

**SUPREME COURT OF NIGERIA**  
25TH JANUARY, 2008 SC.426/2001  
**CORAM:- A. I. KATSINA-ALU, D. MUSDAPHER, S. A.**  
**AKINTAN, W. S. N. ONNOGHEN, I. T. MUHAMMAD, JJSC**

BENJAMIN ONWUGHAMBA EZENWA ..... APPELLANT  
AND  
1. OKPARA OKO  
2. MICHAEL OKO OKPARA ..... RESPONDENTS  
3. EZE O. EZE

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APPEALS - Issues - Grounds of appeal - Are the basis for formulation of issues - Grounds from which no issue is formulated - Are deemed abandoned (H1)

APPEALS - Leave - Issues - Findings of lower court - Where not appealed against - Appellant cannot argue a contradictory issue - Without leave of Supreme Court (H2)

COURT PROCESSES - Writ of summons - Filing fees - Additional reliefs contained in the statement of claim - Should attract additional filing fees where appropriate - But not for specific performance - Which is not a monetary compensation (H3)

CONTRACTS - Sales or lease of land - Specific performance - Need to give evidence of damages suffered - Per adventure the order is refused - Where plaintiff performed all his contractual terms - Court will grant specific performance - In proper cases (H4)

CONTRACTS - Leases - Specific performance - Option to renew lease - Where the lease has expired - Without being renewed - There is no cause of action - To warrant grant of specific performance (H5)

CONTRACTS - Leases - Specific performance - Option to renew lease - That is not accepted by landlord - Remains a mere offer - And not an enforceable contract (H6)

PLEADINGS - Fraud - Allegation of - Must be specifically pleaded - Before a party can rely on fraud (H7)

### **FACTS**

The original 1st defendant/respondent granted a lease of the property in dispute to plaintiff/appellant on the 26-1-1965, for 10 years, with an option for renewal. The lease was to expire on 26-1-1975. Appellant laid foundation for a concrete building up to floor level before the Nigerian Civil War forced him to flee Afikpo to his home town Achina. He returned in 1971, and in February 1975, approached the original 1st respondent for renewal of the lease. 1st respondent refused, and did not collect further rent on the ground that he has made a gift of the land to the 3rd respondent. In 1978, 3rd respondent peacefully quitted the mechanics (appellant's subtenants) from the land, surveyed it and commenced a building thereon.

When it dawned on appellant that 1st respondent was never going to grant him option to renew the lease, he filed this action before the Afikpo High Court, Imo State. Appellant claimed entitlement to statutory right of occupancy, N500.00 general damages for trespass, perpetual injunction and specific performance against respondents in respect of the land in dispute. The trial court dismissed the claim but awarded N500.00 damages in lieu of specific performance. Appellant's appeal to the Court of Appeal was dismissed. Still aggrieved, he has further appealed to the Supreme Court.

### **ISSUE FOR DETERMINATION**

*Whether having regards to the facts and circumstance of the case, appellant was entitled to a decree or order of specific performance.*

**HELD** (Unanimously dismissing the appeal per **ONNOGHEN JSC**)

### **Issues - Grounds of appeal**

1. It is settled law that whereas ground(s) of appeal must arise from the decision appealed against, issues for determination must be formulated from the said grounds of appeal otherwise they are invalid. In that respect, it is my view that appellant's issues 6 and 7 not having been formulated from any of the grounds of appeal filed in this court,

are incompetent and are hereby struck out.

With respect to grounds 3, 9, 11, and 12 of the grounds of appeal filed in this court in respect of which no issue(s) has/have been formulated, it is settled law that the said grounds are deemed abandoned by the appellant and liable to be struck out. I hereby order accordingly. (p. 598 D)

***Leave - Issues - Findings of lower court***

2. As regards appellant's issue No.4, I agree with learned counsel for the respondents that appellant never appealed against the concurrent finding by the lower courts that appellant was quitted from the land in dispute peacefully and cannot now turn round to argue the contrary, without leave of the court. To that extent, the argument on appellant's issue No 4 is hereby discountenanced. (p. 598 E)

