

SUPREME COURT OF NIGERIA
12TH DECEMBER, 2008. SC. 229/2002
**CORAM:- D. MUSDAPHER, G. A. OGUNTADE, I. F. OG-
BUAGU, F. F. TABAI, P. O. ADEREMI, JJSC**

MRS. T. C. CHUKWUMA APPELLANT
AND
MR. BABAWALE IFELOYE RESPONDENT

JUDICIAL PRECEDENTS - Distinguishing - Trespass - Waiver - The facts of Adebajo v. Brown are inapplicable here - Unlike the instant plaintiff - Plaintiff in Adebajo actually came to an agreement with the trespasser - Which was partially implemented before the suit (H1)

TORTS - Trespass - Waiver - Applicability - It will not apply so long as the trespasser be not misled into carrying out further developments - After discovery of the trespassory entry on the land (H2)

LAND LAW - Trespass - Right of action - Waiver - Merely negotiating with trespasser is not enough evidence - To support the conclusion that plaintiff had waived the trespass committed on her land (H3)

FACTS

The plaintiff/appellant sued the defendant/respondent in the High Court of Federal Capital Territory claiming damages for trespass and perpetual injunction. The undisputed facts were that the respondent's successor-in-title had erroneously moved into the plot of the appellant instead of her own, which was adjacent to that of the appellant. Subsequently respondent "acquired" the appellant's plot in the belief that he had acquired that of his successor-in-title. Upon discovery of the encroachment, appellant caused the appropriate authority to issue "stop work" order on the respondent.

Consequently, respondent came to negotiate with the appellant for a peaceful settlement but the negotiation failed, resulting in the instant action by the appellant. After hearing, the learned trial judge held that the appellant had by negotiating with the respondent waived her right to sue for trespass. Aggrieved, appellant appealed to the Court of Appeal which dismissed the appeal. Appellant has

brought this further appeal to the Supreme Court.

ISSUE FOR DETERMINATION

Whether or not the facts and circumstances in this case are the same as found by this Court in *Adebanjo v. Brown* (1990) 3 NWLR (Pt.141) 661.

HELD (Unanimously allowing the appeal per **OGUNTADE JSC**)
JUDICIAL PRECEDENTS - Distinguishing - Trespass

1. It is apparent that the two courts below did not sufficiently give attention to the peculiar facts in *Adebanjo v. Brown* (supra) upon which the decision in the case was hinged. In the *Brown* case, the parties not only went into negotiation after the trespass mistakenly committed by the defendant was discovered. They actually agreed on the terms of the settlement and partially implemented the terms. The facts in the current appeal are different. As soon as the plaintiff (now appellant) knew of the trespass on her land, she caused F.C.D.A, which allocated the land to her to serve a “stop work” order on the defendant (now respondent). The parties opened negotiations which did not succeed. She then promptly sued. ‘There was no evidence that the plaintiff at any stage before she sued caused F.C.D.A, to remove or vacate the “stopwork” order on the defendant. (pp. 3774 H/ 3775 C)

Trespass - Waiver - Applicability

2. If the reasoning of the two courts below be right, it would in my view create a very anomalous situation in the law governing trespass to land. It would lead to a position where the owner of land on which another has committed trespass would not be free to talk to the trespasser at all, lest he be taken to have compromised the trespass even when there has been no agreement reached with the trespasser. The important thing in my view is that the trespasser be not misled into carrying out further developments on the land after the discovery of the trespassory nature of his entry on the land. (p. 3775 E)

LAND LAW - Trespass - Right of action - Waiver

3. Merely negotiating with the defendant/appellant is not enough evidence to support the conclusion that she had waived the trespass committed on her land. It would have been a different situation if she

had, following the negotiation, caused the "stop work" order to be vacated.

It is my firm view that the two court below were in error to have come to the conclusion that the plaintiff /appellant could no longer pursue her rights as owner of the land. The court below would appear, in its decision, to have forced the plaintiff /appellant to accept whatever offer the defendant/respondent made to her in atonement for the wrongful even if mistaken entry on her land. (p. 3777 B)

NOTABLE POINTS OF INTEREST ***OGBUAGU JSC***

1. Estoppel does not apply to the facts of present case

There is no way the principles of equitable estoppel, could have arisen in the instant case leading to this appeal. If I may, in line with decided authorities, where a person or one by words and/or deed or even by conduct, made to another, a clear and unequivocal representation of a fact either with knowledge of its falsehood or with the intention that it should be acted upon, or has conducted himself that another would, as a reasonable man with his full faculties, understand that a certain representation of fact, was intended to be acted upon, and that other person in fact acted upon the representation whereby his position was thereby altered to his detriment, an estoppel arises against that person who made it and he will not be allowed to say that the representation is not what he presented it to be. This is known as estoppel by conduct; estoppel in pais. (p. 3782 B)

ADEREMI JSC

2. Promissory estoppel can only be used as a shield not a sword

It is the defendant/respondent who is contending that the plaintiff/appellant had made some representations to him which representations find expression on her desire to give up all her legal rights on the parcel of land on which he (defendant/respondent) has built on or was building on, and that for a consideration. That promise or undertaking is, what in law, is called PROMISSORY ESTOPPEL. Thinking or reasoning in a logical sequence, it is my view that such promissory 'estoppel can only be used as a shield not as a sword, It is a contractual defence to an assertion of contractual rights; where one party has given a promise or an undertaking to the other that he

would not assert his legal right, if a condition is fulfilled by the other party and that other party, on his part, fulfilled that condition, thus changing his position to the advantage of the promisor; that promisor will not, on good law and equity, be allowed to renege from the position he has voluntarily carved for himself. It will be an unconscionable act or behavior on the part of the promisor. (p. 3800 G)

3. Promissory estoppel does not obviate the need for consideration

The principle does not give a cause of action in itself as it does not stand alone and it can never do away with the necessity of consideration when that is an essential part of the cause of action. From the facts of the present case, can it be said that there was a consideration acceptable to the plaintiff/ appellant and which she has accepted from the defendant/respondent which would make it inequitable or unconscionable on the part of the plaintiff/appellant to renege from the undertaking she (plaintiff/appellant) had given to the defendant /respondent not to enforce her legal right? It is common ground between the parties that the monetary offer made by the defendant/respondent to the plaintiff/appellant in consideration of her undertaking not to enforce her legal right on the piece of land trespassed upon by the defendant/respondent was rejected by the plaintiff/appellant. Consideration which is an essential factor in this type of relationship is therefore absent. (p. 3801 E)

4. Only absolute land owners are entitled to perpetual injunctions

The appellant has also claimed an order of perpetual injunction to prevent further trespass in her land. But, by the nature of the Certificate of Occupancy issued in her favour in respect of the land, she is a limited owner in the sense that she is a lessee of the land allocated to her by the Federal capital Development Authority, the owner of the absolute interest of the land has not been made a party to this case. In Chief Dada, the *Lojaoke vs. Chief Shittu Ogunremi & Anor.* (1967) NMLR 181, this court (Supreme Court) has said that it is improper to grant an order of perpetual injunction at the instance of a limited owner (the like of the plaintiff/appellant) when the owner of the absolute interest is not a party to the case, It is for the reason of the pronouncement of this court, in the Chief Dada's case cited supra that I say that the appellant is entitled only to an order of injunction

as opposed to perpetual injunction. (p. 3802)

REPRESENTATION

Mr. Dele Oye (Mr. Ajara Noah and Miss Abbas Shitta with him)

For the Appellant.

