

SUPREME COURT OF NIGERIA

29TH JUNE, 2007. SC. 213/2002

**CORAM:- N. TOBI, G. A. OGUNTADE, A. M. MUKHTAR,
W. S. N. ONNOGHEN, C. M. CHUKWUMA-ENEH, JJSC**

CHIEF D. S. YARO

..... APPELLANT

AND

1. AREWA CONSTRUCTION LIMITED

(IN RECEIVERSHIP)

2. UNITED BANK FOR AFRICA LIMITED RESPONDENTS

3. ALHAJI MUDI YARO MOHAMMED

APPEALS - Ground of appeal - Competence - Leave - Where a ground is one of mixed law and fact - Failure to obtain leave renders it incompetent (H1)

LAND LAW - Sale - Mortgages - Redemption - Bank Loan - A party that has mortgaged his land - Cannot transfer legal title to another person - As the only interest left for him is equity of redemption - Till the debt is fully paid up (H2)

APPEALS - Evidence - Findings of lower courts - That run counter to the drift of evidence - Occasioned a miscarriage of justice - As lower courts took extraneous matters into account (H3)

LAND LAW - Equity - Sale - Agreement - Where a party has paid part of the agreed price - In line with the agreed terms - There is a binding agreement - That conveys the seller's interest to that party (H4)

LAND USE ACT - Mortgages - Governor's consent - Is normally pursued - After parties have agreed - Then the deed is prepared - And sent for Governor's consent (H5)

LAND LAW - Sale - Specific performance - Though agreement of sale

exists in this case - Only equity of redemption was acquired - Thereby making order of specific performance unavailable (H6)

MORTGAGES - Loan - Title documents - Where the loan has not been fully paid up - Court cannot order mortgagee to release the title documents - As he who comes to equity must also do equity (H7)

FACTS

Before the High Court of Justice Kano, plaintiff/appellant filed an action against the defendants /respondents. Appellant claimed inter alia, a declaration that the agreement between him and the 1st respondent by which 1st respondent sold the landed property in issue to him cannot be unilaterally rescinded, and declaration that appellant is entitled to delivery of all the documents of title to the said property. 1st and 2nd respondents denied the claim and filed separate counterclaims against appellant. The property, plot Nos. 157/159 Club Road, Kano, belonged to the 1st respondent who mortgaged it to the 2nd respondent bank as security for loan, and deposited the certificate of occupancy with the mortgagee. In 1983, 1st respondent being in financial difficulty decided to sell the property to INCAR Nigeria Ltd, who declined the offer. Appellant who was then a Director of INCAR went into negotiations for the sale of the property to him. 1st respondent agreed to sell at the price of N2.3 million, vide instalment payments. Appellant paid a total of N1.8 million leaving the balance of N500,000.00. He was put in possession, he renovated the property at great expense and gave it to tenants who started paying rent to him.

Appellant later came to understand about the mortgage to the 2nd respondent. In July, 1985, he entered an agreement to pay the balance of N500,000.00 to the 2nd respondent so that the certificate of occupancy would be released to him. He was not able to pay within the agreed period. By the time he raised the money, 2nd respondent refused to receive it nor did it release the title documents, hence this suit. At the conclusion of hearing, the trial court dismissed appellant's claim and granted some of the counter claims of the respondents. Appellant's appeal to the

Court of Appeal was dismissed. Still dissatisfied, appellant has further appeal to the Supreme Court.

ISSUES FOR DETERMINATION

“(1) Whether the Court below was not in error when it affirmed the trial Court’s decision that there was no complete agreement of the sale of the disputed property to the Appellant.

(2) Whether the court below did not misdirect itself when in effect it held that there could not have been a valid, sale of the property to the Appellant because the 1st Respondent had offered the property for sale to INCAR NIGERIA LIMITED and because the Appellant knew that until he paid the balance of N500,000.00 to the 2nd Respondent, he could not have a valid transaction on the property.

(3) Whether the Court below was not in error by affirming the award of N100,000.00 made in favour of the 2nd Respondent as general damages.”

HELD (Unanimously allowing the appeal in part per **CHUKWUMA-ENEH JSC**)

Ground of appeal - Competence

1. Undeniably, this ground has not raised a question of law. Clearly the ground raises issue of mixed law and fact as it involves re-evaluation of facts and so, requires leave of the court below or this court. And not having sought and obtained such leave, the ground is declared incompetent and it is struck out. The consequence of having struck out ground 4 is that the issue for determination distilled from it automatically becomes incompetent as having no basis. In this regard it must be ignored. In the absence of the appellant tying the 4 grounds of appeal to their respective issues for determination, I am in no doubt that issue 3 in the appellant’s brief of argument is completely founded on ground 4 as its general discussion in the appellant’s brief bears out. This conclusion is supplemented by the appellant’s submission under sub-head (g) in the said brief under issue 3 at p. 14 of the record, last four sentences of that page; it reads thus: “The award of damages, has been based on erroneous application of the law and misapplication of the facts.” Need one any other proof

that ground 4 is truly one on facts? No. Therefore, issue 3 having no basis is hereby discountenanced.

In the result, I find no substance in the preliminary objection to grounds 1, 2 & 3; it is hereby overruled but it is sustained with regard to B ground 4, which is hereby struck out. (p. 2926 G)

LAND LAW - Sale - Mortgages - Redemption

2. The nature of a mortgagor's interest left after mortgaging his property is known as *equity of Redemption* which otherwise is an estate in land. C See: *Usenfowokan v. Idowu & Anor. (1975) NSCC (vol. 1)175*. This is the 1st respondent's portion, in law after it has mortgaged the said property to the 2nd respondent. *In other words, the 1st respondent's interest is only to demand by way of right to an equity of redemption that the title D documents be released to him on full payment of the loan advanced to it by the 2nd respondent.* More importantly, in any dealing with the disputed property by the 1st respondent, the only interest the 1st respondent can part with in this respect is its interest in the equity of redemption, no E more, no less; as it cannot even if the legal estate is residing in him grant an interest to supersede the equitable rights of the 2nd respondent over the mortgaged property without first getting rid of the whole amount of its indebtedness to the 2nd respondent under the mortgage loan.

F The above cited cases have showed in relation to this case that the only interest the 1st respondent has left in the mortgaged property it can deal with at all material times, of the negotiations with the appellant for the agreement of sale of the said property is its interest in the equity of redemption and this is all it can pass on to a third party as the appellant. G The appellant has had due notice that all he was negotiating was as regards the 1st respondent's interests in the equity of redemption. And so, any purported attempt to transfer the legal estate by the mortgagor to the appellant as the 2nd relief in the claim is contending without getting rid of H the mortgage debt and so, supersede the 2nd respondent's equitable mortgage cannot be allowed in equity. (p. 2934 E/ 2936 A & F)

APPEALS - Evidence - Findings of lower courts

3. I most respectfully disagree with the above findings and conclusions reached, by the court below in this respect as it runs counter to the drift of evidence. There can be no doubt that an equitable interest is acquired when there is payment of money coupled with possession. This is the case of the appellant on the facts of this matter-therefore he has acquired an equitable estate founded on the 1st respondents' equity of redemption. I hold the lower court's, finding above, as perverse; it simply has occasioned a miscarriage of justice. B

And I am very much aware that it is well established in cases as *Atolagbe v. Shorun* (1985) 1 NWLR (pt. 2) 360; *Adimora v. Ajifo* (1988) 3 NWLR (pt. 80) 1 that in such cases a finding is perverse where it runs counter to evidence and pleading or where it has shown that the trial court took into account matters which it ought not to have taken into account or shut its eyes to the obvious or when it has occasioned a miscarriage of justice. The two lower courts have in addition taken into account a collateral matter as to the undertaking given to the 2nd respondent to pay N500,000.00 for the title documents and thus, have improperly used it to becloud the contract (i.e. agreement of sale) between the appellant and the 1st respondent i.e. leading to their holding that there is no agreement of sale and this has occasioned a miscarriage of justice. (p. 2939 A) C D E

LAND LAW - Equity - Sale - Agreement F

4. I have earlier set out the peculiar factors and circumstances not least being that the appellant has paid part of the purchase price of N2.3m to the tune of N1.8m leaving a balance of N500,000.00 and has been put in possession of the disputed property. There is a binding agreement of sale of the 1st respondent's interest in the said property between the appellant and the 1st respondent. The appellant has thereby acquired an equitable interest to the extent of the 1st respondent's interest in the equity of redemption and this is the interest which the mortgagor the 1st respondent has had at all material times. The 1st respondent cannot give what it hasn't got. (p. 2939 H) G H

Mortgages - Governor's consent

5. The 3rd respondent has raised the question of Section 22 of Land Use Act; concisely, the section requires that Governor's consent to the mortgage deal has to be first had and obtained otherwise the contract is void.

B I think with respect that the 3rd respondent's objection is lamely in that as decided in *Awojugbagbe v. Chinukwe & Anor.* (supra) it is after the mortgage has been executed that obtaining of the Governor's consent falls due. It is normally after the parties have agreed that the Deed of Assignment is prepared and sent for Governor's consent. The instant mortgage therefore has not fallen foul of Section 22 of the Land Use Decree. (p. 2940 D)

LAND LAW - Sale - Specific performance

D 6. For all the above, I am of the firm view that the appellant and the 1st respondent concluded an agreement of sale of the equitable interest of the 1st respondent in the property situate at. No 157/159 Club Road; Kano at the purchase price of N2.3 and that the appellant has paid as receipted E in Exhibits 1,2,3,4,5, and 6 a total sum of N1.8m leaving a balance of N500,000.00. And sequel to that, the appellant entered into possession of the property, carried out substantial repairs and renovations and put in rent paying tenants; thus acquired on equitable interest, again, only to the extent of the equitable interest of the 1st respondent in the equity of redemption which as I have found the 1st respondent can transfer to a third party. The appellant cannot on these conclusions be entitled to an order of specific performance. (p. 2940 G)

G ***MORTGAGES - Loan - Title documents***

7. Relief (b) cannot be granted unless and until the mortgage debt is repaid to the last kobo or the 2nd respondent (the mortgagee) has consented to granting of such order. There is no such consent here. The cases of *Barclays Bank of Nig Ltd v. Ashiru* (supra) and *Bank of New South Wales v. O'Connor* (supra) have held that courts cannot compel a mortgagee to part with his security unless he has received his money which is not the case in this matter. This is so, even though, as a general

rule, the mortgagor and all persons having any interests in the equity of redemption as the appellant here are entitled to redeem the mortgage.

This is not the claim before the court. The appellant is here asking for declaratory reliefs which are granted at the court's discretion and being equitable reliefs cannot be granted in the face of the outstanding debt on the mortgage; In other words, what the appellant seem to be contending here is that the court should order the 1st respondent to transfer the said property to him acting on the agreement of sale reached between them and thus prevent the 2nd respondent from interfering with his enjoyment of the said property and even more so to order the 2nd respondent to compensate him for withholding the title documents. I think, that the appellant in so postulating has ignored the general rule that he has to discharge any outstanding debt on the mortgage to be entitled to this relief. There is no proof he has done so. Though, I must advert to the fact that where as here a mortgagee has entered in possession or taken other steps for realising his security as by appointing a receiver as in the instant matter the court has jurisdiction upon payment of the debt on the mortgage, to order the security to be given up. He who comes to equity must also do equity. (p. 2941 E)

NOTABLE POINTS OF INTEREST

CHUKWUMA-ENEHJSC

1. Appeals - Purpose of reply brief

The purpose of reply brief is to tackle new issues or argument raised in the respondents' brief of argument and not dealt with in the appellant's brief of argument otherwise a reply brief would be tantamount to a repetition of the appellant's main brief. In other words, it should not serve as a forum for reopening the appellant's case all over again. And where it is coterminous in every respect with the appellant's main brief, it should be discountenanced. (p. 2932 G)

TOBIJSC

2. Valid agreement existed between appellant and 1st respondent

Where parties enter into an agreement and subsequently decide to intro-

duce new terms, they can only do so by specific reference to the earlier agreement to the effect that the later agreement has introduced new terms thereof. Although that could be inferred by the conduct of the parties in certain circumstances, I do not see such a circumstance in this appeal.