***Writ of summons - Filing fees***

3. It is settled law that the statement of claim supersedes the writ of summons and that what is claimed in the writ but omitted in the statement of claim is deemed abandoned while what is not claimed in the writ but claimed in the Statement of Claim becomes the claim before the court though subject to the payment of appropriate filing fees where appropriate. In the instant case, the additional relief was not for monetary compensation but for specific performance. It is not that appellant never paid for the filing of the Statement of Claim but that he failed to pay for the additional relief of specific performance. Learned counsel cited and relied on Order VIII Rule 5 of the High Court Rules, applicable to Eastern Nigeria Vol. IV Laws of Eastern Nigeria, 1963 which provides as follows:-

*" 5. The fees prescribed in Part 1 of the second schedule shall be payable by the party prosecuting a proceeding or asking for a service as therein provided in respect of the proceedings or services to which they relate and such fees may afterwards be recovered as costs of cause if so ordered.*

*Fees may be waived or remitted, by a Judge on the ground of the poverty of the person chargeable therewith where it appears that there are substantial grounds for his taking the proceeding or asking for the service to be rendered:*

*Provided however, that a Judge may, where he thinks fit, order any party to pay any fees so waived or remitted."*

B Counsel also relied on item 10 of the Part 1 of the second schedule to the above rules which provides for the payment of the sum of £3.15.0 "For any other relief or assistance not specifically provided for" as the basis for his submission that appellant ought to have made payment separately for the relief of specific performance. I do not agree with learned counsel for the respondents in that respect particularly as appellant paid for the filing of the Statement of Claim, in which the relief is claimed and did so after the registrar duly assessed same for payment. I therefore hold the view that the relief of specific performance is properly before the court and that the lower courts were right in considering whether to award same or not. (p. 601 B)

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***Specific performance - Evidence of damages suffered***

4. In cases where there is a subsisting contract or agreement for the sale or lease of land, the court, being also a court of equity is always inclined to grant specific performance because the land being sold or leased may have a peculiar value or significance to the purchaser or lessee particularly where it is a choice land in a busy commercial centre of the town, as in the instant case.

E Since the grant of an order of specific performance is at the discretion of the court, it is always advisable that the party claiming same should call evidence on damages claimed or suffered in the event that the court, for some reason is unable to grant specific performance.

F It is also settled law that the onus is on the person who seeks to enforce his right under a contract to show that he has fulfilled all the conditions precedent, and that he has performed all those terms which ought to have been performed by him. Where the plaintiff fails or defaults in the discharge of his own obligations under the contract, the action must fail.

H From the above stated principles, it is very clear that a decree or an order of specific performance is a form of relief that is purely equitable in origin and the fundamental rule is that specific performance will not be decreed or ordered if there is an absolute remedy

at law in answer to the plaintiff's claim, for instance, where the plaintiff would be adequately compensated by the common law remedy of damages. The jurisdiction in specific performance is therefore anchored on the inadequacy of the remedy of damages at law.  
(p. 602 C)

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***Where the lease has expired - Without being renewed***

5. There is only one lease agreement between the parties which lease expired by efflux of time. With that expiration, any rights arising therefrom became spent or non-existent and consequently unenforceable, or is the appellant talking of the option to renew as constituting the contract he wants specifically enforced? If so, is an option to renew a lease or a contract enforceable by specific performance particularly where there is no provision in the lease to the effect that the lease is renewable in perpetuity or that the landlord or lessor shall not withhold consent to renew the lease? Even where there is a provision that the lessor shall not unreasonably withhold consent to renew the lease, it still leaves the lessor with the discretion either to renew or not to renew the lease how much more where there is no such provision and the lessor refuses, as in the instant case, to renew the lease. Is he bound to renew the lease?

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If the option to renew is considered the contract to be enforced, where is the acceptance of that offer by the lessor 1st respondent, and what, if one may ask, is the consideration so as to make the alleged contract binding and enforceable? I am unable to see the basic constituents of a valid contract existing between appellant and 1st respondent and by extension 3rd respondent which can be said to be amenable to specific performance having regard to the fact that the only valid contract between them had expired without renewal. It is on the above basis that one has to agree with the lower court that "the appellant's option to renewal had ceased to be and there was not, for that reason, a cause of action." (p. 603 H)

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***Option to renew lease - That is not accepted by landlord***