Respondent absent and not represented.

B

CASES REFERRED TO

O. Solomon & Ors. v. A. R. Mogaji & Ors. [1982] 11 SC. 1 at 25

Ramsden v. Dyson. [1866] LR 1HL 1 29 at pp. 140 - 141

Adebanjo v. Brown (1990) 3 NWLR (Pt 141) 661

Management Enterprises v. Otusanya (1987) 2 NWLR (Pt.55) 179;
(1987) 4 SCNJ. 110

Ali & Anor. V. Chief Alesinloye & 8 Ors. (2000) 6 NWLR (pt. 660)
177 at 212; (2000) 4 SCNJ. 264

Adelusola & 4 Ors. v. Akinola 3 Ors. (2004) 12 NWLR (pt.887) 295
at 311; (2004) 5 SCNJ. 235 @ 246

Combe v. Combe (1951) 1 All E.R. 767 @ 769- 770

Joe Iga & 3 ors. v. Chief Ezekiel Amakiri & 3 Ors. (1976) 11 S.C. 1
at 12 - 13; (1976) 11 S.C. (Reprint) 1 @ 9-10

Ude v. Nwara (1993) 2 NWLR (Pt.278) 638; (1993) 2 SCNJ 47

Oyerogba & Anor. v. Olaopa (1998) 13NWLR (Pt.583) 509

RULES OF COURT REFERRED TO

Supreme Court Rules, O. 6, r. 6

LEAD JUDGMENT BY OGUNTADE JSC

The appellant was the plaintiff before the High Court, Abuja and the respondent the defendant. The facts leading to the dispute out of which this appeal arose and the claims of the plaintiff/appellant are pleaded in paragraphs 3 to 8 of the appellant's amended statement of claim as follows:

"3. The plaintiff avers that sometimes in 1988 she applied for an allocation of land to the Federal Capital Development Authority and on May, 1989 she was granted a Certificate of Occupancy in respect of a piece of land known as Plot 496 located on Area A2 Wuse 1 District of the Federal Capital Territory. Plaintiff pleads the said Certificate of Occupancy and shall rely on it at the trial.

"4. On or about the month of February, 1993, the Defendant wrongfully entered the said land and has wrongfully taken possession of same by erecting a four bedroom duplex and has thereby trespassed and in still (sic) trespassing thereon.

B 5. The plaintiff avers that she discovered the Defendant on her piece of land when she employed the services of an Independent Contractor to erect a building of her choice after approval of the building plan has been sought and obtained from the Federal Capital Development Authority.

C 6. The plaintiff further avers that it was when the contractor got to the site of erecting the building that she discovered that the Defendant has already erected a structure on the land and the site was no longer suitable for the use of the Plaintiff.

D 7a. The plaintiff promptly reported the matter to the Development control Unit of the Federal Capital Development Authority who, promptly issued a 'STOP WORK' order on the Defendant.

E 7b. The plaintiff avers that prior to this period she was not resident in Abuja but in Lagos and she only came to Abuja when she was appointed the Chairperson to the National Commission for Women in 1992.

7c. The plaintiff avers that the land in question is a State land and located in Urban area of the Federal Capital Territory.

F 8. By reasons of the matters aforesaid, the Plaintiff has been deprived of the use and enjoyment of the said land and premises and has thereby suffered loss and damages.

WHERE OF the plaintiff claims the sum of 3 million, being general damages for trespass to all that land known as: Plot 496 within A2, Wuse 1 District Abuja.

G B. A perpetual injunction restraining the Defendant, his servants and/or agent from further trespassing on the plaintiff's land; Or doing anything incompatible and inconsistent with the plaintiff's title and ownership of the said property".

H The respondent in his statement of defence paragraphs 4 to 15 and pleaded thus:

"4. The defendant avers that he bought the land and an existing building from one Mrs. Joan Babajide who has been staying on the land from March 1985 until she sold the land in dispute to the defendant in 1988. The defendant pleads and will tender the receipt

of sale.

5. The defendant avers that since 1988 he has been exercising continuous and maximum acts of possession and ownership by staying on one part of the existing building and letting the other to one Mallam Isa Haruna.

6. The defendant also avers that apart from (5) above, he has been going in and out on the land since 1988 without anybody disturbing or questioning him or his - (the defendant's) interest on the land. B

7. The defendant asserts that the failure of the plaintiff to comply with the terms of the certificate of occupancy granted her has immensely contributed to the action of the defendant and the transferor. The defendant pleads and will tender the certificate of occupancy that contains the terms. C

8. In 1992, before we were challenged, we demolished the existing building on the land in dispute and started the construction of another building which is there on the land in dispute now. It was only in 1993 when we had almost completed construction that we were served with a 'stop work' order from the FCDA. D

9. The defendant asserts that the plaintiff is negligent in that she stood by and allowed substantial development to be done on the land in dispute between 1985 and 1992 before she raised an alarm and/or assert her right on the same. E

10. As a result of the 'stop work' order served on us, we now discovered from the FCDA that the proper allottee is the plaintiff in this case. F

11. Notwithstanding our assertion in paragraph 9 above, we approached the plaintiff for negotiation and settlement.

12. She agreed for negotiation with us and during negotiation she (Plaintiff) gave the defendant two conditions upon which she would accept our terms of settlement. The conditions are: -

(a) That we perfect our title in respect of plot 495 which was originally allocated to our own transferor.

(b) That we should be responsible for the cost of transfer which was then estimated to be in the sum of N250, 000.00 (Two Hundred and Fifty Thousand Naira) only in addition to transferring the vacant (plot 495) to her. H

13. To satisfy condition 12B above the defendant on the 22nd

July 1994 issued a Union Bank of Nigeria Abuja Branch cheque of N250,000.00 (Two Hundred and Fifty Thousand Naira) only. .

14. The plaintiff however, declined to accept the cheque because the defendant was not yet in position (sic) to transfer plot 495 to her;

B 15. The defendant then met with his transferor who then took necessary steps to effect proper transfer of plot 495. XXXXXXXXXXXX

19. The defendant will at the hearing of this case rely on all available equitable, legal and statutory defences open to him including but not limited to

- C (a) Laches,
- (b) Acquiescence,
- (c) Stand by,
- (d) Long possession,
- D (e) Estoppel by conduct &
- (f) Negligence.

Where of the defendant prays that this suit be dismissed with substantial cost against the plaintiff for being gold – digging and an abuse of court processes".