B On the contrary, i see a clearly complete agreement in respect of the sum of N2,800,000.00. As the undertaking to pay the sum of N500,000.00 was distinct and separate from the first agreement, the remedy of the 2nd respondent was to sue in the event of breach as in this case.

C It is in that respect, I find it difficult to agree with the Court of Appeal when it said at page 316 of the Record:

“In my respectful view the fact that the appellant was put in possession of the property did not validate the sale. He certainly knew that until he paid the balance of N500,000 to the 2nd Respondent who had the
D *title deeds he could not have a valid transaction on the property.”*

With the greatest respect, the Court of Appeal is wrong in coming to the above conclusion. There was a complete valid agreement which did not need the prompting of the later undertaking to be valid in law. As
E there was a complete valid agreement, the learned trial Judge ought to have ordered specific performance in the circumstances of the case.
(p. 2944 H)

F **ONNOGHEN.JSC**

3. *Acceptance of offer backed by consideration creates a valid contract*
From the undisputed facts, it is my considered view that there was a complete sale agreement of the landed property in question between the appellant and the 1st respondent long before the appellant became aware
G of the interest of the 2nd respondent. It is settled law that a contract is formed once there is an offer by the offeror to the offeree which is accepted by the offeree backed by consideration. At that point in time, the parties to the contract are said to be ad idem or in agreement, and,
H that agreement or contract is binding on both parties and as such it is enforceable by action. In the instant case the offer of sale of the property was made to the appellant by the 1st respondent, after INCAR NIGERIA LTD failed to buy the property which offer was accepted by the appel-

lant. A price for the sale was also agreed upon and the total sum of N1.8 million out of N2.3 million agreed price was paid over to and accepted by the 1st respondent who, as an act of consummating the contract, duly put the appellant in possession of the property in issue. Despite all these undisputed facts, the lower courts held that there was no completed sale! B I hold the view, with all due respect to the lower courts, that they are wrong in so holding. There was a complete agreement or contract between the parties which contract was substantially performed by the appellant. (p. 2955 F)

C

REPRESENTATION

The appellant was not represented

O. Ibitoye, Esq. for the 1st respondent

O.A. Akerele Esq. with him M. Sallam Esq. for the 3rd respondent

The 2nd respondent was not represented.

D

CASES REFERRED TO

Omo v. Delta State (2000) 7 SC (pt.11) 1

Evans v. Bartlans (1937) AC 473

Odure v. Davis (1952) 14 WACA 46

Ediaghenya v. Dumez (Nig) Ltd (1986) 3 NWLR 753

Usenfowokan v. Idowu & Anor. (1975) NSCC (vol. 1)175

Kadiri v. Olusaga (1956)1 FSC at p. 178

Barclays Bank of Nigeria Ltd v. Adamu B. Ashiru & Anor. (1978) 6/7 SC 70

Atolagbe v. Shorun (1985) 1 NWLR (pt. 2) 360

Adimora v. Ajifo (1988) 3 NWLR (pt. 80)1

Awoniyi v. AMORC (2000)6 SC (pt.1) 103

Afrotech Technical Services (Nig.) Ltd. v. M/A & Sons Ltd (2000) 12 SC (pt.11)1

Romame v. Romame (1992) 4 NWLR (pt.238) 650

Kariba v. Green (1992) NWLR (pt.230) 426

S.B. Fashanu v. M.A. Adekoye (1974) 1 ANLR (pt.1) 35

Iregunima v. R. S.H.P.D.A (2003) 12 NWLR (pt 834) 427 at 441

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H

STATUTE REFERRED TO

Constitution of the Federal Republic of Nigeria, 1999 s. 233

LEAD JUDGMENT BY CHUKWUMA-ENEH JSC

B The plaintiff in this matter by a writ of summons has claimed against the defendants as follows:

“(a) A declaration that the agreement by the 1st defendant to sell to the plaintiff all its interest in that property known as Plots Nos. 157/159 Club Road, Kano, had been completed by 1984, and that the 1st defendant could not unilaterally rescind the said agreement thereafter.

(b) A declaration that the plaintiff is entitled to delivery over to him of all the documents of title to the, property aforesaid including in particular the certificate of occupancy nos. 13819 and 6929 registered as No.140 at page 1413 in volume 8 (Misc.) at the Lands Registry in the Office at Kano at present, in the custody of the 2nd defendant.

(c) N500,000.00 special and general damages for wrongful refusal to return the said documents of title to plaintiff.”

The 1st defendant counter-claimed from the plaintiff in its statement of defence and counter-claim as follows:

“i. An order for account by the plaintiff to the 1st defendant of all sums of money the plaintiff has been collecting and collected from tenants since May, 1985 till date.

ii. Payment of such monies to the 1st defendant forthwith.

iii. Mesne profit on the 1st apartment in the said house and premium by the plaintiff in respect of No. 157/159 Club Road, Kano till date.

iv. A sum of N2 million for the increased indebtedness on the loan and interest by the 1st defendant to the 2nd defendant as a result of the breach of promises made by the plaintiff in respect of the said property No. 157/15-9 Club Road, Kano State.

v. N100,000.00 being damages special and general for the trespass committed and still continued to be committed by the plaintiff on 1st defendant's property No. 157/159 Club Road, Kano State.”

Particulars of damages:	Special Damages	
Cost of damages to the building and premises of the 1 st defendant at No. 57/1 59 Club Road, Kano State	N400.000.00	
General damages.....	<u>N100,000.00</u>	B
	<u>N500,000.00</u>	

The 2nd respondent also in its Amended statement of defence counter-claimed from the plaintiffs as follows as per paragraph 30 thereof at page 95 of the record:

“a. A declaration that the 2nd defendant by its authorised representatives and the plaintiff agreed orally at a meeting on 23rd July, 1985 as well as in a letter of the same date from the 2nd defendant to the plaintiff that the 2nd defendant would release the title documents to Nos. 157/159 Club Road, Kano to the plaintiff upon the payment by the plaintiff to the defendant of the sum of N500,000.00

b. A declaration that the, agreement between the plaintiff and the 2nd defendant referred to above was on account of the 2nd defendant's charge in the sum of N500,000.00 over the said properties Nos. 157/159 Club Road, Kano owned by the 1st defendant, and that the plaintiff so knew and/or agreed with the defendant.

c. A declaration that the agreed agreement between the plaintiff and the 2nd defendant referred to the above was to be performed immediately on the day it was made orally and in the letter aforesaid i.e. on 23rd July 1985, or on or, before 30th November, 1985 and that the plaintiff failed to perform his own part thereof.

d. A declaration that the plaintiffs failure to perform his part of the contract aforesaid automatically brought it to an end and the 2nd defendant's offer pursuant thereof lapsed.

e. A declaration that the plaintiff's failure or neglect to pay the sum of N500,000.00 to the 2nd defendant pursuant to their agreement was wrongful and that the 2nd defendant has thereby suffered loss and damage.

f. General damages in the sum of N1.00,000.00 for the plaintiffs breach of contract, between himself and the 2nd defendant referred to

above and subject matter of these presents.

g. Costs and further or other relief'

The record has showed that the plaintiff filed replies to the counter-claims pleadings were filed and exchanged between the parties and at the trial the plaintiff testified and called 2 witnesses; the 1st and 2nd respondents each called one witness in their defence. The trial court in a considered judgment found for the defendants and made the following orders as culled from the judgment of the court below:

- C “(1) *That the plaintiff 's claim failed and were all dismissed.*
 (2) *That the plaintiff should render account to the 1st defendant.*
 (3) *That the plaintiff should vacate the premises and stop collecting rent on the premises.*
 (4) *That the plaintiffs should pay N1,000,000.00 General damages to the 1st defendant.*
D (5) *That the plaintiffs should pay N100,000.00 to the 2nd defendant.*
 (6) *That the 1st defendant should refund to the plaintiff the sum of*
E *N1,800,000.00 after the property should have been sold.”*

The plaintiff, aggrieved by the decision appealed to the Court of Appeal, Kaduna Judicial Division by a Notice of Appeal containing 17 grounds of appeal. The parties in compliance with Rules of the Court below filed and exchanged their respective briefs of argument. The court below after hearing the .appeal, gave a considered judgment dismissing, the plaintiffs appeal and in affirming the decision of the trial court, the court below held as follows as at p.319 of the Record (the last paragraph):

G *“From all have said in this judgment, I am of the firm view that the trial judge correctly dismissed the appellants claim before him and the appeal in respect of that aspect of his judgment is hereby dismissed. The trial judge was also right in awarding the sum of N100,000.00 as*
H *general damages to the 2nd respondent and I dismiss the appeals it relates to that award.*

As for the counter-claim of the 1st respondent it is my view that the 1st respondent failed to prove its claim and the trial judge was wrong, in

giving judgment in its favour. Accordingly the appeal succeeds in that respect and the judgment of the trial court in favour of the 1st respondent in its counter-claim is hereby set aside and the counter-claim is dismissed. From the circumstances of this case. I do not consider it appropriate to award any costs.”

With these pungent conclusions the appellant’s case was dismissed; and feeling greatly aggrieved by the decision he has finally appealed to this Court upon a Notice of Appeal dated 3/10/1996 and therein has raised 4 grounds of appeal. Parties, again, filed and exchanged their briefs of argument in this court. The appellant filed, his brief of argument on 2/4/2001 and has therein distilled 3 issues for determination and they read as follows:

“(1) Whether the Court below was not in error when it affirmed the trial Court’s decision that there was no complete agreement of the sale of the disputed property to the Appellant.

(2) Whether the court below did not misdirect itself when in effect it held that there could not have been a valid, sale of the property to the Appellant because the 1st Respondent had offered the property for sale to INCAR NIGERIA LIMITED and because the Appellant knew that until he paid the balance of N500,000.00 to the 2nd Respondent, he could not have a valid transaction on the property.

(3) Whether the Court below was not in error by affirming the award of N100,000.00 made in favour of the 2nd Respondent as general damages.”

The 1st respondent also filed a brief of argument on 4/8/2004 which was deemed properly so filed and served; it has identified in the said brief of argument 2 issues for determination as follows:

“(1). Whether the Court of Appeal was right in coming to the conclusion that there was no complete agreement of sale of the disputed property proved before the trial court to enable it order specific performance thereof.

(2) Whether the Court of Appeal was right when it held that the payment of the sum of N500,000.00 by the appellant to the 2nd respondent was preconditioned to the finalisation and/or validation of the agree-

ment of sale.”

The 3rd respondent filed a brief of argument on 28/9/2001; besides, he has taken a point of preliminary objection and in the event of it being overruled has identified 2 issues for determination in his brief of argument as follows:-

“(1) *Whether the Court of Appeal was right in holding, that payment of the sum of N500,000.00 to the 2nd respondent was a condition precedent to the agreement for the sale of the disputed property.*

C “(2) *Whether the plaintiff can succeed in his claim in the absence of the Governor’s consent, pursuant to provisions of the Land Use Act.”*

The appellant has in response to the new questions raised in the briefs of argument of the 1st and 2nd respondents on the preliminary objection, filed two reply briefs. The one in regard to the 1st respondent was D filed on 7/2/2005 and the other on the 3rd respondent’s objection and other questions was filed on 5/10/2004.