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6. It should be noted that the facts of this case is different from the usual factual situations where specific performance is obtainable. There is no existing valid contract of lease or purchase of land be-

tween the parties, the earlier one having expired by efflux of time so the 3rd respondent cannot be said to have taken the property "with notice of the prior contract" between the appellant and 1st respondent neither has he acquired any further interest in the property in issue by payment of rents particularly as 1st respondent refused to  
 B renew the lease or collect further rents from the appellant. I hold the considered view that an option to renew a lease is an offer made to the landlord, the acceptance of which would constitute a valid contract enforceable by specific performance; it remains an offer until  
 C accepted. In the instant case, it was never accepted by the 1st respondent so no enforceable contract exists. (p. 604 F/605 C)

***PLEADINGS - Fraud - Allegation of***

7. On the third issue which deals with fraud, it is trite law of practice  
 D and procedure that for one to rely on fraud in any case he must first and foremost specifically plead same and in addition supply particulars of the alleged fraud so as not to take the other party by surprise. (p. 605 H)

**E NOTABLE POINT OF INTEREST  
 ONNOGHEN JSC**

*1. Volunteer - Meaning*

By "a volunteer", the law means a person who enters into any trans-  
 F action of his own free will or a person to which property is transferred without valuable consideration. It is the second meaning that is more relevant to the facts of this case. (p. 603 F)

***REPRESENTATION***

G Chief H.B. Onyekwelu, for the Appellant  
 Chief Ebele Nwokoye, for the Respondents.

***CASES REFERRED TO***

- Awosile v. Sotumbo (1992) 6 SCNJ 182  
 H David Oguntade v. Ezekiel Adeleye (1992) 10 SCNJ 58  
 Obijuru v. Ozims (1985) 2 NWLR (Pt. 6) 167 at 179  
 Balogun v. Ali -Owe (2000) 3 NWLR (Pt. 649) 477  
 Ezenwa v. Ekong (1999) 11 NWLR (Pt. 625)55

Afrotec Tech. Servo (Nig) Ltd. v. MIA & Sons Ltd. (2000) 15 NWLR (Pt. 692) 730 at 790

Obijuru v. Ozims (1985) 2 NWLR (Pt. 6) 167 at 179

### **LEAD JUDGMENT BY ONNOGHEN JSC**

This is an appeal against the judgment of the Court of Appeal, holden at Enugu in appeal No.CA/E/102/79 delivered on the 11th day of November, 1999 in which the court dismissed the appeal of the appellant against the judgment of the High Court of Imo State Holden at Afikpo Division in suit No.HAF/13/78, delivered by that court on the 18th day of June, 1979 in which it dismissed the appellant's claim for Statutory Right of Occupancy, trespass, injunction and specific performance, but awarded the sum of N500.00 (Five Hundred naira) damages in lieu of specific performance.

On the 26th day of May, 1978 the appellant, as plaintiff, caused a writ of summons to be issued against the respondents, as defendants, claiming the following reliefs:-

(i) *"A declaration that plaintiff is the person entitled to a Statutory Right of Occupancy to a parcel of land near Eke Market, Afikpo and which is part of a larger area of land situate at Amachi Village, Afikpo in Afikpo Local Government Area of Imo State within Judicial Division, the annual value which is N10.00 (Ten Naira).*

(ii) *N500.00 (Five Hundred Naira) being general damages for trespass upon the said land.*

(iii) *Injunction perpetually restraining the defendants, their servants, agents and workmen from further entry upon or interference with the land.*

(iv) *Specific performance against the defendants in respect of the contract and for lease agreement made on the 26th day of January, 1965 in connection with the renewal of the lease."*

The facts of this case are very simple and straight forward just as they remain undisputed. The original 1st defendant granted a lease of the property in dispute to the appellant on the 26th day of January, 1965 for 10 years as evidenced in Exhibit A. Exhibit A was therefore to expire on 26th day of January, 1975 with an option for renewal. In 1966 appellant took possession of the land and laid foundation for a concrete building thereon up to the floor level before the

Nigerian Civil War forced him to flee Afikpo to his home town, Achina from where he returned in 1971 to find motor mechanics in occupation of the property who atoned tenancy to him as appellant continued with the leasehold.