E At the appellant testified in support of her claim. She did Fitness. The defendant called three witnesses and also testified in the judgment of Kuserki J. on 16/1/97, the trial judge said:

The question is whether as alleged by the plaintiff in her statement of claim, the Defendant has wrongly entered and taken possession by erecting a building thus trespassing thereon. By the and the evidence led DW3 from whom the Defendant land, sought the land office of the FCDA to help her identify her land and peg it for her to enable her commence development. The land shown, unknown is F DW3, (sic) was plot No. 496 and not 495 which is hers. She proceeded to erect a Boys quarters thereon. Later she transferred her right over her land to the Defendant in consideration of N60,000.00. The Defendant in turn erected duplex and new boys' quarters thereon. At a stage before the Defendant completed the building the building H the Plaintiff found out that it was her piece of land that was being encroached upon. This in itself is constructive trespass which is actionable per se. See Adebajo v. Brown (1990) 3 NWLR PART 133 page 661 at 664 where it held that 'Trespass is a violation of possessory rights claim in trespass can only be brought by one in possession

or one who has a right to possession.

Upon realizing the mistake the parties themselves try {sic} to negotiate and reach an amicable settlement between them since the construction work put up by the Defendant on the land belonging to the Plaintiff had reached advanced stage. This, according to the testimony of the parties concerned, would have entailed swapping the land one for the other or outright sale to Defendants of the Plaintiff's land. The Plaintiff asked for N 900,000 outright sale while the Defendant offered N250, as cost for the Plaintiff to prepare the adjacent land for entry in place of hers.

The negotiation stalemated and the Plaintiff therefore decided to institute this action claiming damages for trespass which Bola Ojo) learned Counsel for the Defendant contended cannot succeed basing contention on the holding of the Supreme Court in Adebajo v. Brown (supra) where it was held inter alia - .

There can only be trespass if the person in possession withholds his consent to the entry to the land. If there is a mistaken entry and when the mistake is discovered, approach is made to the person in possession and he consents', the right to claim in trespass abates (as his consent relates back the initial entry without permission:

"In furtherance to this Honourable Justice Obaseki JSC (as he then was) states:

The Court of Appeal seemed to have over looked the very basis for negotiation. If the Plaintiff/Respondent has said I do not want you on my land, there, would have been no 'basis for negotiation. But having said alright you can stay on my land but get me another plot of land or money, the issue of trespass becomes dead issue and cannot be resurrected by the failure to fulfill the terms of the consent to the entry. This is more evident from the fact that the plaintiff/Respondent allowed the Defendant/Applicant to proceed with his building to completion and jointly with the Defendant/Applicant approached and instructed PW1 to carry out a survey at the Defendants expenses. That fact alone destroys all the pretences of the respondent to the withdrawal or withholding of consent to the entry on the land.'"

"In the same case the present Chief Justice of Nigeria, then JSC further elucidates the issue thus;

'There is no doubt that the appellant in building his house

encroached on the respondent's land. Initially the encroachment was a trespass on the respondent's land which was referred to as plot 10. However the trespass was condoned by the respondent who allowed the appellant to continue with the construction of the house. In that respect no finding of trespass can be made on the claim by the respondent for trespass and perpetual injunction restraining the Defendant, his servant and or agents from further trespassing on the said land or any part of same since the construction of the applicant's house had been completed and the Applicant has gone into occupation of the house. It is now too late in the day to grant the claim. The respondent cannot go back on the license given to the appellant for he (the respondent) has waived to his detriment the right to sue for trespass' Italics mine

The trial judge finally concluded his judgment thus:

"In the case in issue the plaintiff found out that the Defendant had encroached onto (sic) her land and the two tried to negotiate with the help of the Lawyers to either pay for the land or swap the land for the adjacent one. The plaintiff cannot therefore be heard to be complaining over spilled milk after having waived to her detriment the right to sue for trespass until much later: The learned Counsel for the plaintiff, S.T. Ologun Orisa, wants the court to depart from this line argument (sic) by trying to relate same to the holding of Agbaje , J.S.C. (as then was) (sic) in the same case of Adebajo v. Brown where the learned jurist held the view that price of land is a fundamental term of any negotiation for sale of land and where it fails then there is no contract. I vouch to say that there is a departure here from the point being conversed (sic). In fact if the price of land is agreed upon then the case itself will never come before the court. In view of the fact that the plaintiff has condoned the trespass she has waived her right to sue the Defendant. Her claim for general damages of N3 million naira fails. The injunction sought is hereby not granted," (Italics mine).

The appellant was dissatisfied with the judgment of the trial court. She brought an appeal against it before the Court of Appeal, Abuja (hereinafter referred to as the 'court below'). The court below on 15-0-02 upheld the judgment of the trial court. Still dissatisfied, the appellant has come before this court on a final appeal. The appellant raised five grounds of appeal. In the appellant's brief, the

issues for determination in the appeal were identified thus:

“3.1 Whether (the respondent’s) negotiations (with the appellant) without more is sufficient to estop the appellant from asserting her rights arising from the Respondent’s trespass on her (the appellant’s) parcel of land.”

3.2 Whether the finding by the Court of Appeal that the appellant allowed the respondent to continue with the construction exercise on the appellant’s parcel of land (the subject matter of this action) could be supported or substantiated by the evidence presented before the trial court.

3.3 Whether the court below was justified in its finding that the appellant is not entitled to damages or injunction in the light of the trial court’s finding that the Respondent wrongfully entered and remained on the appellant’s parcel of land.”

The respondent’s issues are these:

“3.01. Whether taking into consideration the totality of the facts and circumstances of this case including the pleadings and the evidence led before the High Court, the Court of Appeal is right in upholding the judgment of the High Court that dismissed the plaintiffs claim for damages for trespass and injunction on the principle of the case of Adebajo v. Brown decided by the Supreme Court and reported in [1990] 3 NWLR Part 141.

3.02 Whether with the evidence adduced and the findings of the trial judge, judgment for damages for trespass and injunction could have been properly entered in favour of the plaintiff in the High Court or in the Court of Appeal.

3.03 Whether an alleged error or mistake in a supporting judgment can vitiate the judgment of the court (Relates to Ground 3 of Grounds of Appeal and issue 3 formulated thereon in the Appellant’s Brief of Argument). ”

I think that the important issue in this case is whether or not the facts and circumstances in this case are the same as found by this Court in Adebajo v. Brown (1990) 3 NWLR (Pt.141) 661.

In this case, there is no doubt that the respondent who had a valid title to Plot No. 495 on Area 2 Wuse 1, District of the Federal Capital Territory mistakenly went into Plot No. 496 belonging to the appellant and developed same. Was he entitled to be forgiven for his mistake on the ground that the appellant had entered into a negotia-

tion with him, which said negotiation proved abortive or in conclusive as the parties did not agree on the terms?