The 2 respondents filed no brief of argument nor appeared before this court for the hearing even though served all the processes. In short, E it has not showed any interest in these proceedings.

The 3rd respondent preliminary objection principally is that all the grounds of appeal encompassed in the instant Notice of Appeal are grounds of fact or at best, grounds of mixed law and fact; and characteristically F that the grounds have been couched in a manner suggesting they are grounds of law. It is also the contention of the 3rd respondent that all the four grounds of appeal have been so couched as a collateral attempt to dislodge the concurrent findings of fact by the two lower courts.

G Taking these grounds of appeal *seriatim*, the 3rd respondent has argued as follows: On ground 1 that particular (c) refers to undisputed evidence in the matter. It is submitted that this ground cannot be gone into without a re-evaluation of the concurrent findings of fact and that paragraph (f) of the same ground has distorted the evidence accepted by H the court, and so, will require that the facts have to be gone into all over again.

The ground has therefore raised questions of mixed law and fact requiring leave of court:-

On ground 2: this ground it is submitted has attacked, the court's finding of fact that there was on contract and that the offer was made to a different party not to the plaintiff and like ground 1 will require the court delving into questions of facts of this matter.

On ground 3: it is contended that particular (a) is seeking an evaluation of Exhibit 32 while particular (b) is challenging the finding of fact that there was a pre-condition to the contract and that particular (c) has alleged an agreement denied by the defendant. In respect of each of these particulars, it is submitted that issues of fact have been raised.

On ground 4: which has attacked the award of damages; it is contended by the appellant that there are no credible evidence to support the award and as submitted by the 3rd respondent for this court to hold that the plaintiff's evidence is not credible raises a question of fact.

Finally, it is submitted; the 4 grounds of appeal, having at best raised questions of mixed law and fact, that leave of the court below or this court is required to render them competent grounds of appeal, before this court; and not having sought and obtained leave, the appeal is incompetent and should be struck out, I think I should firstly, dispose of this objection one way or the other to pave the way to go into the substantive matter and so, go ahead to state the response of the appellant, to the preliminary objection. This is more so as the whole essence of preliminary objection is to foreclose hearing the appeal and like questions of jurisdiction it is always best to take it first as it could result in saving valuable time. See *Okafor v. Nwude* (1999) 7 SC (pt.1) 106. The appellant has raised a pertinent point of whether the preliminary, objection is not improperly Constituted vis-à-vis the provisions of Order 2 Rule 9 of the Supreme Court Rules and therefore has urged that it be disregarded. I think this objection is diversionary as the matter is competent. Alternatively, it is submitted as follows:

On ground 1: that is, on particular (c), it has complained that erroneous conclusions have been deduced from undisputed facts and that any complaints of wrong conclusions from undisputed facts is a matter of law even then, in the instant matter that the totality of the ground has posed a challenge to the misapplication of the law to the undisputed facts,

which necessarily is a ground of law. See *A.C.B. Plc v. Obmiami Brick & Stone Ltd* (1993) 5 NWLR (pt.294) 399 and *Attorney General Kwara State v. Olawale* (1993) 1 NWLR (pt.272) 649 and *Arjay Ltd. v. A.M.S. Ltd* (2003) 7 NWLR (pt.820) 577 at 600-601 paras. F.A.

B On Ground 2: i.e. has complained of misapplication of the law on facts in that there are rudiments of contract i.e. offer, acceptance and consideration founded on the undisputed facts yet the court found that there, was no contract; it also misdirected itself on whether there must be a formal sale agreement or not. These questions, it is submitted do not
C call for evaluation of facts.

On Ground 3: the complaint is that the court has taken into account wrong criteria in reaching its conclusion not conformity with the guidelines as per the case of *Nwadike v. Ibekwe* (1987) 4 NWLR (pt.67)
D 718 at 744-745 paras. C. D. The ground it is submitted is one of law.

On Ground 4: the complaint is against the quantum of damages awarded by the court. It is argued that the award of N100,000.00 general damages is a matter of discretion, not based on any known principles of
E law; besides as there is no admissible evidence to support the award, the award being illegal is an issue of law.

In conclusion, it is contended that the 4 grounds of appeal are questions of law. As to the matter of want of Governor's consent raised
F in the said reply brief, I shall return to it later in dealing, with the substantive appeal. To grapple with the questions raised by the preliminary objection one must go into the grounds of appeal filed in this matter, and I set them forth as follows:

G “(1) *The Court below erred in law in affirming the trial court's decision that there was no complete agreement of sale of the disputed property to the appellant and thereby came to a wrong decision.*

PARTICULAR

(a) *It is settled law that an immediately binding contract will result if the parties have come to an agreement on all terms which they
H consider necessary to agree upon.*

(b) *The agreement of the sale of property was between the parties thereto namely the appellant and the 1st respondent.*

(c) *A binding and conclusive agreement of sale of the said property by the 1st respondent to the appeal had, on the undisputed evidence, been concluded latest by July 23, 1985.*

(d) *The equitable charge of N500,000.00 which the 2nd respondent claimed over the said property does not in law detract or derogate from the concluded, independent agreement of sale between the appellant and the 1st respondent.*

(e) *It is proper in law for the 1st respondent validly to dispose of its interest in the property to the appellant, the equitable charge notwithstanding.*

(f) *It is undisputed that the appellant had paid the entire purchase price of the said property less the balance of N500,000.00 and was put in physical possession by 1st respondent and carried out extensive renovation thereon with the 1st respondent's knowledge and agreement.*

(2) *The Court below misdirected itself in law by holding that:*

'.....clearly this paragraph shows that the property was offered to INCAR Nigeria Limited by the Board of the 1st respondents certainly not to the appellant as claimed by him in his evidence. When it was intended to the agreement, Exhibit was prepared but INCAR Nigeria Limited failed to endorse it. Throughout the proceedings, the appellant failed to tender any sale agreement of the property to him. He only tendered documents to show that, he was negotiating to purchase the property.... In my respectful view, the fact that the appellant was put in possession of the property did not validate the sale. He certainly knew that until he paid the balance of N500,000,00 to the 2nd respondent who had the title deeds, he could not have a valid transaction of the property.'

and thereby came to an erroneous decision in this case.

PARTICULARS

(a) *The identity of the purchaser of the said property was not made an issue on the pleadings,*

(b) *The Failure to tender any sale agreement, by the appellant is irrelevant as the sale of the said property by the 1st respondent to the appellant was not in dispute in the proceedings.*

(c) *The concluded contract of sale between the appellant and the*

1st respondent is different and independent in law from the 2nd respondent's undertaking to the appellant to release the title documents of the said property to him on receipt of the sum of N500,000.00 due to the 1st respondent representing the balance for the purchase price of the said

B property.

(d) The validity or otherwise of the agreement of sale of the said property between the 1st respondent and the appellant was not predicted on the payment of the said N500,000.00 to the 2nd respondent.

(3) The court below misdirected itself in law by holding that:

C

'For example, Exh.32 which was addressed to the appellant by the 2nd respondent made it clear that the 2nd respondent undertook to release to him the title documents to the property on payment to it of the sum of N500,000.00. That was certainly a precondition to the finalisation of the D agreement of sale, notwithstanding the fact that the appellant had already made part payment. I have therefore come to the firm conclusion that there was no complete agreement of sale of the disputed property proved before the trial court.....'

E

and thereby came to a wrong decision, in the matter PARTICULARS

(a) Exh.32, by the 2nd respondent is extraneous in law to the construction of the validity or otherwise of the agreement of sale between the F appellant and the 1st respondent.

(b) There was absolutely no pre-condition to the finalisation of the agreement of the sale, of the said property between the appellant and the 1st respondent.

G

(c) The validity of the sale agreement between the appellant and the 1st respondent was neither challenged nor put into question by the 2nd respondent.

H

(4) The court below erred in law by affirming the award of N100,000.00 as general damages to the 2nd respondent against the appellant and thereby came to an erroneous decision.

PARTICULARS

(a) There was no admissible or credible evidence in law to support the said award of N100,000.00 as general damages.

(b) The said award of general damages was not based on any principles known to the law.

(c) Quantifiable items of claim cannot in law be lumped together under general damages and they must be specifically, proved and not assumed.

(d) The 2nd respondent did not make out a case for the said award of general damages as required by law.

(e) In law, it is not for the court to make out a case for a party.

(f) Further Grounds of appeal will be added on the receipt, of the Record of Appeal and the certified true copy of the judgment.”

The provision of section 233 of the 1999 Constitution is directly in point particularly on the backdrop of the objection taken here. Section 233(2) and (3) of the 1999 Constitution Covers questions of Rights of Appeal (i.e. as of Right or by leave) to this Court from the Court below and it says and I quote:

‘The Supreme Court shall have jurisdiction to the exclusion of any other court at law in Nigeria to hear and determine appeals from the Court of Appeal.

(2) An appeal shall be from decisions of the Court of Appeal to the Supreme Court as of right in the following codes:-

(a) not applicable

(b) not applicable

(c) not applicable

(d) not applicable not applicable

(f) not applicable

(3) Subject to the provisions of subsection 2 of this section an appeal shall lie from the decisions of the Court of Appeal to the Supreme Court with leave of the Court of Appeal or the Supreme Court.”

[For emphasis]

Appeals to this court by leave which otherwise means permission, relate to matters of facts or mixed law and fact for which leave of the court below or this court must be obtained as a matter of condition precedent: see *Nalsa & Team Associates v. N.N.P.C. (1991) 8 NWLR (pt.212) 652 SC*. This court has the responsibility to ensure that the grounds of

appeal in respect of the mailers before it fall within its constitutional competence. In this regard, therefore, a ground of appeal is not let off the hook simply because it is tagged an error in law. This court must be satisfied it is so. See *Ojemen & 4 Ors v. Momodu II (1983) 3SC 173*. The
B consequence for not seeking leave where a ground of appeal is of mixed law and fact is fatal to the ground. However, one ground of appeal on law in a Notice of Appeal, I must observe, is capable of sustaining an appeal but not otherwise in which case the Notice of Appeal as well as the
C Grounds of Appeal is incompetent and liable to be struck out.

To determine whether a ground of appeal, as in this matter is one of law or mixed law and fact or both is not a straightforward matter as it stretches the ability of the court to its limits. However I have to go on to sieve through the instant 4 grounds of appeal and their particulars as
D raised in the instant Notice of Appeal guided by the guidelines as enunciated in the case of *Nwadike v. Ibekwe (supra)*, to sort out whether all or any of the 4 grounds of appeal are questions of law. This court in *Nwadike v. Ibekwe* laid down the general propositions to guide in this exercise and
E they are as follows:-

“(1) *it is an error in law if the adjudicating tribunal took into account some wrong criteria in reaching its conclusion or applied some wrong standard of proof or, if although applying the correct criteria, it*
F *gave wrong weight to one or more of the relevant factors; see O’ Kelly v. Trusthouse Forte Plc (1983) 3 All E.R. at p. 468.*

(2) *Several issues that can be raised on legal interpretation of deeds, documents, terms of art, words or phrases, and inference drawn therefrom are grounds of law; see Ogbechie v. Onochie (supra) at pp.419-*
G *492*

(3) *Where a ground deals merely with a matter inference, even if it be an inference of tact, a ground framed on it is a ground of law; provided it is limited to admitted or prove and accepted facts: see Edwards*
H *v. Bairstow (supra) p.55; H.L. for, many years, it has been recognised that inferences to be drawn from a set of proved or undisputed facts, as distinct from primary facts, are matters upon which an appellate court is as competent as the court of trial; see Benmax v. Austin Motor Co. Ltd*

(1945) *All E.R.* 326 at p. 327.