B Sometime in February, 1975 the appellant approached the original 1st defendant/respondent for the renewal of the lease who refused to allow appellant exercise the option and refused to collect further rents from the appellant on the ground that the original 1st defendant/respondent has made a gift of the land in dispute to the C 3rd respondent.

On his part, the 3rd defendant/respondent knew of the lease to the appellant and the fact that the mechanics on the land were the sub-tenants of the appellant. In 1978, the 3rd respondent peacefully quitted the mechanics from the land and surveyed same after which D the land was formally conveyed to the 3rd respondent by the 1st respondent and he commenced building thereon in April, 1978. In May, 1978 when it finally dawned on the appellant that the 1st respondent had no intention of changing his mind on the option of renewal of the lease, the appellant instituted this action claiming the E relief's earlier reproduced herein.

Learned counsel for the appellant, Chief H. B Onyekwelu in the appellant's brief filed on 30th day of September, 2007 and adopted and relied upon at the hearing of the appeal on the 29th day of F October, 2007, formulated the following issues for the determination of the appeal, to wit:-

3.1 "Whether specific performance of the appellant's equities cannot be enforced against the 3rd respondent whose ostensible interest over the land is that of a mere volunteer, but is the alleged G successor in- title of the 1st respondents;

3.2 Whether on the facts of the case, the appellant was guilty of delay at all or such delay as in the circumstances could deprive the appellant, enforcement of specific performance against the 1st respondent or the 3rd respondent or their successors-in-title;

H 3.3 Whether fraud or unconscionable behaviour should be specifically pleaded as against setting out facts in support thereof;

3.4 Whether the appellant was not entitled to notice to quit from the land, if so what would be the length of time of the notice, in



*view of Exhibit A which was a lease for ten years, in the first instance;*

*3.5 Was the Court of Appeal right in holding that the 3rd respondent was not liable in trespass on the facts and applicable law in the circumstances; and that the appellant was not entitled to damages at all in lieu of specific performance? If not whether the appellant is not entitled to the market value of the land and improvement. Thereof by the appellant, of the property so well commercially situated;*

*3.6 If the Supreme Court holds that the appellant is entitled to specific performance, is the lease perpetually renewable or merely for another ten years or so;*

*3.7 Whether the provisions of the land use Act 1978, made it impossible for an order of specific performance to be entered against the 1st and 3rd respondents."*

On the other hand, learned counsel for the respondents, Chief Ebele Nwokoye identified the following issues for determination in the respondents' brief filed on 18th day of October, 2005:

*3.1 "Whether specific performance of this appellant's equitable interest could not have been ordered by the court below in the circumstances of this case;*

*3.2 As opposed to appellant's 2nd issue, whether the appellant has pleaded, argued and satisfied the court that the special reasons to interfere with the concurrent findings that appellant did not come to court promptly to claim the equitable relief of specific performance;*

*3.3 As opposed to appellant's 3rd issue, whether the appellant pleaded fraud and, if so, why the appellant is at pains to pin-point paragraphs of the Statement of Claim where he did so;*

*3.4 As opposed to appellant's 4 issue, whether the appellant who did not appeal against the finding of the High Court that he was quitted from the disputed land peacefully can now agitate the contrary view, without specific leave to do so and, furthermore, whether the appellant has pleaded, argued and satisfied the court on special reasons or circumstances to interfere with the concurrent finding on the issue by the two lower courts;*

*3.5 Appellant's 5th issue is hereby adopted for argument;*

*3.6 Appellant's 6th issue is hereby opposed on the ground that it is not based on any ground of appeal before the court. Awosile v.*

*Sotumbo (1992) 6 SCNJ 182;*

3.7 Appellant's 7th issue is hereby opposed on the ground that it is not based on any ground of appeal before the court, *Awosile v. Sotumbo (1992) 6 SCNJ 182;*

B 3.8 It is further submitted that no issue have been raised on the grounds of appeal numbered (3) (9) (11) and (12) and those grounds are therefore deemed to have been abandoned. *David Oguntade v. Ezekiel Adeleye (1992) 10 SCNJ 58."*

C It is important to note at this stage that the learned counsel for the appellant filed no reply to the brief of the respondents in answer to the complaints as to whether appellant's issues 6 and 7 arose from the grounds of appeal before this court and also the abandonment of grounds 3,9,11 and 12 of the grounds of appeal following the non formulation of issues therefrom.