In her evidence before the trial court, the appellant at page 35 of the record of proceeding;; testified thus:

"From the time I got the Certificate of Occupancy when I was working in Lagos waiting to get approval for the plan before making any journey to Abuja. In October, 1992 I was appointed Chairman of Women Commission and I moved into Abuja then. Coincidentally that was the time I collected the approval (Exh, B). So after settling down for 3 months I decided to send a contractor to the site who discovered the encroachment. That was the first time, I went to the plot. On their paragraph 12-13 (sic) of the statement of defence. We tried to settle with the assistance of FCDA staff but the settlement failed and I refused to accept the cheque though I had not seen the cheque.

I refused to accept the cheque because the man he brought by name Ibrahim and my son, Charles Chukwuma who is now in U.S.A. together with a Quantity Surveyor from Peter Okolo agreed to N900, 000 and this was to compensate' for my land that was high than his and the new set of plans to be made and approved. The Defendant said he would not pay N900, 000.00 instead I should take the house and pay him N300, 000.00 it was at that point I brought in my lawyer."

The respondent in his evidence at pages 38-39 of the record of proceedings testified thus:

"The boys' quarter was 2 flats and I gave one of the flats to the security man and I occupy the other flat any time I came to Abuja. In 1992 I pulled down the boys' quarters, drew another building plan which was approved by FCDA. I then commenced development of a duplex in accordance with the specification of DW3. After that I started building. I completed building the duplex and started plastering when the FCDA ordered stoppage of the construction work. The new boys' quarters was at roofing level then. It was a written notice pasted on the wall. I then, went to FCDA to find out why stop order should be given. It was then I was informed that I encroached on the land of one Mrs. Chukwuma. I was asked to see the owner as there was a mistake somewhere. The Plots are 20 495 and 496. I meet the Plaintiff who told me that we should have a meeting with our lawyers

together. During the meeting I agreed to pay the expenses of shwarpring (sic) the two plots. That of the Plaintiff to be mine while mine to be that of the Plaintiff. The reassignment of the land of Mr. Babajide had been completed then. As the Plaintiff felt not satisfied she came to court. I even gave a cheque of N250, 000.00 to enable the Plaintiff take care of the plot shwarping (sic). But she rejected the money. B

CROSS-EXAMINATION

The transaction between myself and the Plaintiff was done by our Lawyers. We had only two concrete meetings. But I made several attempt (sic) for us to discuss the issue wherever we met. 'I know (Engineer) Alhaji Ibrahim who was the go between Mrs. Chukwuma and I. Engineer Ibrahim had never informed me of an agreement for us to pay the plaintiff N900,000.00. I had never had any meeting with the Plaintiff's son.' C

The evidence of the appellant was that she caused FCDA to serve on the respondent a "stop work" notice as soon as she was aware that the respondent had strayed on her land. She did not wait for the respondent to carry out further development on the land so that she could afterwards profit from the developments carried out on the land by the respondent. Negotiations followed. The appellant wanted N900,000.00 for her land. The respondent on the other hand was willing to relinquish the land with the developments thereon to the appellant if the appellant would pay her N300,000.00. Because parties could not agree, negotiations broke down, The appellant promptly sued. D

The trial court and the court below in their judgments obviously took the view that the facts in the instant case were similar to those in Adebajo V. Brown (supra). They then applied the principle of law upon which the decision in Adebajo v. Brown was hinged. Were the two courts below right? I think not. E

In the Adebajo v. Brown case (supra), the plaintiff whose land had been trespassed upon actually entered into negotiations with the defendant (who trespassed upon his land) and conveyed to the plaintiff that he would not enforce his rights as owner of the land against the defendant. The facts as found by the trial judge, which said findings were endorsed by the Supreme Court are reproduced at pages 672-773 of the judgment of the Supreme Court in the case. The Su F

preme Court said:

"At the conclusion of the hearing, the learned trial judge, Oguntade, J. (as he then was) very carefully and meticulously considered the totality of the evidence by both parties, and having observed that the plaintiff 'had come to court to tell nothing but lies in support of his claim, made the following important findings of fact. He said:-I find as a fact that the plaintiff having discovered that the defendant encroached upon his land went into an arrangement with the defendant and defendant's vendors to have a plot of land in exchange for that encroached upon.

I also find as a fact that when it was discovered that plaintiff had built on part of plot 10, the original arrangement was revised and that plaintiff agreed to take monetary compensation in lieu of the land encroached upon.

I find as a fact that it was in furtherance of this arrangement that the plaintiff voluntarily removed his shed from plot 10 and re-installed it on plot 9 at the defendant's expense.

I also find as a fact that the plaintiff and the defendant in furtherance of the arrangement went to P. W. 1 to prepare Exhibit 'E' so that the defendant might know how much to pay to plaintiff for the area of land encroached upon. Why would defendant just go and pay his money to P.W. 1 for the preparation of Exhibit 'E' if not for that purpose? And what was plaintiff doing with defendant in P. W. 1 's house on that mission?

I find as a fact that the whole of plaintiff's actions and conduct were directed to convey to defendant that plaintiff would not insist on his strict proprietary rights over the land and that such actions and conduct did so convey such to the defendant.

The evidence of the defendant and D.W.I are in my view the more probable as the evidence draws substantial support from the witness called by plaintiff, that is, P.W.1.

The whole attitude of defendant clearly evinces remorse and anxiety to reach an understanding with plaintiff after the encroachment was discovered."

It is apparent that the two courts below did not sufficiently give attention to the peculiar facts in Adebajo v. Brown (supra) upon which the decision in the case was hinged. In the Brown case, the parties not only went into negotiation after

the trespass mistakenly committed by the defendant was discovered. They actually agreed on the terms of the settlement and partially implemented the terms. As a result, the plaintiff retrieved a shed he had on plot 10 which was in dispute and installed same on plot 9 at the defendant's expense, Further, the defendant was led into paying money to a land surveyor (P. W.I in the case) to draw a new plan implementing the terms of the agreement between the parties. It was in the belief that this settlement had been reached that the defendant in the Brown's case continued the further development of the land in dispute. B

The facts in the current appeal are different. As soon as the plaintiff (now appellant) knew of the trespass on her land, she caused F.C.D.A, which allocated the land to her to serve a "stop work" order on the defendant (now respondent). The parties opened negotiations which did not succeed. She then promptly sued. 'There was no evidence that the plaintiff at any stage before she sued caused F.C.D.A, to remove or vacate the "stopwork" order on the defendant. It is therefore unarguable that she tricked the defendant into investing further money into the project so that she could afterwards come to claim the land with the improvements made on the land by the defendant. C D E

If the reasoning of the two courts below be right, it would in my view create a very anomalous situation in the law governing trespass to land. It would lead to a position where the owner of land on which another has committed trespass would not be free to talk to the trespasser at all, lest he be taken to have compromised the trespass even when there has been no agreement reached with the trespasser. The important thing in my view is that the trespasser be not misled into carrying out further developments on the land after the discovery of the trespassory nature of his entry on the land. It is apposite to refer in this respect to the views expressed by Obaseki, JSC at page 683 of the judgment in Adebajo v. Brown (supra) thus; F G