(4) *Where a tribunal states the law on a point wrongly, it commits an error in law.*

(5)..... *Where the complaint is that there was no evidence or no admissible evidence upon which a finding or decision was based. This is regarded as a ground of law, on the premises that in a jury trial there would have been no evidence to go to the jury”* B

Using the foregoing guidelines amongst others have helped the courts to resolve questions in this regard.

On Ground 1: I am more than certain that particulars (c) and (f) C are clear in questioning the conclusions reached on the undisputed evidence before the court below and not on the correctness of disputed facts which otherwise would attract a re-evaluation of evidence; some of the undisputed facts are that the appellant has taken possession of the property, carried out extensive repairs and renovations of the property, put in rent paying tenants and has paid the purchase price less the balance of N500,000.00. The ground has challenged reaching of wrong conclusion or inference from undisputed facts; thus, it is challenging D misapplication of the law to undisputed facts as against disputed facts. E The lower court it is complained has misunderstood the import of the admitted facts in this regard.

See *Ogbechie v. Onochie* (1980) 2 NWLR (pt. 23) 484. The question, in this ground is one of law: see *A.C.B Plc v. Obmiami Brick & Stone Ltd* (supra), *Attorney General Kwara State v. Olawale* (supra) and *Arjay Ltd v. A.M.S. Ltd* (supra). F

On ground 2: The whole gamut of ground 2 and its particulars come to a misdirection in law; the court is misled to hold that there is no contract; the ground and its particulars have challenged that conclusion as resulting from misunderstanding of the rudiments of contract consisting of offer, acceptance and consideration; and given as a common cause between the parties; they otherwise constitute a valid agreement. See H *Ogbechie v. Onochie* (1980) 2 NWLR (pt.23) 484 and also whether in a contract of sale there must be a formal sale agreement or not Undoubtedly, this ground raises questions of pure law and involves no evaluation

of facts.

On Ground 3: This ground challenges the taking into account wrongfully an extraneous factor, in this instance, the undertaking to pay N500,000.00 by the appellant given to the 2nd defendant, in reaching the conclusion that there is no complete agreement of sale *ab initio* between the appellant and the 1st respondent. The ground read on the backdrop of its particulars is contending that there is a complete agreement of sale of the property to the appellant without, taking into account the collateral matters. This does not call for a re-evaluation of fact as it is attacking the conclusion so reached. In the light of the foregoing, I refer and rely on one of the five classes of identifying a ground of law *Nwadike v. Ibekwe Supra* and I quote:

“(1) it is an error in law if the adjudicating tribunal took into account some, wrong criteria in reaching its conclusion or applied some wrong standard of proof or if although applying the correct criteria, it gave wrong weight to one or more of the relevant factors. See O’ Kelly v. Trusthouse Forte Plc (1983) 3 at 468.”

Ground 3 considered upon the above principle is unquestionably a ground of law as it is complaining of introducing extraneous element into the agreement of sale reached between the parties.

On Ground 4: The particulars of ground 4, particularly (a) and (d) belie the conclusion that ground 4 is anything but an error in law as the said two particulars of error (a) and (d) have showed that the real question is against evaluation, assessment, findings of facts as to the award of N100,000,00 as general damages. These particulars are there to explain and support the core issue in ground 4 and these particulars being part and parcel of ground 4 must stand or fall with ground 4. See *Mba v. Agu* (1999) 9 SC 13. **Undeniably, this ground has not raised a question of law. Clearly the ground raises issue of mixed law and fact as it involves re-evaluation of facts and so, requires leave of the court below or this court. And not having sought and obtained such leave, the ground is declared incompetent and it is struck out. The consequence of having struck out ground 4 is that the issue for determination distilled from it automatically becomes incompetent as hav-**

ing no basis. In this regard it must be ignored. See *Omo v. Delta State* (2000) 7 SC (pt.11) 1. In the absence of the appellant tying the 4 grounds of appeal to their respective issues for determination, I am in no doubt that issue 3 in the appellant's brief of argument is completely founded on ground 4 as its general discussion in the B appellant's brief bears out. This conclusion is supplemented by the appellant's submission under sub-head (g) in the said brief under issue 3 at p. 14 of the record, last four sentences of that page; it reads thus: "The award of damages, has been based on erroneous C application of the law and misapplication of the facts." See *Evans v. Bartlans* (1937) AC 473 & *Oduro v. Davis* (1952) 14 WACA 46, *Ediaghenya v. Dumez (Nig) Ltd* (1986) 3 NWLR 753. Need one any other proof that ground 4 is truly one on facts? No. Therefore, issue 3 having no basis is hereby discountenanced. D

In the result, I find no substance in the preliminary objection to grounds 1, 2 & 3; it is hereby overruled but it is sustained with regard to ground 4, which is hereby struck out.

I have to come to the appeal proper. The facts of this matter as I E have found out are well set-out in the judgment of the court below and I adopt the facts as so set-out thereat and replicate them in this judgment as from pp.312 to 313 of the record as follows:

"The 1st respondent owned a landed property known as Nos.157/15 F Club Road, Kano which it mortgaged to the 2nd respondent by depositing the certificate of occupancy with it in consideration for a loan granted to the 1st respondent. The 1st respondent was in financial difficulty and decided to sell the property to INCAR Nigeria Ltd as per the Board resolution, of the Company in Exh.30 INCAR Nigeria Ltd declined the offer to G buy the property and the appellant then entered into negotiation to buy the property for himself for the sum of N2.3 million to be paid in instalments sometime in 1983. He continued to pay the instalments until he H had paid a total of N1.8 million leaving a balance of N500,000.00. Sometime in 1984 the appellant was put in possession of the property by officials of the 1st respondent. He improved the property and let it out to tenants and began to collect rents. Meantime, he had not paid the bal-

ance of N500,000.00. In July 1985 the appellant and the 2nd respondent agreed that if the appellant paid the balance of N500,000.00 to the 2nd respondent it would release the documents of title to the appellant as per Exh.32. The appellant was unable to make the payment throughout the year 1985 and the 2nd respondent then wrote Exh. 49 cancelling the whole transaction on the ground that it could no longer wait indefinitely for the appellant to pay up. Following this the appellant tried in vain to pay the money in 1986 but the 2nd respondent refused to accept the payment. The appellant then went to court to enforce specific performance of the contract of sale.

The respondents counter-claimed as set out earlier in this judgment and the 2nd respondent called a witness to testify that it had lost a lot of money by the failure of the appellant to pay to it the sum of N500,000.00. The 1st respondent also requested the court to order the appellant to account for the rents collected by him. The learned trial judge dismissed appellant's claim and gave judgment in respect of some of the counter-claims of the respondents."

One thing that is very startling about this case is the way it has been handled by the two lower courts that is, leaving out of their discussion on one aspect of the mortgage created by the deposit of the 1st respondent's title documents with the 2nd respondent Bank and its wide legal implications in the context of this matter. This is because there is no other way of identifying the 1st respondent's extent of interest in the disputed property other than by examining in its ramification, the deposit of the 1st respondent's title deeds in the mortgage transaction vis-à-vis the bank loan granted it by the 2nd respondent.

The appellant arguing issue one in his brief of argument has hinged his case on the parties having entered into a complete agreement of sale of the disputed property following upon which the appellant has been put in possession of the property. And so, he claims entitlement to an equitable relief of specific performance of the agreement of sale and has applied to the court to grant the remedy in exercise of its equitable jurisdiction. He has referred to the holding by the court below at p.316 LL5-9 of the record to the effect that unless he paid the balance of N500,000.0.0

the transaction is not valid. Nonetheless, the appellant has contended on the undisputed facts that the undertaking given by the appellant to pay the sum of N500,000.00 to the 2nd respondent to be able to call for the title deeds has been made after the agreement of sale had been completed.

Even then, as a follow up to their agreement; that by Exhibit (28^A), B a letter of 14/2/83, Alhaji A.B. Waziri the chairman of the 1st respondent company to the appellant, has told him the company would vacate the disputed property about July 1983. Also by Exhibit 29^A, a letter written by the Managing, Director of the 1st respondent company, one P. C Destafano, to appellant, has conveyed to him the realistic dates of vacating the disputed property. So also by another letter, Exhibit 31^A Alhaji A.B. Waziri wrote to the appellant asking for more time for the title deeds to be handed to the appellant. It is argued, in the circumstances, that this relationship has arisen between them, because the agreement of sale of the D property has been successfully concluded. And besides; that Exhibit 31^A has not said as contended by the respondents that surrendering of the title deeds to the appellant has to depend on a prior payment of N500,000.00. Supportive of this contention is the evidence by the 2nd E respondent to the effect, that the 2nd respondent would first release the title deeds to the appellant before the payment of the balance of N500,000.00. The appellant makes the point that the 1st respondent has neither in the pleading nor in their evidence challenged, the capacity by F which the three gentlemen of the 1st respondent's company the chairman Alhaji Waziri, a Director - Piero Destafano and Alhaji I.M. Chado General Manager and Alternate Director respectively who transacted the deal on its behalf, have acted. The 1st respondent cannot do so now, the .appellant has submitted and so, he relies on the import of Section 149(c) of the G Evidence Act Cap. 112 Laws of the federation 1990 and on the latin maxim: *Omnia praesumuntur rite esse* for the proposition. Finally, the appellant contends therefore, that it is erroneous to hold that there is no agreement of sale between the appellant and the 1st respondent upon which H specific performance could be granted.

The appellant's case under issue 2 has challenged the conclusions of the court below that there could not have been a valid sale of the said

property to the appellant because the 1st respondent had earlier offered the disputed property for sale to Incar (Nig) Ltd and not to the appellant and even then that the appellant is aware that until he has paid the balance of N500,000.00 to the 2nd respondent there could not be a valid transaction on the property. He has attacked the misunderstanding of the statement credited to him as overlooking the basic principles of contract. And so, that it is wrong to say the appellant has only tendered letters showing he has been negotiating to purchase the property as against Incar (Nig) Ltd to whom a formal sale agreement had been sent for initialling. It is strongly contended upon the admitted facts that the appellant has taken possession of the said property; has carried out extensive repairs and renovations of the same and put in rent paying tenants; all these to the knowledge of the 1st respondent and which can only be explained on the basis of their being a complete sale agreement between the appellant *and* the 1st respondent as to the said property. It is also submitted that wrong conclusions have been drawn from the evidence given by the appellant to the effect that he agreed to pay N500,000.00 to the 2nd defendant in order to get the title deeds back, as the 1st respondent must still give him an assignment before the transaction could be valid. The appellant has submitted that the foregoing statement having been misconstrued has been taken out of the context to mean that until he has paid N500,000.00 to the 2nd respondent there will be no valid deal. He debunks the submission.

On issue 3: It has been struck, out as having been founded on ground 4 filed in this matter without leave of either the court below or this court as being incompetent. See Section 233(3) of the 1999 Constitution.

The 1st respondent on Issue 1 in its brief of argument here has alleged that there is no complete agreement of sale of the disputed property to the appellant as there are no facts as to any offer of it to the appellant by the Board of Incar (Nig) Ltd and no formal sale agreement either. It is contended that any negotiations in the absence of a board decision to sell the property to the appellant is of no effect. And further, that by not paying the N500,000.00 to 2nd respondent as agreed, a condition, precedent, to the agreement of sale, there can be no complete

agreement of sale and because of that default the title deeds cannot be released to him.