D The above complaints are very germane as ***it is settled law that whereas ground(s) of appeal must arise from the decision appealed against, issues for determination must be formulated from the said grounds of appeal otherwise they are invalid. In that respect, it is my view that appellant's issues 6 and 7 not having been formulated from any of the grounds of appeal filed in this court, are incompetent and are hereby struck out.***

F ***As regards appellant's issue No.4, I agree with learned counsel for the respondents that appellant never appealed against the concurrent finding by the lower courts that appellant was quitted from the land in dispute peacefully and cannot now turn round to argue the contrary, without leave of the court. To that extent, the argument on appellant's issue No 4 is hereby discountenanced.***

H ***With respect to grounds 3, 9, 11, and 12 of the grounds of appeal filed in this court in respect of which no issue(s) has/have been formulated, it is settled law that the said grounds are deemed abandoned by the appellant and liable to be struck out. I hereby order accordingly.***

Be that as it may, it is unfortunate that from the simple and straight forward facts of this case, which is very much undisputed, so many issues could have been properly raised for determination when

the primary issue before the court remains whether having regards to the facts and circumstance of the case, appellant was entitled to a decree or order of specific performance; every other issue remains ancillary if at all relevant.

In arguing issue 1, learned counsel for the appellant submitted that the 3rd respondent, having stepped into the shoes of the 1st respondent in respect of the land, was bound by any equities attached to the land in that before he acquired his supposed interest, the 3rd respondent was a volunteer with full knowledge of the appellant's equities in the land; that it is trite law that where a purchaser of land or a lessee is in possession of the land and has paid the purchase money to the vendor or has paid the rent to the lessor as the case may be, then in either case, the purchaser or the lessee has acquired an equitable interest in the land which is as good as a legal estate and this equitable interest can only be defeated by a purchaser of the land, for value without notice of the prior equity, relying on the case of *Obijuru v. Ozims* (1985) 2 NWLR (Pt. 6) 167 at 179. Learned counsel also cited and relied on Vol. 36, Halsbury's Laws of England (3rd Ed. 330 Para. 482) which states that "where there is a contract for the sale or demise of property and the property is thereafter transferred to a third party, the general practice is that specific performance may be had against the transferee;

- i. If he is a volunteer; or*
- ii Takes with notice of the prior contract; or*
- iii Acquired only an equitable title and has no better equity than the purchaser or intended lessee."*

Learned counsel for the appellant argued that the 3rd respondent being a volunteer who also took the land with notice is liable to specifically perform the contract of renewal attached to the land by virtue of Exhibit A, that the lower court was in error when it held that specific performance cannot be ordered against the 3rd respondent because he was not privy to the agreement to renew the lease particularly as that court had earlier held that the 3rd respondent stepped into the shoes of the 1st respondent in relation to the land in dispute; that it is not correct, as held by the lower court, that the original lease had expired before appellant started to ask for renewal as there is evidence to show that appellant started to demand for renewal be-

fore 25 January, 1975 when the lease expired; that even if the lease had expired, appellant continued in possession and was collecting rents from his sub-tenants until April, 1978 thereby being led to believe that the 1st respondent was ready or could be persuaded to renew the lease.

B On his part, learned counsel for the respondents referred to the holding of the lower court at page 202 of the record to the effect that, "I have already held that at the time appellant went to court, the basis of his claim had lawfully ceased to exist. It was the continued  
C existence of his status of a tenant at sufferance that would have made the 1st respondent compellable "meaning that, the appellant lost .the status of tenant at sufferance or the relationship of tenant and land-  
D lord which must exist to qualify him to seek specific performance to compel 1st respondent and that since appellant cannot compel per-  
D formance against 1st respondent he cannot also do so against the 3rd respondent; that the lower court did find that the appellant's option for renewal had ceased to be and there was not, for that reason, a cause of action, sealed the fate of the appellant; that appel-  
E lant did not appeal against this specific finding and should not now be allowed to impugn same; that the issue of privity of contract does not really arise nor have effect on the conclusion judging from the above findings of the lower court which completely took care of the appellant's case, that the court should refuse the grant of specific per-  
F formance on the following grounds:-