"The Court of Appeal seemed to have overlooked the very basis for negotiation. If the plaintiff/respondent had said I do not want you on my land, (there would have been no basis for negotiation. But having said alright you can stay on my land but get me another plot of land or money, the issue of trespass becomes a dead H

issue and cannot be resurrected by failure to fulfill the terms of the consent to the entry. This is more evidence from the fact the plaintiff/respondent allowed the defendant/appellant to proceed with his building to completion and jointly with the defendant/appellant approached and instructed PW.1 to carry out a survey of the land at the defendant's expense . The fact alone destroys all the pretences of the respondent to the withdrawal or withholding of consent to the entry on Upland.
 (Underlining mine)

In *Nwakobi v. Nzekwu (1964) 1 WLR 1019 at 1023*, the Privy Council discussing the nature of the defence of laches observed;

"Where laches is in question, the issue is not so much the question what rights a plaintiff has as whether in any event his conduct has been such as to leave him in a position to invite the court to enforce them,"

Has the plaintiff/appellant in this case lost her right to enforce her ownership rights over the land in dispute just because she stated that she would accept N900,000,00 to make her relinquish those ownership rights which offer the defendant/respondent rejected? I think not. In *Taiwo v. Taiwo (1958) 3 FSC 80 at 82*, this Court said:

"Acquiescence does not bar a claim unless certain conditions are fulfilled. One of the most important is that the party who relies on his opponent's acquiescence must have been led by it to expend money or otherwise alter his position, There is nothing to show here that the plaintiffs or their predecessor-in-title, Rebecca's, have been led to do anything of the sort by the defendant's failure to assert their claim."

In *O. Solomon & Ors. v. A. R. Mogaji & Ors. [1982] 11 SC. 1 at 25*, this Court per Bello BC (as he then was) said-

"The authorities, such as Mogaji v. Nuga (1960) 5 FSC J 07, Aganran v. Olushi (1967) J All NLR J 77 appear to establish that where a land owner stood by and knowingly by his inaction allowed a stranger to develop the land in good faith without the owner appraising the stranger the defect of his title, then the doctrine of acquiescence may properly be invoked to estop the owner from reaping the benefit of the stranger's labour. However, if the owner promptly warns the stranger of the defect of his title as soon as he discovers the presence of the stranger on the land and, despite the warning, the stranger proceeds to develop the land, then the doctrine of acquies-

cence may not assist the stranger: Adeniji v. Ogunbiyi [1965] NMLR 395 and Maraiyo v. Okiade 8 W.A.C.A. 46, “

See also Ramsden v. Dyson. [1866] LR 1HL 1 29 at pp. 140 -141.

My view in this appeal would have been different if there was evidence that the plaintiff/appellant had been aware of the trespassory entry upon her land earlier than the time she caused a “stop work” order to be served on the defendant/respondent or if she had caused the “stop work” order to be vacated before she ultimately sued in court. ***Merely negotiating with the defendant/appellant is not enough evidence to support the conclusion that she had waived the trespass committed on her land . It would have been a different situation if she had, following the negotiation, caused the “stop work order to be vacated.***

It is my firm view that the two court below were in error to have come to the conclusion that the plaintiff/respondent could no longer pursue her rights as owner of the land. The court below would appear, in its decision, to have forced the plaintiff/appellant made to her in atonement for the wrongful even if mistaken entry on her land.

There will be judgment in favour of the plaintiff/appellant against the defendant /respondent for N500,00 damages for trespass. The defendant/respondent is perpetually restrained from entering the plaintiff/appellant’s land. I am unable to grant the sum of N3million damages as claimed by the plaintiff/appellant as did not lead satisfactory evidence in support of the claim. I award in favour of the plaintiff/appellant N5,000,00 and N10,000,00 costs in the High Court and the Court of Appeal respectively and in this court N50,000,00.

MUSDAPHER JSC

I have had the preview of the judgment of my Lord Oguntade JSC just delivered with which I entirely agree. From the undisputed facts, as comprehensively recounted in the aforesaid judgment, the appellant was clearly the undisputed holder Of the right of occupancy of the land in dispute. It was either by mistake or error that respondent entered upon the land and erected his buildings therein. There was also no doubt that upon the discovery of his mistake the respondent tried to negotiate with the appellant and some how settle

the matter. But the parties could not reach any agreement. The lower courts in this matter were in error to have adopted the principle in *Adebanjo v. Brown* (1990) 3 NWLR (Pt 141) 661. The facts of this case are clearly different. In the instant case negotiations between the parties were never concluded and in my view, the courts cannot force the appellant to accept whatever is offered by the respondent in settlement of the appellant's claims,

I accordingly allow the appeal of the appellant and abide by all the orders contained in the aforesaid lead judgment including the order as to costs.

OGBUAGU JSC

This is a further appeal against the Judgment of the Court of Appeal Abuja Division (hereinafter called "the court below"), delivered on 15th January, 2002, affirming the decision of the High Court of the Federal Capital Territory which had dismissed the appellant's claim for damages for trespass and injunction on her plot of land known as and situate at No. 35 496, Zone 2, Wuse 1 District, Abuja and injunction,

Dissatisfied with the said Judgment, the Appellant, has further appealed to this Court on five Grounds of Appeal and has formulated three (3) issues for determination, namely,

ISSUES FOR DETERMINATION

3.1. Whether (the Respondent's) negotiations [with the Appellant] with out more, is sufficient to estop the Appellant from asserting her rights arising from the Respondent's trespass on her [the Appellant's] parcel of land,

3.2. Whether the finding (by the Court below)- that the Appellant allowed the Respondent "to continue with the construction exercise" on the Appellant's parcel of land (the subject-matter of this action) could be supported or substantiated by the evidence presented before the trial court.

3.3. Whether the Court below was justified in its finding that the Appellant is not entitled to damages or injunction in the light of the trial Court's finding that the Respondent wrongfully entered and remained on the Appellant's parcel of land" ..

The Respondent on his part also formulated three (3) Issues for determination. They read as follows:

3.01 Whether taking into consideration the totality of the facts and circumstances of this case including the pleadings and evidence led before the High Court, the Court of Appeal is right in upholding the judgment of the High Court that dismissed the plaintiffs (sic) claim for damages for trespass and injunction on the principle of the case of Adebajo v. Brown decided by the Supreme Court and reported in 1990 3 NWLR part 141.

3.02 Whether with the evidence adduced and the findings of the trial judge, judgment for damages for trespass and injunction could have been properly entered in favour of the plaintiff in the High Court or in the Court of Appeal.

3.03 Whether an alleged error or mistake in a supporting judgment can vitiate the judgment of the court (Relates to Ground 3 of Grounds of Appeal and Issue 3 formulated thereon in the Appellant's Brief of Argument)".

When this appeal came up for hearing on 7th October, 2008, the learned leading counsel for the Appellant - Dele Oye, Esq. adopted the Appellant's Brief and he urged the Court, to allow the appeal. The Respondent and his learned counsel, were absent although served. I noted that the Respondent's Brief of Argument dated 10th October, 2003, was filed on 14th October, 2003. Pursuant to Order 6 Rule (6) of the Rules of this Court, 1999 (as Amended), the appeal was deemed as having been argued and so, Judgment was reserved till today.