Again, the point is taken that the 2 lower courts have made concurrent findings of facts *inter alia*, that there is no complete agreement of sale and that the appellant has not so far showed that these findings are perverse. Again, the point is taken that the evaluation of evidence and ascription of probative value to such evidence are the primary functions of the trial court which, saw, heard and assessed the witnesses. It is contended that where as here the trial court has made findings of facts, to the effect that there is no complete agreement of sale, which finding is not perverse, that this court has no business substituting its own views for those of the trial court, and that the court below has adhered strictly to this principle of law in approaching this matter. See *Anyawu v. Mbara* (1992) 2 NWLR (pt.243) 386 at 404 paras. E-F; *Isaac Gaji &. Ors v. Emmanuel D. Pave* (2003) 5 SCNJ 20 at 32. And so, it is reiterated that an order of Specific performance cannot lie as the appellant has breached the contract to pay N500,000.00 to the 2nd respondent whereby the 2nd appellant has undertaken to release to the appellant the title documents to the said property. See *Universal Vulcanising (Nig) Ltd. v. I.U.T. & T. Company Ltd & Anor.* (1992) 11-12 U 243 at 257. It is also the case of the 1st respondent that where a contract contains interdependent undertakings, a plaintiff cannot obtain in his favour, an order for specific performance if he has breached his obligation. See *Australian Harwoods Property Lid, v. Commissioner for Railways* (1961) 1 AER 737 at 797; *Anaeze v. Anyaso* (1997) 5 SCNJ 151 at 170.

On issue 2: The 1st respondent has argued that unless the sum of N500,000.00 is paid to the 2nd respondent who has the title deeds that putting the appellant in possession has not validated the sale of the property to him and that the court below rightly so found and besides, as it has not been the intention of the parties that the disputed property should so pass to the appellant without paying in full the purchase price of N2.3 million i.e. the premium. The 1st respondent in the premises has urged this court to dismiss the appeal and uphold the decision of the court below.

The 3rd respondent on his part has contended in his brief of argument that it is the intention of the parties in relation to the disputed property that payment must precede handing over the deeds of title and that the appellant having failed to fulfil the condition, precedent before the B offer was withdrawn the title deeds in the disputed property cannot pass to the appellant. He refers to the critical evidence at p.316 of the Record elicited under cross-examination where the appellant has said that without assignment to him there could be no valid transaction as clearly demonstrating their intention.

The 3rd respondent has also raised for the first time an aspect of the Land Use Act directly in question here as the 3rd respondent was not a party in the 2 lower courts but was joined as a party in this court. He questions the whole deal with regard to Section 22 of the Land Use Act, that is, as to want of Governor's consent first had and obtained to the transaction. And that not having obtained the consent of the Governor that relief (a) and (b) of the claim as sought cannot avail the appellant. See *Awojugbagbe Light Industries v. Chinukwe* (1995) 4 NWLR p.379. D
E The court is urged to dismiss the appeal and uphold the decision of the court below.

I have read the appellant's reply brief of argument to the 1st respondent's brief. In my view it has dwelt on two questions that is that:-
F “(i) *There is no evidence on record to show that the 1st respondent offered to sell the property in dispute to the appellant; and*
 (ii) *There was also no sale agreement of the property to the appellant*”

These two questions as raised have been further discussed in the G instant reply brief. I must say that these points have been duly covered in the appellant's main brief; so that the reply brief is a repetition of them. The purpose of reply brief is to tackle new issues or argument raised in the respondents' brief of argument and not dealt with in the appellant's H brief of argument otherwise a reply brief would be tantamount to a repetition of the appellant's main brief. In other words, it should not serve as a forum for reopening the appellant's case all over again. And where it is coterminous in every respect with the appellant's main brief, it should be

discountenanced. See *Nwali v. State* (1991) 3 NWLR (pt.182) 663; *Okpala v. Ibeme* (1989) 2 NWLR (pt.102) 208 and *Essien v. C.O.P* (1996) 5 NWLR (pt.449) 489.

I now come to the appellants' reply brief of argument to the 3rd respondent's brief. The new issue is none other than Section 22 of the Land Use Act on the contention that there is no indication that the consent of the Governor has been obtained. It is argued that the submission is made in error as the Governor's consent is usually endorsed on the Deed of Assignment itself. See: *Iregunima v. R. S.H.P.D.A* (2003) 12 NWLR (pt 834) 427 at 441 paras C-D per *Ogundare JSC*.

The appellant relying on *Awojugbaghe's* case has contended that a party does not obtain the consent of the governor prior to the agreement of the parties or sale and that it is endorsed on the deed of assignment itself. Finally, the court is urged to allow the appeal

This matter has raised some crucial questions as to the nature of the interests of the parties herein in the disputed property situate at No 157/159 Club Road, Kano, Kano State, the subject of a mortgage by deposit of title deeds between the 1st respondent, as the mortgagor and the 2nd respondent, as the mortgagee. An adjunct to the question is the alleged agreement of sale of the disputed property which in my view, forms no part of the instant mortgage transaction but in a way, a collateral agreement of sale of the disputed property alleged to have been made between the 1st respondent (mortgagor), the appellant and the 2nd respondent, (mortgagee). I think I have to determine first what is the nature of the interest of the 1st respondent left after it had mortgaged the said property to the 2nd respondent and whether, by the nature of the interest it is capable of being transferred to a third party if at all, bearing in mind that the 1st respondent could be called upon by the mortgagee, that is the 2nd respondent, to convey the legal estate to it. I think it is timely to explore the nature of equitable mortgage:

"An equitable mortgage, is an agreement that has arisen out of the deposit of the mortgagor's title deeds with the mortgagee for loan as security. The essence of an equitable mortgage by deposit of title deeds is an agreement, between parties concerned, followed by an act of part

performance. Where a party, pursuant to an oral agreement deposits the title deeds with a bank as here, the act of depositing the title deeds is regarded as part performance of an agreement, which removes the transaction from the provisions of the Statute of Frauds 1677, as per Barclays Bank of Nigeria Ltd v. Alhaji Adamu B. Ashiru & Anor. (1978) 6-7 SC-70.”

I therefore, start by looking at the agreement created between the 1st and 2nd respondents with regard to the mortgaged property. It is a common cause between the parties that the 1st respondent having taken a bank loan from the 2nd respondent has secured the bank loan by depositing its title deed's of the property situate at No. 157/159 Club Road, Kano, Kano State, with the 2nd respondent. It is settled that the deposit of title deeds with a bank as security for a loan, creates an equitable mortgage as against legal mortgage which is created by deed transferring the legal estate to the mortgagee. See: *Ogundiani v. Araha & Anor. (1978) NSCC (vol.11) 55*. An important feature of mortgages both legal or equitable is that once a mortgage always a mortgage and nothing but a mortgage. See: *Adjei v. Dabanka (1930)IWACA 63 at 67; Kadiri v. Olasaga (1956) 1 FSC & Bank of New South Wales v O'Connor (1889) 14 AC 273*.

The nature of a mortgagor's interest left after mortgaging his property is known as equity of Redemption which otherwise is an estate in land. See: *Usenfowokan v. Idowu & Anor. (1975) NSCC (vol. 1)175*. This is the 1st respondent's portion, in law after it has mortgaged the said property to the 2nd respondent. In other words, the 1st respondent's interest is only to demand by way of right to an equity of redemption that the title documents be released to him on full payment of the loan advanced to it by the 2nd respondent. More importantly, in any dealing with the disputed property by the 1st respondent, the only interest the 1st respondent can part with in this respect is its interest in the equity of redemption, no more, no less; as it cannot even if the legal estate is residing in him grant an interest to supersede the equitable rights of the 2nd respondent over the mortgaged property without first getting rid of the whole amount

of its indebtedness to the 2nd respondent under the mortgage loan.

See: Usenfowokan v. Idowu (supra). In expounding the principles of equitable mortgage as I have encapsulated above I refer to the case of *Kadiri v. Olusaga (1956)1 FSC at p. 178 and I quote:*

"It is The case, as stated, by the learned trial judge, that the security given was not the form of a legal mortgage, that is to say by deed, transferring the legal estate to the respondent, but the deposit of title deeds, as security for a loan is an equitable mortgage and I am unable to agree that the loan was an unsecured one within the meaning of the legislation in question. As Lord Macnaghten said when delivering the judgment of the Board in Bank of New South Wales v. O'Connor, 1889 14 AC page 273. 'It is a well established rule of equity that a deposit of a document of title without either writing or word of mouth will create in equity a charge upon the property to which the document relates to the extent of the interest of the person who makes the deposit. In the absence of consent that charge can only be displaced by actual payment of the amount secured.'"

The case of *Bank of South Wales v. O'Connor (supra)* has been cited in *Kadiri v. Olusaga (supra)* and it is an authoritative decision on the principles I have adumbrated above as well and is helpful in expounding, on the nitty gritty of the complex problems that have come up in this matter and it has-also held that:

"A mortgagor coming into equity to redeem must do equity and pay the principal interest and cost before he can recover the property which at law is not his. So it is in the case of an equitable mortgage. It is a well established rule of equity that a deposit of a document of title without either writing or word of mouth will create in equity a charge upon the property to which the document relates to the extent of the interest of the person who makes the deposit. In the absence of consent that the charge can only be displaced by actual payment of the amount secured.... Lord Eldon said: 'I take it to be contrary, to the whole course of proceedings in the court to compel a creditor to part with his security till he has received his money. Nothing but consent can authorise me to take the estate from the plaintiff before payment.'"

The above cited cases have showed in relation to this case that the only interest the 1st respondent has left in the mortgaged property it can deal with at all material times, of the negotiations with the appellant for the agreement of sale of the said property is its interest in the equity of redemption and this is all it can pass on to a third party as the appellant. But is that what the facts here have showed? This will become more certain as I go on to examine the facts.

The appellant has argued that a clear distinction has to be drawn between the agreement of sale made between the appellant and the 1st respondent through its Directors who have not acted ultra vires their powers in this matter, (that is at least to the extent that such fact is pleaded nor adduced in evidence) and the agreement concerning the delivery of the title deeds from the 2nd respondent to the appellant. And I agree entirely I will come to discuss this distinction in full.

In the light of the above cited cases, let me advert to the position of the appellant vis-à-vis the 1st and 2nd respondents in this deal. I have showed above that the only interest the 1st respondent in equity can deal with is the equity of redemption not the legal estate in the said property. *See: Barclays Bank of Nigeria Ltd v. Adamu B. Ashiru & Anor. (1978) 6/7 SC 70.* The appellant from the very beginning, of the deal with the 1st respondent over the said property has been aware i.e. acquainted with clue notice of the bank loan and the mortgage of the said property to the 2nd respondent and the lodgment of the title deeds of the said property with the 2nd respondent to secure the bank loan. **The appellant has had due notice that all he was negotiating was as regards the 1st respondent's interests in the equity of redemption. And so, any purported attempt to transfer the legal estate by the mortgagor to the appellant as the 2nd relief in the claim is contending without getting rid of the mortgage debt and so, supersede the 2nd respondent's equitable mortgage cannot be allowed in equity.** *See Usenfowokan v. Idowu (supra) and Barclays Bank of Nigeria Ltd v. Ashiru (supra).* If must be noted that the equity of redemption which arises on the mortgagee's failure to exercise his contractual Right of Redemption is distin-

guishable from the equitable estate remaining with the mortgagor on having deposited his title deeds with the mortgagee. It is sometimes referred to as an *equity of redemption*: see *Kreglinger v. New on Patagonia Meat & Cold Storage Co. Ltd (1914) A.C.* I make this point to put to rest any misgiving as to the duality of its use in the context of this judgment. I will come to conclude this aspect of the judgment. I now proceed to harmonise the positions of the appellant and 1st respondent in relation to the appellants' claim in this matter particularly vis-à-vis whether between them there is subsisting a complete agreement of sale of the 1st respondent's interest in the disputed property. And consequently, whether the appellant is entitled to call for the title documents in the hands of the 2nd respondent. The (question that arises would be whether the 1st respondent is in a position to call for the release of the documents of title to it and so its successor in title the appellant when the mortgage debt has not been completely, discharged. I doubt it.

