be made where a plaintiff has not failed in-toto and where in any case, the defendant is not entitled to the judgment of the court - see *George vs. UBA Ltd* (1972) 829 S.C 264. In the present case, the trial and lower courts found that appellant, as plaintiff, had failed completely to prove his case and therefore dismissed his claim. That decision is either right or wrong and I believe the present appeal is aimed at setting same aside for being a wrong decision.

I therefore hold the view that the issue of non-suit being the proper

order does not arise, the same having not been raised and addressed upon by counsel nor the lower court given an opportunity to rule thereon. That apart, I also hold the view that the issue is irrelevant having regard to the decision of the lower court appealed against. Finally, the issue being a
B fresh one, leave of court is required before it can be raised in this court. There is no evidence on record that leave was sought and granted by this court.

Looking from every angle the issue in question is incompetent and
C is accordingly discountenanced.

In conclusion, I too hold the view that the lower court erred in confirming the judgment of the trial court. The appeal therefore has merit and is accordingly allowed. I abide by the consequential orders made in the said lead judgment of my learned brother MUSDAPHER, JSC
D including the order as to costs.

Appeal allowed.

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