Before going into the merits of this appeal, I note that the learned counsel for the Appellant, did not state under which ground of appeal of their Notice of Appeal, each issue or all the three issues, was or were formulated/distilled from. Admirably, the learned counsel for the Respondent in their Brief, did so indicate/state. The consequence of failure to so state, has been stated and re-stated by the two Appellate Courts, in a plethora of decided authorities. The said issue or issues, will be struck out as being incompetent. See the cases of Management Enterprises v. Otusanya (1987) 2 NWLR (Pt.55) 179; (1987) 4 SCNJ. 110; Ali & Anor. V. Chief Alesinloye & 8 Ors. (2000) 6 NWLR (pt. 660) 177 at 212; (2000) 4 SCNJ. 264 - per Iguh, JSC and Adelusola & 4 Ors. v. Akinola 3 Ors. (2004) 12 NWLR (pt.887) 295 at 311; (2004) 5 SCNJ. 235 @ 246 - Per Edozie, JSC citing some other cases.

However, since the Respondent has related the said issues grounds of appeal in his Brief, I will ignore the said omission and treat it as inadvertent and proceed to deal with the merits of the appeal.

I note that the two lower courts decided the case and the appeal respectively; on the issue of Negotiation basing their respective final decision, on the case of *Adebanjo v. Brown* (1990) 3 NWLR (Pt. 14) 661 (it is also reported in (1990) 6 SCNJ. (Pt. I) 1 at 19).

The learned trial Judge, at page 48 of the Records stated inter alia, as follows:

"In the case in issue the Plaintiff found out that the Defendant had encroached onto(sic) her land and the two tried to negotiate with the help of the Lawyers to either pay for the land or swap the land for the adjacent one. The Plaintiff cannot therefore be heard to be complaining over spilled milk after having waived to her detriment the right to sue for trespass until much later. The Learned Counsel for the Plaintiffs. T Ologun Orisa, wants the court to depart from this line of argument by trying to relate same to the holding of AGBAJE JSC (as he then was) in the same case of Adebanjo v. Brown where the Learned jurist held the view that price of land is a fundamental term of any negotiation for sale of land, and where it fails then there is no contract. I vouch to say that there is a departure here from the point being conversed, (sic). In fact if th price of land is agreed upon then the case itself will never come before the court. In view of the fact that the Plaintiff has condoned the trespass she has waived her right to sue the Defendant. Her claim for general damages of N3 Million Naira fails. The injunction sought is hereby not granted",

[the underlining mine]

The court below at page 132, stated inter alia, as follows:

"The trial court had found that the appellant having gone into negotiations to either swap the land for another or get monetary compensation for her land upon her discovery of the initial trespass had condoned the trespass and therefore waived her right to sue. This is the principle as enunciated in Adebanjo's case and the trial court ought on the facts and circumstances of the case to find for the respondent. Having been no finding for trespass by the Trial court the appellant is similarly not entitled to damages for same nor injunction for trespass."[the underlining mine]

I will therefore, take Issues 3.1 and 3.2 of the Appellant and

issue 3.01 of the Respondent, together. In *Adebanjo v. Brown* (supra), the facts as appears in this Court's Judgment briefly stated, are that the plaintiff upon discovering that the defendant was trespassing on his parcel of land, elected/opted/decided, to convey the disputed piece of land to the defendant. He thereupon, asked the defendant, to employ the services of a licensed Surveyor to survey the land in order to determine its actual value. The defendant employed a Surveyor, who determined the actual value of the said land. Meanwhile, the defendant, continued the construction on the land to the knowledge of the plaintiff. In spite of these facts, the plaintiff later resiled from his representation/intention/desire/willingness/decision to convey the said land to the defendant. This Court on the particular facts before it, held that it would be inequitable to allow the Plaintiff to resile from his said representation i.e. of inducing the defendant to act to his prejudice (by continuing his said construction and procuring the services of a licensed Surveyor who actually worked and determined the actual value of the land as directed/advised by the Plaintiff).

In summary, there was a completed negotiation which culminated into a valid agreement pursuant of which, the defendant altered his position to his detriment and prejudice.

The facts of this case from the evidence on the pointed Records, are that the Appellant on becoming aware of the encroachment/trespass by the Respondent, promptly reported/informed the FCDA (Federal Capital Development Authority). The FCDA thereupon, also promptly, issued a "STOP WORK" order. In paragraph 10 of the Respondent's pleadings, it is averred that,

"As a result of the "stop work" order served on us, we now discovered from the FCDA that the proper allottee is the plaintiff in this case".

As a result of the "Stop work" order, the Respondent stopped further trespass on the said land. The Respondent in his evidence-in-chief admitted seeing the "stop order". That it was a written notice pasted on the wall. Said he inter alia:

"I then went to FCDA to find out why stop order should be given. It was then I was informed that I encroached on the land of one Mrs. Chukwuma. I was asked to see the owner as there was a mistake somewhere"

There is no evidence that before or during the negotiation, that the Respondent, continued in the construction or erecting of any building on the land to the knowledge or consent of the Appellant as in Adebajo case (supra). In fact, the Respondent stopped work and approached the Appellant for negotiation which failed and the Appellant came to court. So, there is no way the principles of equitable estoppel, could have arisen in the instant case leading to this appeal. If I may, in line with decided authorities, where a person or one by words and/or deed or even by conduct, made to another, a clear and unequivocal representation of a fact either with knowledge of its falsehood or with the intention that it should be acted upon, or has conducted himself that another would, as a reasonable man with his full faculties, understand that a certain representation of fact, was intended to be acted upon, and that other person in fact acted upon the representation whereby his position was thereby altered to his detriment, an estoppel arises against that person who made it and he will not be allowed to say that the representation is not what he presented it to be. This is known as estoppel by conduct; estoppel in pais.

In other words, where one by his words or conduct, wilfully causes another to believe the existence of certain state of things and induces him to act on the belief so as to alter his own previous position, the former is precluded from asserting against the later, a different state of things as existing at the same time See the English case of *Combe v. Combe* (1951) 1 All E.R. 767 @ 769- 770; *Joe Iga & 3 ors. v. Chief Ezekiel Amakiri & 3 Ors.* (1976) 11 S.C. 1 at 12 - 13; (1976) 11 S.C. (Reprint) 1 @ 9-10; *Gregory Ude v. Clement Nwara & Anor.* (1993) 2 NWLR (Pt.278) 638 at 662-663; (1993) 2 SCNJ 47; *Oyerogba & Anor. v. Olaopa* (1998) 13NWLR (Pt.583) 509 @ 519; (1998) 12 SCNJ 115 @ 123 –per Belgore, JSC (as he then was); *Humphrey N. Ude v. Herding Osuji* (1998) 10 SCNJ. 75 @ 82 - per Ogwuegbu, JSC and *Chief Nsirim v. Nsirim* (2002) 3 NWLR (Pt. 755) 697 @ 714-715; (2002) 2 SCNJ, 46 @ 69 -per Iguh, JSC to mention but a few (the last two cases in the NWLR, were also referred to in the Appellant's Brief).