A follow-up question is to determine whether as between the 1st respondent and the appellant on the facts of this case there is a binding agreement of sale.

There are on record Exhibits 28, 29, 30 and 31 (or 28^A, 29^A, 30^A & 31^A). They speak in unison on the 1st respondents attempt to vacate the property for the appellant who earlier had paid N1.8m as part of the purchase price of the property as receipted as per Exhibits 1,2,3,4,5 and 6. This deal has been conducted on behalf of the 1st respondent by its principal officers i.e. the Chairman, Managing Director, and Directors who one may call the "alter ego" of the 1st respondent company. There is also evidence of having been let into possession of the property and the appellant having carried out substantial repairs and renovations of the property and of renting the property to rent paying tenants; all these to the knowledge and connivance of the 1st respondent, that is without any challenge whatsoever from the 1st respondent. There can be no doubt that the 2nd respondent must have acquiesced in these acts by the appellant as it was very desperate to recall the loan in full, and has cooperated with the appellant to get the loan repaid. The next question is whether these acts in the circumstance are consistent with, the appellants' claim of

having reached a complete agreement of sale of the said property.

However, before then let me put along side it the contention of the 1st respondent. The 1st respondent upon the foregoing fact situation is insinuating that there cannot be an agreement of sale when the appellant has failed to fulfil the condition precedent of paying N500,000.00 as undertaken by him before the offer to purchase the property was eventually withdrawn. It is the respondents' case that the payment of "the said N500,000.00 is tied to surrendering of the title deeds to the appellant even so the answer by the appellant in this regard, under his examination in chief has not been so helpful as the 1st respondent has capitalised on it to contend that it is a conclusive fact that the payment of N500,000.00 is a condition precedent to releasing the documents. It should be noted, that I have held herein that the undertaking to pay the sum of N500,000.00 to the 2nd respondent is collateral to the agreement of sale between the 1st respondent and the appellant. All the same let me revert to the appellant's answer in this regard to see how dam aging, to wit:

"I agreed to pay the N500,000.00 to the 2nd defendant because after getting the documents the 1st defendant must still sign the Deed of Assignments to me before the transaction would be valid".

I have read the foregoing abstract in the context of the appellant's testimony at the trial and I do not see how it is damnifying of the appellant's case here as the Deed of Assignment is the ultimate title document he requires to perfect his title to the said property.

The court below in its conclusions on the 1st respondent's case upon the foregoing background has, however, held as follows:

"In my respectful view the fact, that the Appellant was put in possession of the property did not validate the sale. He, certainly knew that until he paid the balance of N500,000.0 to the 2nd respondent who had the title deeds he could not have a valid transaction on the property".

Upon this finding the court below has concluded thus:

"I have therefore come to the firm conclusion that there was no complete agreement, of sale of the disputed property proved before the trial court to enable it order specific performance thereof."

I most respectfully disagree with the above findings and conclusions reached, by the court below in this respect as it runs counter to the drift of evidence. There can be no doubt that an equitable interest is acquired when there is payment of money coupled with possession. This is the case of the appellant on the facts of this matter - therefore he has acquired an equitable estate founded on the 1st respondents' equity of redemption. I hold the lower court's, finding above, as perverse; it simply has occasioned a miscarriage of justice.

And I am very much aware that it is well established in cases as *Atolagbe v. Shorun* (1985) 1 NWLR (pt. 2) 360; *Adimora v. Ajifo* (1988) 3 NWLR (pt. 80) 1 that in such cases a finding is perverse where it runs counter to evidence and pleading or where it has shown that the trial court took into account matters which it ought not to have taken into account or shut its eyes to the obvious or when it has occasioned a miscarriage of justice. The two lower courts have in addition taken into account a collateral matter as to the undertaking given to the 2nd respondent to pay N500,000.00 for the title documents and thus, have improperly used it to becloud the contract (i.e. agreement of sale) between the appellant and the 1st respondent i.e. leading to their holding that there is no agreement of sale and this has occasioned a miscarriage of justice.

Very much aware of the findings of facts by the two lower courts in this matter, I must state, all the same, that where the evidence to be evaluated is mainly documentary as here this court is as in good a vintage position as the trial court. See *Romame v. Romame* (1992) 4 NWLR (pt.238) 650; *Kariba v. Green* (1992) NWLR (pt.230) 426 and *S.B. Fashanu v. M.A. Adekoye* (1974) 1 ANLR (pt.1) 35. This court has to wade into Exhibits 1, 2, 3, 5, 6, 28, 29, 30 and 31, all documentary exhibits, amongst other evidence on the record to make its findings, and avert a miscarriage of justice occasioned by the perverse findings of the two lower courts.

I have earlier set out the peculiar factors and circumstances not least being that the appellant has paid part of the purchase price of N2.3m to the tune of N1.8m leaving a balance of N500.000.00

and has been put in possession of the disputed property. There is a binding agreement of sale of the 1st respondent's interest in the said property between the appellant and the 1st respondent. The appellant has thereby acquired an equitable interest to the extent of
 B the 1st respondent's interest in the equity of redemption and this is the interest which the mortgagor the 1st respondent has had at all material times. The 1st respondent cannot give what it hasn't got. And as I intimated, earlier any attempt to pass the legal estate in the
 C disputed property to the appellant will be of no effect and void not void-able because the 1st respondent as the mortgagor has bound itself to convey the legal estate to the mortgagee whenever it is called upon to do so until the principal, interest and costs are duly paid on the mortgage see: *Barclays Bank of Nigeria Ltd v. Ashiru & Anor* (supra) per Idigbe JSC
 D and *Jared v. Clements* (1903)1 Ch.428. Besides, the appellant is acquainted with notice of the mortgage and so cannot take priority, to the 2nd respondent's equitable mortgage which is first in time.

The 3rd respondent has raised the question of Section 22 of
 E Land Use Act; concisely, the section requires that Governor's consent to the mortgage deal has to be first had and obtained otherwise the contract is void. I think with respect that the 3rd respondent's objection is lamely in that as decided in *Awojugbagbe v.*
 F *Chinukwe & Anor.* (supra) it is after the mortgage has been executed that obtaining of the Governor's consent falls due. It is normally after the parties have agreed that the Deed of Assignment is prepared and sent for Governor's consent. The instant mortgage therefore has not fallen foul of Section 22 of the Land Use Decree.

G For all the above, I am of the firm view that the appellant and the 1st respondent concluded an agreement of sale of the equitable interest of the 1st respondent in the property situate at. No 157/159 Club Road; Kano at the purchase price of N2.3 and that the
 H appellant has paid as receipted in Exhibits 1,2,3,4,5, and 6 a total sum of N1.8m leaving a balance of N500,000.00. And sequel to that, the appellant entered into possession of the property, carried out substantial repairs and renovations and put in rent paying tenants;

thus acquired on equitable interest, again, only to the extent of the equitable interest of the 1st respondent in the equity of redemption which as I have found the 1st respondent can transfer to a third party. The appellant cannot on these conclusions be entitled to an order of specific performance. This is even more so as these title documents are not in the possession of the 1st respondent but in the possession of the 2nd respondent; a total stranger to the said agreement of sale between the appellant and the 1st respondent. Again, the appellant has not asked for such relief. And no court has the power to award to a party what he has not claimed. See: *Awoniyi v. AMORC (2000) 6 SC (pt.1) 103* and *Afrotech Technical Services (Nig.) Ltd. v. M/A & Sons Ltd (2000) 12 SC (pt.11)1*.

The two lower courts therefore, wrongly dismissed the appellant's claim. I now come to the reliefs claimed. In this regard I have to consider my conclusions in this judgment against the 3 reliefs claimed by the appellant in this matter to wit:

On relief (a): this is granted accordingly as claimed; for the avoidance of doubt it encompasses the equitable interest of the 1st respondent in the said property only to the extent of the 1st respondent's interest in the equity of redemption.

Relief (b) cannot be granted unless and until the mortgage debt is repaid to the last kobo or the 2nd respondent (the mortgagee) has consented to granting of such order. There is no such consent here. The cases of *Barclays Bank of Nig Ltd v. Ashiru* (supra) and *Bank of New South Wales v. O'Connor* (supra) have held that courts cannot compel a mortgagee to part with his security unless he has received his money which is not the case in this matter. This is so, even though, as a general rule, the mortgagor and all persons having any interests in the equity of redemption as the appellant here are entitled to redeem the mortgage. This is not the claim before the court. The appellant is here asking for declaratory reliefs which are granted at the court's discretion and being equitable reliefs cannot be granted in the face of the outstanding debt on the mortgage; In other words, what the appellant seem to be contend-

ing here is that the court should order the 1st respondent to transfer the said property to him acting on the agreement of sale reached between them and thus prevent the 2nd respondent from, interfering with his enjoyment of the said property and even more so to order the 2nd respondent to compensate him for withholding the title documents. I think, that the appellant in so postulating has ignored the general rule that he has to discharge any outstanding debt on the mortgage to be entitled to this relief. There is no proof he has done so. Though, I must advert to, the fact that where as here a mortgagee has entered in possession or taken other steps for realising his security as by appointing a receiver as in the instant matter the court has jurisdiction upon payment of the debt on the mortgage, to order the security to be given up. See: *Exparte Wickens (1898) 1 QB 543; Barclays Bank of (Nig) Ltd v. Ashiru (supra) and Kadiri v. Olusaga (1956) 1 FSC*. **He who comes to equity must also do equity.** Relief (c) cannot also be granted. This follows from my reasoning on relief (b)

Having found that there is a subsisting agreement of sale between the 1st respondent and the appellant the basis for the award of N100,000.00 as damages against the appellant in favour of the 2nd respondent no longer exists and indeed, it hangs in the air. The award of N100,000.00 as damages to the 2nd respondent is hereby set aside.

In conclusion, the appeal succeeds and it is allowed; the judgments of the two lower courts are severally set aside. I make no order as to costs

G

TOBI JSC

The facts are succinctly stated by the appellant. The 1st respondent was the beneficial owner of the landed property known as Plots Nos. H 157/159 Club Road, Kano. As security for a loan, the 1st respondent mortgaged the property to the 2nd respondent by way of deposit of title, namely a Certificate of Occupancy. In spite of the loan, the 1st respondent became immersed in a financial difficulty and decided to dispose of the

property by way of sale, it then entered into negotiations for the sale of the property to Incar Nigeria Limited. The property was offered to that Company, but as it did not have sufficient money to make payment for the property, the deal fell through. Meanwhile, the appellant got to know of the deal by reason of the fact that he was also a Director of the Company, Incar Nigeria Limited. The appellant then entered into negotiations with the 1st respondent which negotiations resulted in agreement by which the appellant, was to pay the total sum of N2.3 million for the property. However, as he could not put down that sum at once, it was agreed between him and the 1st respondent that the total agreed price be paid by instalments. Following that agreement the appellant commenced making payments and he was put in possession. He then carried out extensive repairs and renovations at great expense. After paying a total sum of N1.8 million he became aware that the title paper, namely, the Certificate of Occupancy, was with the 2nd respondent. The 2nd respondent refused to release the Certificate of Occupancy to the appellant until it had paid the balance of N500,000 to it. The appellant was unable to make that payment within the time stipulated by the 2nd respondent. In consequence, the 2nd respondent failed to deliver the Certificate of Occupancy to the appellant. Subsequently, the appellant became able to make the payment and offered to pay the 2nd respondent, but the 2nd respondent refused to accept payment. The appellant then sued. He asked for two declaratory reliefs and one for special and general damages of N500,000.00.