(a) the trial court refused to exercise its discretion in favour of the appellant and the appellant did not appeal against that refusal;

(b) the Court of Appeal did not interfere with the exercise of the discretion not to grant specific performance and, indeed, affirmed  
G what the trial court did as appellant has shown no special circumstances to warrant the interference of this court;

(c) the lower court's finding that the appellant's option to re-  
new had ceased to be and there was not for that reason a cause of action even though complained against in ground 11 of the grounds  
H of appeal before the lower court, the same was abandoned when no issue was raised therefrom;

(d) the appellant who covenanted to build on the land could not do so after possessing the land for over 13 years and contented

himself with a mere concrete foundation up to floor level;

(e)appellant brought action for declaration of title against his former landlord;

(f)that the claim on specific performance is an after thought as the same was not claimed in the Writ of Summons; that the claim for specific performance as claimed on the Statement of Claim was never paid for. B

I will begin a consideration of the issue in contention between the parties by stating that ***it is settled law that the statement of claim supersedes the writ of summons and that what is claimed in the writ but omitted in the statement of claimed is deemed abandoned while what is not claimed in the writ but claimed in the Statement of Claim becomes the claim before the court though subject to the payment of appropriate filing fees where appropriate. In the instant case, the additional relief was not for monetary compensation but for specific performance. It is not that appellant never paid for the filing of the Statement of Claim but that he failed to pay for the additional relief of specific performance. Learned counsel cited and relied on Order VIII Rule 5 of the High Court Rules, applicable to Eastern Nigeria Vol. IV Laws of Eastern Nigeria, 1963 which provides as follows:-*** C D E

***" 5. The fees prescribed in Part 1 of the second schedule shall be payable by the party prosecuting a proceeding or asking for a service as therein provided in respect of the proceedings or services to which they relate and such fees may afterwards be recovered as costs of cause if so ordered.*** F

***Fees may be waived or remitted, by a Judge on the ground of the poverty of the person chargeable therewith where it appears that there are substantial grounds for his taking the proceeding or asking for the service to be rendered:*** G

***Provided however, that a Judge may, where he thinks fit, order any party to pay any fees so waived or remitted."***

Counsel also relied on item 10 of the Part 1 of the second schedule to the above rules which provides for the payment of the sum of £3.15.0 "For any other relief or assistance not specifically provided for" as the basis for his submission H

**that appellant ought to have made payment separately for the relief of specific performance. I do not agree with learned counsel for the respondents in that respect particularly as appellant paid for the filing of the Statement of Claim, in which the relief is claimed and did so after the registrar duly assessed same for payment. I therefore hold the view that the relief of specific performance is properly before the court and that the lower courts were right in considering whether to award same or not.**

Having taken care of the preliminary matter, the issue is whether this is a proper case for the court to exercise its equitable jurisdiction by ordering specific performance.

**In cases where there is a subsisting contract or agreement for the sale or lease of land, the court, being also a court of equity is always inclined to grant specific performance because the land being sold or leased may have a peculiar value or significance to the purchaser or lessee particularly where it is a choice land in a busy commercial centre of the town, as in the instant case.**

**Since the grant of an order of specific performance is at the discretion of the court, it is always advisable that the party claiming same should call evidence on damages claimed or suffered in the event that the court, for some reason is unable to grant specific performance.**

**It is also settled law that the onus is on the person who seeks to enforce his right under a contract to show that he has fulfilled all the conditions precedent, and that he has performed all those terms which ought to have been performed by him. Where the plaintiff fails or defaults in the discharge of his own obligations under the contract, the action must fail -**  
See Balogun v. Ali -Owe (2000) 3 NWLR (Pt. 649) 477 Ezenwa v. Ekong (1999) 11 NWLR (Pt. 625)55.