In Black's Law Dictionary 7th Edition page 571, it is stated that it is a defensive doctrine preventing one party from taking unfair advantage of another when, through false language or conduct the

person to be estopped, has induced another person to act in a certain way, with the result *ibid* the other person, has been injured in some way. That this doctrine is founded on principle of fraud. There are five essential elements i.e.

(1) that there was a false representation or concealment of material facts, B

(2) that the representation must have been known to be false by the party making it or the party must have been negligent in not knowing its falsity.

(3) that it was believed to be true by the person to whom it was made. C

(4) that the party making the representation must have intended that it be acted on or the person acting on it must have been justified in assuming this intent and

(5) that the party asserting estoppel acted on the representation in a way that will result in substantial prejudice unless the claim of estoppel succeeds. D

The above, cannot or could not apply to the circumstance or facts of the instant case leading to this appeal. I should perhaps, observe that since the defences of laches acquiescence or negligence were not canvassed or pronounced upon in or by the court below. I will not go into them in this Judgment. In any case, it is not an issue in the instant appeal. But just by way of comment, it has been held that the gist of the doctrine of laches, etc, is that a plaintiff, will be banned, unless he has been reasonably diligent, from seeking relief from the court. The doctrine would be applied, where it would be practically unjust to give a remedy, either because the plaintiff has, by his conduct, done that which might fairly be regarded as a waiver of the remedy, or where by his conduct and neglect, he has, though perhaps not waiving that remedy, yet, put the defendant in a situation in which it would not be reasonable to place him if the remedy, were afterwards to be asserted. See the cases of *Fagbemi v. Aluko* (1968) 1 All NLR 233 @ 236; *Alhaji Oduola & Ors. v. Ibadan City Council & Anor.* (1978) 4. S.C. 59; *Alhaji Oduola & ors. v. Mrs. Ashcroft & Anor.* (1978) 11 & 12 S.C. 95; *Ikuomola v. Oniwava* (1990) 7 SCNJ. 1470 @ 148; *Inspector. Kayode v. Alhaji Odutola* (2001) 11 NWLR (pt.725) 659 @ 679; (2001) 5 SCNJ. 391 and *Ogunka & 2 Ors.v. Alhaja Shelle* (2004) 5 NWLR (Pt.868) 17 just to mention but a few. E
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The Appellant as PW. 1 at page 35 of the Records testified in-chief inter alia, as follows:

“On their paragraph 12-13 (sic) of the Statement of Defence. We tried to settle with the assistance of FCDA staff but the settlement failed and I refused to accept the cheque though. I had not seen the cheque. I refused to accept because the man he brought by name Ibrahim and my son, Charles Chukwuma who is now in U.S.A. together with a quantity surveyor from Peter Okolo to agreed to N900.000.00 and this was to compensate for my land that was high than his and the new set of plans to be made and approved. The Defendant said he would not pay N900.000 instead I should take the house and pay him N300,000.00 it was at that point I brought in my Lawyer”.[the underlining mine]

The above, is not ambiguous. Under cross-examination, she stated inter alia, as follows:

..... The present lawyer was not handling the matter at the initial stage. It was during the political disturbance that the Defendant said he sent his lawyer with a cheque and I told him I did not receive any cheque from anybody”.

I note that in the cross-examination, the said material evidence of the Appellant why the negotiation failed, was not challenged as untrue. So, that evidence remained intact.

The Respondent as DW4, testified in-chief at page 39 of the Records, inter alia, as follows:

“I meet (sic) the Plaintiff who told me that we should have a meeting with our lawyers together. During the meeting I agreed to pay the expenses of shwarping (sic) the two plots. That of the Plaintiff to be mine, while mine to be that of the Plaintiff. The re-assignment of the land of Mr. Babajide had been completed then. As the Plaintiff felt not satisfied she came to court. I even gave a cheque of N250.000.00 to enable the Plaintiff take care of the plot shwarping. But she rejected the money”, [the underlining mine]

This evidence is not also ambiguous.

Under cross-examination, the respondent testified as follows:

“The transaction between myself and the plaintiff was done by our Lawyers. We had only two concrete meetings. But I made several attempt (sic) for us to discuss the issue wherever we met. I know (Engineer) Alhaji Ibrahim who was the go between Mrs. Chukwuma

and I, Engineer Ibrahim had never informed me of an agreement; for us to pay the plaintiff N900,000.00. I had never had any meeting with the plaintiff's son. "

I note that Engineer Ibrahim also mentioned by the Appellant in her said evidence-in-chief, is the representative of the Respondent in the aid negotiation. He was not called as a witness by the Respondent who only testified that Engineer Ibrahim never informed him of an agreement for him to pay the Plaintiff N900.000.00. I will invoke here, the provisions of section 149(d) of the Evidence Act that the reason for not calling the Engineer, was because the Respondent knew that his evidence as regards this payment of N900,000.00 to the Appellant, would be unfavourable to him. Of course, the Respondent, could never have had a meeting with the Plaintiff's son as the negotiation, was being handled by the parties' lawyers and their "agents" or representatives. Engr. Alhaji Ibrahim was, I hold, a witness for the respondent in view of the said payment to the Appellant of the said sum of N900,000.00. However, the respondent himself, I admitted or testified to the effect, that the negotiation failed as she was not satisfied and that, that was why she sought her remedy in the court.

As a matter of fact, the court below - per Bulkachuwa, J.C.A. at page 128 of the Records, conceded that the negotiation failed. For said His Lordship inter alia, thus:

"The negotiation stalemated and the plaintiff therefore decided to institute this action claiming damages for trespass."

Again, the learned trial judge had at the second paragraph 2 of Page 47 of the Records, found as a fact and stated inter alia, as follows

".... The plaintiff asked for N900.000.00 oughtright sale while the Defendant offered N250.000.00 as cost for the Plaintiff to prepare the adjacent land for her entry in place of hers. The negotiation stalemated and the plaintiff therefore decided to institute this action claiming damages for trespass...." (the underlining mine).

The above is clear and unambiguous and needs no interpretation. I had earlier in this Judgment, underlined the material evidence and the finding of fact of the learned trial Judge at page 48 of the Records.

In spite of these unambiguous evidence about the failure of

the said negotiation and the finding of fact by the two courts below, that the negotiation stalemated, it is difficult for me and in fact regrettable to say the least, why or how the two lower courts, will make a U-turn so to say and held that by the inconclusive negotiation, the Appellant had waived her right to come to court or that she was estopped from so suing. Stalemate as defined in the Oxford Advanced Learners Dictionary, means, inter alia;

“a situation in a dispute or competition to which neither side is able to win or make any progress”.