The learned trial Judge dismissed the claim of the plaintiff/appellant. He gave judgment to the 1st defendant. He *inter alia* ordered that the plaintiff should pay the 1st defendant the sum of N1,000,000.00 as general damages. An appeal to the Court of Appeal was dismissed.

The appellant has come to this court. Briefs were filed and duly exchanged. The appellant formulated three issues. The 1st respondent formulated two issues. The 3rd respondent also formulated two issues. It does not appear that the 2nd respondent filed a brief.

It is the case of the appellant that the undertaking by the appellant to make payment of the sum of N500,000 to the 2nd respondent was not part, of the sale agreement as there was a complete sale agreement long

before the undertaking. The case of the respondents is that the payment of the sum of N500,000.00 by the appellant to the 2nd respondent was a pre-condition to the finalization or validation of the sale agreement.

B An agreement is made where there exists an offer, acceptance, consideration, capacity to contract and intention to create legal relationship. In this appeal, the important consideration is when the parties entered into the agreement. It was in 1983 that the appellant entered into an agreement with the 1st respondent to buy the property for the sum of N2.3 million to be paid in instalments. The appellant paid a total of N1.8 million leaving a balance of N500,000. It is that balance that the ‘respondents say is a pre-condition to the conclusion of the agreement, that is to the finalization of the agreement of sale of the property in dispute.

D In order to achieve the above purpose, the 1st respondent decorated the facts at page 2 of its brief as follows:

“In July, 1985, the 2nd respondent agreed that it would release the documents of title of the property to the appellant, if the appellant paid the balance of N500,000.00 to the 2nd respondent before the end of November, 1995. The appellant was unable to make the payment of N500,000.00 as agreed. The appellant’s inability to make this payment led the 2nd respondent to withdraw the offer and consequently cancelled the transaction sometime in December, 1985. In 1986 the appellant made attempts to pay the 2nd respondent, the N500,000.00 but the 2nd respondent refused to accept.”

G It seems to me that the 2nd respondent refused to accept the balance of N500,000 because of the case the 1st respondent has made above. But is that the correct legal position? I think not. There is a clear dichotomy in this matter between the agreement for the sale of the property for the sum of N2,800,000.00 and the undertaking by the appellant for the payment of the balance of N500,000.00. In my view, all the ingredients of a valid agreement were present by the agreement of sale of the property for the sum of N2,800,000.00. The subsequent undertaking was not part of the agreement.

Where parties enter into an agreement and subsequently decide to introduce new terms, they can only do so by specific reference to the

earlier agreement to the effect that the later agreement has introduced new terms thereof. Although that could be inferred by the conduct of the parties in certain circumstances, I do not see such a circumstance in this appeal. On the contrary, I see a clearly complete agreement in respect of the sum of N2,800,000.00. As the undertaking to pay the sum of B N500,000.00 was distinct and separate from the first agreement, the remedy of the 2nd respondent was to sue in the event of breach as in this case.

It is in that respect, I find it difficult to agree with the Court of C Appeal when it said at page 316 of the Record:

“In my respectful view the fact that the appellant was put in pos- session of the property did not validate the sale. He certainly knew that until he paid the balance of N500,000 to the 2nd Respondent who had the title deeds he could not have a valid transaction on the property.” D

With the greatest respect, the Court of Appeal, is wrong in coming to the above conclusion. There was a complete valid agreement which did not need the prompting of the later undertaking to be valid in law. As there was a complete valid agreement the learned trial Judge ought to E have ordered specific performance in the circumstances of the case.

It is for the above reasons and the more detailed reasons given by my learned brother, Chukwuma-Eneh, JSC in his judgment that I too allow the appeal. I abide by all the orders he has made, including the F order as to costs.

OGUNTADE JSC

I have had the advantage of reading in draft a copy of the lead G judgment by my learned brother Chukwuma-Eneh, JSC. I agree with his reasoning and conclusion and adopt them as mine. I intend however to offer a few words of my own by way of emphasis on some aspects of the lead judgment. H

The facts, leading to the dispute out of which this appeal arose, have been succinctly set out in the lead judgment of the court below at pp.312-313 of the record of proceedings, I do not intend to reproduce

them save to the extent necessary to make my discussion of issues intelligible and easy to follow.

The 1st respondent on the evidence was the owner of the property at 157/159 Club Road, Kano. It needed money, and ended up agreeing to sell the property to the appellant for N2.3million. The 1st respondent had however previously mortgaged the same property to the 2nd respondent by way of deposit of the title documents. The appellant paid N1.8million to the 1st respondent leaving outstanding a balance of N500.000.00. The 1st respondent surrendered the possession of the property to the appellant. It would appear that the appellant, however, did not promptly pay the balance of N500,000.00. When the appellant later offered the balance, the 2nd respondent failed to hand over the title documents to the appellant. This, in a broad sense, was the reason why the appellant (as the plaintiff) issued his writ of summons against the respondents (as the defendants) claiming the following reliefs:

“(a) A declaration that the agreement by the 1st defendant to sell to the plaintiff all its interest in that property known as Plots Nos. 157/159 Club road, Kano had been completed by 1984 and that the 1st defendant could not unilaterally rescind the said, agreement thereafter.

(b) A declaration that the plaintiff is entitled to delivery over to him of all the documents of title to the property aforesaid including in particular the certificate of occupancy Nos. 13819 and 6929 registered as No. 140 at page 140 in volume 8 (Misc.) at the Lands Registry in the office at Kano at present in the custody of the 2nd defendant.

(c) N500,000.00 special and general damages for wrongful refusal to return the said documents of title to the plaintiff.”

The first respondent (who was 1st defendant at the trial court) raised a counter-claim against the plaintiff as follows:

“i. An order for account by the plaintiff to the 1st defendant of all sums of money the plaintiff has been collecting and collected from tenants since May, 1985 till date.

ii. Payment of such monies to the 1st defendant forthwith.

iii. Mane profit on the 1st apartment in the said house and premium by the plaintiff in respect of No. 157/159 Club Road; Kano till

date.

v. A sum of N2million for the increased indebtedness on the loan and interest by the 1st defendant to the 2nd defendant as a result of the breach of promises made by the plaintiff in respect of the said property No. 157/159 Club Road, Kano, State.

B

v. N100,000.00 being damages special and general for the trespass committed and still continued to be committed by the plaintiff on 1st defendant's property No. 157/159 Club Road, Kano State.

Particulars of damages: Special Damages

Cost of damages to the building N400,000.00

and premises of the 1st defendant

at No. 157/159 Club Road, Kano

State

General damages N100,000.00

N500,000.00"

C

D

The 2nd respondent (who was 2nd defendant at the trial court) similarly raised a counter-claim as follows:

"a. A declaration that the 2nd defendant by its authorized representatives and the plaintiff agreed orally at a meeting on 23rd July, 1985 as well as in a letter of the same date from the 2nd defendant to the plaintiff that the 2nd defendant would release the title documents to Nos. 157/159 Club Road, Kano to the plaintiff upon the payment by the plaintiff to the defendant of the sum of N500,000.00.

E

F

b. A declaration that the agreement between the plaintiff and the 2nd defendant referred to above was on account of the 2nd defendant's charge in the sum of N500,000.00 over the said properties Nos. 157/159 Club Road, Kano owned by the 1st defendant, and that the plaintiff so knew and/or agreed with the defendant.

G

c. A declaration that the agreed agreement between the plaintiff and the 2nd defendant referred to the above was to be performed immediately on the day it was made orally and in the letter aforesaid i.e. on 23rd July 1985, or on or before 30th November, 1985 and that the plaintiff failed to perform his own part thereof.

H

d. A declaration that the plaintiff's failure, to perform his part of

the contract aforesaid automatically brought it to an end and the 2nd defendant's offer pursuant thereof lapsed.

e. A declaration that the plaintiffs failure or neglect to pay the sum of N500,000.00 to the 2nd defendant pursuant to their agreement was B wrongful and that the 2nd defendant has thereby suffered loss and damage.

f. General damages in the sum of N100,000.00 for the plaintiffs breach of contract between himself and the 2nd defendant referred to above C and subject matter of these presents.

g. Costs and further or other relief."

The trial court concluded its judgment in these words:

- "1. That the plaintiffs claim failed and were all dismissed.*
2. That the plaintiff should render account to the 1st defendant.
3. That the plaintiff should vacate the premises and stop collect- D ing rent on the premises.
4. That the plaintiffs should pay N1,000,000.00 General damages to the 1st defendant.
5. That the plaintiffs should pay N100,000.00 to the 2nd defend- E ant.
6. That the 1st defendant should refund to the plaintiff the sum of N1,800,000.00 after the property should have been sold."

F Dissatisfied, the plaintiff brought an appeal against the judgment of the trial court before the Court of Appeal, Kaduna (hereinafter referred to as the court below). The court below in its judgment affirmed the order of the trial court dismissing plaintiffs claim and the award of N100,000.00 as damages to the 2nd defendant. The 1st defendant's counter claim against the plaintiff was dismissed and the appeal succeeded on that score. Still dissatisfied, the plaintiff has come before this court on a final appeal. The appellant formulated three issues for determination in the appeal. The issues read:

H "(1) Whether the court below was not in error when it affirmed the trial Court's decision that there was no complete agreement of the sale of the disputed property to the Appellant.

(2) Whether the court below did not misdirect itself when in effect

it held that there could not have been a valid sale of the property to the Appellant because the 1st Respondent had offered the property for sale in INCAR NIGER LIMITED and because the Appellant knew that until he paid the balance of N500,000.00 to the 2nd Respondent, he could not have a valid transaction on the property.

(3) Whether the court below was not in error by affirming the award of N100,000.00 made in favour of the 2nd Respondent as general damages.”

On the admitted facts of this case, there could be no doubt that the 1st respondent had by depositing the title deeds in respect of his property with the 2nd respondent, created an equitable mortgage in favour of the 2nd respondent over the property. It is now settled that a mere deposit of title deeds as security for a loan constitutes an equitable charge over the land or property. See *Mathews v. Good day* [1861] 31 L.J. ch.282. The resulting position at Law is that the 2nd respondent as equitable mortgagee possesses the legal estate over the mortgaged property whilst the 1st respondent had possession and the right to have the legal estate retransferred to him upon payment of the amount owed to the 2nd respondent.

The 1st respondent whilst this position persisted transferred all the remaining interest it had in the property to the appellant for valuable consideration. By that sale, the appellant stepped into the shoes of the 1st respondent and succeeded to the equity at law which 1st respondent had and which was to have the property transferred to him upon payment of the mortgage loan.

On the evidence before the trial court there could be no doubt that the 1st respondent sold the property to the appellant and handed over possession to him. It was also apparent that the agreement was that the appellant would be entitled to the title deeds on the property upon payment of the amount owed to the 2nd respondent by the 1st respondent.

The two courts below were therefore in error to have taken the position that there was no sale of the property to the appellant.

I agree with the lead judgment of my learned brother Chukwuma-Eneh JSC. I would also allow this appeal. I subscribe to all the other orders made in the lead judgment including that on costs.

MUKHTAR JSC

I have had the opportunity of reading in advance the lead judgment
B delivered by my learned brother Chukwuma-Eneh, JSC. I am in full,
agreement with the reasoning and conclusion reached that the appeal has
merit and should be allowed. I also allow the appeal, and set aside the
judgment of the Court of Appeal, Kaduna division. I abide by the conse-
C quential orders made in the lead judgment.