**From the above stated principles, it is very clear that a decree or an order of specific performance is a form of relief that is purely equitable in origin and the fundamental rule is that specific performance will not be decreed or ordered if there is an absolute remedy at law in answer to the plaintiff's**

***claim, for instance, where the plaintiff would be adequately compensated by the common law remedy of damages. The jurisdiction in specific performance is therefore anchored on the inadequacy of the remedy of damages at law*** - See Afrotec

Tech. Servo (Nig) Ltd. v. MIA & Sons Ltd. (2000) 15 NWLR (Pt. 692) 730 at 790. The question then is, how do the facts of this case fit into the principles guiding the order of specific performance? B

It is not disputed that appellant entered into a lease with the 1st respondent in respect of the land in dispute for a term of 10 years which was to expire on 25th January, 1975 with an option to renew same for a further term of years. C

The lease duly came to an end by efflux of time though appellant had, meanwhile put up a foundation on the land up to the floor level before abandoning same following the outbreak of the Nigerian Civil War. It is important to note that the lease ended without the 1st respondent agreeing to renew the lease nor, to accept further rents from the appellant. The lower courts therefore came to the right conclusion when they held that the lease was duly terminated by efflux of time.

However, the action for specific performance appears to be founded on the option to renew contained in the lease between the appellant and 1st respondent. E

Learned counsel for the appellant has submitted that the 3rd respondent can be ordered to specifically perform the contract of option to renew particularly as he stepped into the shoes of the 1st respondent and was a volunteer and did take with notice of appellant's equities - option to renew. By "a volunteer", the law means a person who enters into any transaction of his own free will or a person to which property is transferred without valuable consideration. It is the second meaning that is more relevant to the facts of this case. F

We have to bear in mind that the principles of specific performance relate to enforcement of contract entered into between the parties and that a contract involves offer and acceptance of the offer coupled with provision of consideration. One may ask in relation to this case, what is the contract that appellant wants the court to specifically enforce? ***There is only one lease agreement between the parties which lease expired by efflux of time. With that expira-*** H

**tion, any rights arising therefrom became spent or non-existent and consequently unenforceable, or is the appellant talking of the option to renew as constituting the contract he wants specifically enforced? If so, is an option to renew a lease or a contract enforceable by specific performance particularly where there is no provision in the lease to the effect that the lease is renewable in perpetuity or that the landlord or lessor shall not withhold consent to renew the lease? Even where there is a provision that the lessor shall not unreasonably withhold consent to renew the lease, it still leaves the lessor with the discretion either to renew or not to renew the lease how much more where there is no such provision and the lessor refuses, as in the instant case, to renew the lease. Is he bound to renew the lease?**

**If the option to renew is considered the contract to be enforced, where is the acceptance of that offer by the lessor 1st respondent, and what, if one may ask, is the consideration so as to make the alleged contract binding and enforceable? I am unable to see the basic constituents of a valid contract existing between appellant and 1st respondent and by extension 3rd respondent which can be said to be amenable to specific performance having regard to the fact that the only valid contract between them had expired without renewal. It is on the above basis that one has to agree with the lower court that "the appellant's option to renewal had ceased to be and there was not, for that reason, a cause of action."**

**It should be noted that the facts of this case is different from the usual factual situations where specific performance is obtainable.** Learned counsel for the appellant has cited and relied on the decision in *Obijuru v. Ozims* (1985) 2 NWLR (Pt. 6) 167 at 179, where it was held thus:-

*"It is trite law that where a purchaser of land or a lessee is in possession of the land and has paid the purchased money to the vendor or has paid the rent to the lessor as the case may be, then in either case, the purchaser or the lessee has acquired an equitable interest in the land which is as good as a legal estate and his equitable interest can only be defeated by a purchaser of the land for value*



without notice of the prior equity" and also Halsbury's Laws of England (3rd Ed) 330 Para. 482 where it is stated thus:-

"Where there is a contract for the sale or demise of property and the property is thereafter transferred to a third party, the general principle is that specific performance may be had against the transferee,

- (i) If he is a volunteer, or
- (ii) Takes with notice of the prior contract, or
- (iii) Acquired only an equitable title and has no better equity than the purchaser or intended lessee ."

Though the above statements represent the law applicable to the situations described therein, the principles do not apply to the facts of the instant case because primarily, and this is the most important consideration for its applicability, **there is no existing valid contract of lease or purchase of land between the parties, the earlier one having expired by efflux of time so the 3rd respondent cannot be said to have taken the property "with notice of the prior contract" between the appellant and 1st respondent neither has he acquired any further interest in the property in issue by payment of rents particularly as 1st respondent refused to renew the lease or collect further rents from the appellant. I hold the considered view that an option to renew a lease is an offer made to the landlord, the acceptance of which would constitute a valid contract enforceable by specific performance; it remains an offer until accepted. In the instant case, it was never accepted by the 1st respondent so no enforceable contract exists.** I therefore resolve the issue against the appellant.