ONNOGHEN JSC

This is an appeal against the judgment of the Court of Appeal holden
D at Kaduna in appeal No.CA/K/252/93 delivered on the 11th day of July,
1996 in which the court dismissed the appeal of the appellant against the
judgment of the Kano State High Court in suit No.K/57A/92 delivered on
1/2/92 in which the trial court dismissed the claim of the appellant, as
E plaintiff and allowed the counter claim, of the defendants/respondents.
The appellant was dissatisfied with that judgment and appealed to the
Court of Appeal which dismissed his appeal resulting in the instant fur-
ther appeal to this Court.

F By way of writ of summons issued on the 28th day of September
1987, the plaintiff/appellant claimed the following reliefs against the de-
fendants/respondents:

G *"1. A declaration that the agreement by the 1st Defendant to sell
the property known as Plots Nos. 157/15.9 Club Road, Kano had been
completed in 1984.*

*2. A declaration that the plaintiff is entitled to delivery over to
him all the documents of title in respect of the said property; and*

H *3. The sum of N500,000.00 as special and general damages for
wrongful refusal to return the said documents."*

In paragraph 31 of the statement of Defence and Counter Claim,
the 1st defendant/respondent counter claimed against the plaintiff/appel-
lant as follows:-.

“31. That the 1st defendant therefore counter claim as follows for:-

(1) An order for account by the plaintiff to the 1st defendant of all sums of money the plaintiff has been collecting and collected from tenants since May, 1985 from the tenants the plaintiff let out portions in the house and premises No. 157/159 club Road, Kano, Kano State the property of the 1st defendant in possession till date. B

(2) Payment of such monies to the 1st defendant forthwith.

(3) Mense Profit on the 1st apartment in the said house and premises (sic) by the plaintiff in respect of No, 157/159 Club Road, Kano till date of judgment. C

(4) A sum of N2 million for the increased indebtedness on the loan and interest by the 1st defendant to the 2nd defendant as a result of the breach of promise made by the plaintiff in respect of the said property No. 157/159 Club Road, Kano State. D

(5) N100,000.00 being damages special, and general for the trespass committed and still continued to be committed by the plaintiff on 1st defendant property No.157/159 Club Road, Kano, Kano State

THE PARTICULARS OF DAMAGE SPECIAL DAMAGES E

(a) Cost of damages to building and premises of the 1st defendant at NO. 157 159 Club Road, Kano..... N400,000.00

GENERAL DAMAGES..... N100,000.00

N500,000.00 F

AND WHEREFORE the 1st defendant applies:-

(1) That the plaintiff's claim per his writ of summons be dismissed with heavy costs as being illogical unreasonable and in congruent in law and in fact AND

(2) That the counter claim of the 1st defendant be allowed with substantial costs.” G

On the other hand, the Counter Claim of the 2nd defendant is on the following terms:-

“30 Whereof the 2nd defendant Counter Claims from the plaintiff H as follows:

a. A declaration that the 2nd defendant by its authorized representatives and the plaintiff agree orally at a meeting on 23rd July, 1985

as well as in a letter of the same date from the 2nd defendant to the plaintiff that the 2nd defendant would release the title documents to Nos. 157/159 Club Road, Kano to the plaintiff upon the payment by the plaintiff to the defendant of the sum of N500,000.00"

B b. A declaration that the agreement between the plaintiff and the 2nd defendant referred to above was on account of the defendants charge in the sum of N500,000.00 over the said properties Nos.157/159 Club Road, Kano, owned by the 1st defendant, and that the plaintiff so knew and/or agreed with the defendant.

C c. A declaration that the agreed agreement between the plaintiff and the 2nd defendant referred to the above was to be performed immediately on the day it was made orally and in the letter aforesaid i.e. on 23rd July 1985, or on or before 30th November, 1985 and that the plaintiff
D failed to perform his own part thereof.

d. A declaration that the plaintiff failure to perform his part of the contract aforesaid automatically brought it to an end the 2nd defendants offer pursuant thereof lapsed.

E e. A declaration that the plaintiff's failure or neglect to pay the sum of N500,000.00 to the 2nd defendant pursuant to their agreement was wrongful and that the 2nd defendant has thereby suffered loss and damage.

F f. General damages in the sum of N100,000.00 for the plaintiff breach of contract between himself and the 2nd defendant referred to above and subject matter of these presents."

The facts of the case include the following:

G The 1st respondent was the owner of the landed property situate at and known as Riots Nos. 157/159 Club Road, Kano which it mortgaged to the 2nd respondent as security for a loan, by way of deposit of title deeds. Later on the 1st defendant ran into more financial difficulties and decided to sell the property in issue and therefore entered into negotiations with INCAR NIGERIA LTD. for the sale. It turned out that INCAR
H Nigeria Ltd had no sufficient funds to purchase the property so the deal fell through.

Meanwhile, appellant was a director in linear Nigeria Ltd and got

to know of the deal and consequently entered into negotiations with the 1st defendant/respondent which resulted in an agreement by which appellant was to pay the total sum of N2.3 million for the property by instalment. Appellant commenced making the payments and was as a result put into possession of the property and he carried out extensive renovations in the property at great expense. After paying a total sum of N1.8 million appellant became aware that the title deed was with the 2nd respondent who refused to release same until it was paid time balance of N500,000.00 being part of the loan owed it by the 1st respondent. However, appellant could not make payment within the time unilaterally fixed by the 2nd defendant/ respondent as a result of which the 2nd respondent refused to deliver the Certificated Occupancy to the appellant on the ground that at the time appellant tendered the money the time unilaterally fixed by the 2nd respondent had lapsed and therefore refused to accept the payment, it was at that stage that appellant instituted the action claiming the reliefs earlier reproduced in This judgment with the resultant counter claims supra.

At the conclusion of the trial, the learned trial judge dismissed the case of the appellant and entered judgment for the defendants in their counter claims as follows:-

- (i) that the appellant pays to the 1st respondent the sum of N1,000,000.00 (one million naira) as general damages;
- (ii) that appellant should render account of air monies collected by him on the premises, and pay over to the 1st respondent;
- (iii) that the appellant vacate the buildings and stop collecting rent on the premises;
- (iv) that appellant pays N100,000.00 (one hundred thousand naira) to the 2nd respondent as damages for breach of contract;
- (v) that the 1st respondent should pay back to the appellant by way of refund the sum of N1.8 million being the total sum of money paid by the appellant to the 1st respondent for the sale of the property in issue.

As stated earlier in this judgment, the appeal to the Court of Appeal was dismissed resulting in the instant appeal. The issues for determination as identified by learned Senior counsel for the appellant KEHINDE

SOFOLA SAN in the appellant brief of argument filed on 2/4/04 and adopted in argument of this appeal on the 3/4/07 are as follows:-

“(1) Whether the court below was not in error when it affirmed the trial court’s decision that there was no complete agreement of the sale of the disputed property to the appellant.”

“(2) Whether the court below did not misdirect itself when in effect it held that there could not have been a valid sale of the property to the appellant because the 1st respondent had offered the property for sale to INCAR NIGERIA LIMITED and because the appellant knew that until he paid the balance of N500,000.00 to the 2nd respondent, he could not have a valid transaction on the property.”

“(3) Whether the court below was not in error by affirming the award of N100,000.00 made in favour of the 2nd respondent as general damages.”

The primary issue in this appeal is whether or nor there was a valid agreement of sale of the property in issue between the appellant and 1st respondent. It is the case of the appellant that such an agreement exists while the 1st respondent in particular maintains that no such agreement existed particularly as the appellant failed to pay the N500,000.00 to the 2nd respondent as a precondition for the validity of the sale as found by the lower courts..

It is true that at page 316 of the record, the lower court held as follows:-

“In my respectful view the fact that the Appellant was put in possession of the property did not validate the sale. He certainly knew that until he paid the balance of N500,000.00 to the 2nd Respondent who had the title deeds he could not have a valid transaction on the property.”

The question is whether the above holding of the lower court is in accord with the undisputed facts of the case. In the first place there is no dispute that the property in issue was first offered for sale by the 1st respondent, who is the owner in possession thereof, to INCAR NIGER but the sale could not be concluded due to the fact that Incar Nigeria Ltd had no cash to pay for it particularly as what the 1st respondent needed urgently at the time was cash. It is also not disputed that appellant who

was a director of Incar Nigeria Ltd got to know of the failed negotiations between the 1st respondent and Incar Nigeria Ltd and subsequently entered into fresh negotiations in his personal capacity with the 1st respondent for the sale of the property in issue. Both parties i.e. appellant and 1st respondent are agreed that following the negotiation of the sale, it was agreed between the parties that appellant was to pay to the 1st respondent by way of purchase price the sum of N2.3 million by installments. It is also not disputed that following the said agreement appellant did pay to the 1st respondent, by way of installments the total sum of N1.8 million leaving a balance of N500,000.00; that it was at that stage that appellant became aware of the fact that the title deeds to the property was with the 2nd respondent to whom 1st respondent had mortgaged the property by deposit of the title deeds; meanwhile appellant had been, put in possession of the property by the 1st respondent following appellant's part performance of the agreement of sale between them and he had, as a result, undertaken extensive and very expensive renovations of the property and had put in tenants who pay rents to him. It is equally not disputed that upon appellant becoming aware of the equitable mortgagor the 2nd respondent agreed to release the title deeds to the property to the appellant on condition that appellant pays to the 2nd respondent the sum of 500,000.00 which, in effect, is the balance of the purchase price of the property. However, the 2nd respondent unilaterally imposed a time limit within which the payment was to be effected; that appellant was unable to pay within the time limit so when he later made the money available, 2nd respondent refused to accept same resulting in court action.

From the undisputed facts, it is my considered view that there was a complete sale agreement of the landed property in question between the appellant and the 1st respondent long before the appellant became aware of the interest of the 2nd respondent. It is settled law that a contract *is* formed once there is an offer by the offeror to the offeree which is accepted by the offeree backed by consideration. At that point in time, the parties to the contract are said to be *ad idem* or in agreement, and, that agreement or contract is binding on both parties and as such it is enforceable by action. In the instant case the offer of sale of the prop-

erty was made to the appellant by the 1st respondent, after INCAR NIGERIA LTD failed to buy the property which offer was accepted by the appellant. A price for the sale was also agreed upon and the total sum of N1.8 million out of N2.3 million agreed price was paid over to and accepted by the 1st respondent who, as an act of consummating the contract, duly put the appellant in possession of the property in issue. Despite all these undisputed facts, the lower courts held that there was no completed sale! I hold the view, with all due respect to the lower courts, that they are wrong in so holding. There was a complete agreement or contract between the parties which contract was substantially performed by the appellant.

I hold the further view that the payment of the sum of N500,000.00 to the 2nd respondent for the release of the title document is not and cannot be said to be a condition precedent to the validity of the sale agreement between the appellant and 1st respondent as the sale had long been completed between the said parties. It was therefore wrong for the lower court to hold that the non payment of the sum of N500,000.00 vitiated the contract of sale, it is not in doubt that the 2nd respondent had a lien on the property by virtue of the equitable mortgage but the equity of redemption in the property in issue remained with the owner -1st respondent, who exercised his right of ownership of same by entering into a contract of sale of same to the appellant. It is however in the interest of the appellant to pay up the mortgage debt and retrieve the title deeds.

It is for the above and the more detailed reasons given by my learned brother, CHUKWUMA-ENEH, JSC in the lead judgment, a draft of which I had the privilege of reading before now, that I agree that the appeal is meritorious and should be allowed. I therefore order accordingly and abide by all other consequential orders contained in the said lead judgment including the order as to costs.

Appeal allowed.

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