On the second issue which deals with the question as to whether appellant was guilty of any delay in presenting his case for renewal of the lease, like the other issues, it is my view that their consideration will have no meaningful effect on the position of the case particularly as a resolution of issue No 1 has rendered the second issue irrelevant. In any event it is not disputed that appellant went to court after three years of the expiration of the lease at which time the 3rd respondent had acquired his interest thereon.

**On the third issue which deals with fraud, it is trite law of**

***practice and procedure that for one to rely on fraud in any case he must first and foremost specifically plead same and in addition supply particulars of the alleged fraud so as not to take the other party by surprise*** - See Order XXXIII rule 13 of the

applicable High Court rules of Eastern Nigeria, 1963. In conclusion,  
 B I find no merit in this appeal which is accordingly dismissed with costs which I assess and fix at 10, 000.00 (Ten Thousand Naira) against the appellant. Appeal dismissed.

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### **KATSINA-ALU JSC**

I have read before now in draft the judgment delivered by my learned brother, Onnoghen JSC, in this appeal. I entirely agree with it and, for the reasons which he has given, I too, dismiss the appeal  
 D with N10,000.00 costs in favour of the Respondents.

### **MUSDAPHER JSC**

I have had the honour to read before now the judgment of  
 E my Lord, Onnoghen, JSC, just delivered. In the aforesaid judgment his lordship has meticulously and admirably dealt with all the issues properly submitted to this court for the determination of the appeal. I respectfully adopt his reasonings as mine. I too, find this appeal  
 F unmeritorious and accordingly dismiss it. I abide by the order for costs proposed in the aforesaid lead judgment.

### **AKINTAN JSC**

G The dispute that led to this case was over a parcel of land near Eke Market, Afikpo in Amachi Village, Afikpo, Imo State. The land was leased to the appellant on 26th January, 1965 for 10 years. The life span of the lease was to expire on 26th January, 1975. There was, however, an option for renewal. But the appellant did not ask  
 H for a renewal until sometime in February, 1975. This was after the expiration of the life span of the ten years lease. The appellant's request for a renewal was turned down and the defendant refused to accept any further rent from the appellant. The present action was

then commenced wherein the appellant, as plaintiff, claimed against the defendant:

*"(i) A declaration that the plaintiff is the person entitled to a statutory right of occupancy to a parcel of land near Eke Market, Afikpo and which is part of a larger area of land situate at Amachi Village, Afikpo Local Government Area of Imo State within Judicial Division, the annual value which is N10.*

*(ii) N500 being general damages for trespass upon the said land.*

*(iii) Injunction perpetually restraining the defendants, their servants, agents and workmen from further entry upon or interference with the land.*

*(iv) Specific Performance against the defendants in respect of the contract and for lease agreement made on the 26th day of January, 1965 in connection with the renewal of the lease."*

*(iv) Specific Performance against the defendants in respect of the contract and for lease agreement made on the 26th day of January, 1965 in connection with the renewal of the lease."*

The plaintiff's claim was dismissed by the trial High Court and his appeal to the Court of Appeal was also dismissed. The present appeal is from the judgment of the Court of Appeal. The main reason for the failure of the plaintiff/appellant in the two lower courts is that the lease he was trying to renew had expired before making his request for a renewal. There was therefore no subsisting lease which could be renewed.

I entirely share the same view that the request for the renewal of the lease could only be made before the expiration of the lease.

I had the privilege of a preview of the lead judgment written by my learned brother, Onnoghen, JSC. He has fully discussed all the issues raised in the appeal. I agree with his reasoning and conclusion that there is no merit in the appeal. I also dismiss the appeal with N10,000.00 costs.

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### MUHAMMAD JSC

I was privileged by my learned brother, Onnoghen, JSC, to have read in advance the lead judgment just delivered by him. I too

find the appeal very unmeritorious. It must fail. I hereby dismiss the appeal. I abide by the consequential orders made in the lead judgment including order as to costs.

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