In other words, there is/was no finality in the settlement of a dispute or negotiation.

It has to be stressed and this is also settled. Negotiation is negotiation and in any form, it is governed by the principles in the law of contract. In other words, to be a valid contract, there must be an offer and acceptance and in addition, consideration. So, negotiation, cannot and does not on its own, in my respectful view, constitute a contract. A proper perusal or reading of the case of Adebajo v. Brown (supra), will put no one in doubt that the reason for the application of the holding or part of the decision by this court, could not and cannot be the same as in the instant case leading to this appeal.

In fact, in order to demonstrate, with respect, the misconception of the Appellant's case as appears in the Records or evidence and also partly reproduced in the Briefs of the parties, my learned brother Muntaka-Coomassie, JCA (as he then was), stated in his concurring Judgment at page 133 of the Records inter alia, as follows:

“I agree with the judgment which has just been delivered by my learned brother Bulkachuwa JCA. Since the Plaintiff made the Defendant to believe that he had voluntarily waived his right to prosecute the Defendant for the initial trespass and allowed him to continue with the construction exercise on the land, the Appellant has effectively waived their right. There is no justifiable complaint against the position taken by both the Respondent and the learned trial judge in the matter I am happy that my learned brother clearly analysed and applied the locus classicus of the issue of “waiver in trespass” in her lead judgment, namely; Adebajo vs. Brown (1990) NWLR (pt. 141 at 661).

I hold as held by my learned brother Bulkachuwa J.C.A. that the

appeal lacks merit same is hereby dismiss by me (sic). The decision of the lower court, being unassailable, is hereby affirmed. I endorse the order as to costs”.

In conclusion, Issues 3.01 of the Respondent is apt and therefore, my answer thereof and in respect of issues 3.1 and 3.2 of the Appellant, is, rendered in the Negative. B

I will now deal with Issue 3.3 of the Appellant and Issue 3.03 of the Respondent which although substantially the same, are differently couched. I note that another reason why the court below dismissed the Appellant’s appeal, was because according to it, the trial court did not make a finding of trespass against the Respondent. Said His Lordship at page 131 of the Records, inter alia, as follows: C

“With all due respect to the learned counsel for the appellant the learned trial Judge did not make a finding of trespass against the respondent” D

Then at page 132, the following appear inter alia,

“.....Having been no finding for trespass by the trial court the appellant is similarly not entitled to damages for same nor injunction for trespass”.

With profound humility and respect, the above is far from the truth. At page 47 of the Records, the learned trial Judge stated inter alia, as follows: E

“Mistake or no mistake the Defendant wrongfully entered and remained in constructive possession of the plaintiffs piece of land. This is trespass of land which is held by the supreme court (sic) to be actionable per se. See Adebajo Vs. Brown (1990) 3 NWLR (pt. 133) page 661 at 664 where it was held that ‘Trespass is a violation of possessory rights and all claim in trespass can only be brought by one in possession or one who has a right to possession.” F

(the underlining mine). G

The above, is unambiguous and need no interpretation. Not surprising, in spite of the said finding of fact and holding of the learned trial judge reproduced by me above, the learned counsel, for the Respondent, at page 8 paragraphs, 4.15, 4.16 and 4.17 of their Brief, also stated that the learned trial Judge did not make a finding of trespass against the Respondent. Amusingly to me, he submitted that the learned trial Judge, “was merely reviewing the evidence and stating the principle of law which governs the issue of trespass.” Won- H

ders shall never end! He further submitted that “the statement of law defining an act of trespass could not be, and must not be interpreted as a finding of acts of trespass”. With respect, these submissions are completely misconceived and I accordingly reject them.

It need be borne in mind that in *Adebanjo v. Brown*’s case B (supra), the appeal to this Court, was partly allowed. This Court stated, the nature of trespass as reproduced by the learned trial Judge above and referred with approval, the case of *Amakor v. Obiefuna* (1974) 1 All NLR (Pt. 1) 119; (1974) 3 S.C. 67. Indeed, it is also settled that C trespass, unlike conversion and detainee, is actionable per se i.e. without any proof of damage and it can be committed, without any denial of it or interference with title. But it does only favour a plaintiff, who has possession or at the suit of a person having the immediate right to possession. See the case of *Ojini v. Ogo Oluwa Motors Nig. D Ltd.* (1998) 1 SCNJ 20. Actual possession, is against the whole world except the true owner. See *Madam Shittu v. Alhaji Eigbeyemi* (1996) 7 SCNJ. 43 @ 49-50. In fact, there is no need my going into the settled principles in respect of trespass in detail in this Judgment. This is because, the Respondent admitted the trespass even in his evidence in the trial court. The undisputed fact, is that there are two plots - Nos. 495 and 496. There is Exhibit A of the Appellant. At E pages 46 to 47, His Lordship, stated inter alia, as follows:

“It is not in dispute that the Plaintiff has title to the land in F Question as amended by EXHIBIT “A” the certificate of occupancy certificate of occupancy No. FCT/ABU/IM/502 was issued to and in the name of the Plaintiff. This gives her exclusive right to possess and deal with the piece of land situate at and known as Plot No. 496 Zone A2 Wuse 1 District Abuja in accordance with the terms of G the grant. This is albeit the fact that the Plaintiff did not make any effort to see the piece of land itself since it was allocated to her in 1981. In the same token DW3 Mrs. Joan Oluremi Babajide, was granted right to occupy the adjacent plot to that of the Plaintiff, this being Plot 495 Zone A2 Wuse 1 District Abuja by Certificate of Occu- H pancy No. FCT/ABJ/LA/264. The two ladies have prima facie of title or exclusive possession over the two pieces of land adjacent to each other”, [the underlining mine]

The learned trial Judge, as stated earlier above in this Judgment, found as a fact, the act of trespass mistake or no mistake. It is

also settled that a trespasser, does not by the act of trespass, secure possession in law against the true owner or against whom he is in trespass. See the case of Foreign Finance Corporation v. Lagos State Development & Property Corporation & 2 ors. (1991) 5 SCNJ. 52 at 75.

In the case of Mr. Onagoruwa v. Mrs. Akinremi & 2 Ors. (2001) 6 SCNJ. 76 at 93, it was held that it is a continuing tort of trespass, for a person to remain in another's land without that others authority or consent, so that barring the defences properly raised and sustained which defeat the right of the owner of such land to complain of the continuing trespass, the land owner, is always entitled to protection as appropriate. The case of Adebajo v. Oke (1999) 3 NWLR (Pt.594) 154 @ 163 - 164; (1999) 3 SCNJ. 46, was referred to. Of course, the protection is by way of an order of injunction. It is now firmly established that even where an injunction was not sought, once a court has found for trespass, it has the jurisdiction to grant the equitable remedy of injunction. See the case of Sorungbe v. Motunwase (1988) 19 NSCC (Pt.3) 252 @ 268 cited and relied on in the Appellant's Brief. As a matter of fact, in that circumstance, the order of an injunction, can be made as a consequential order and it will not amount to a court giving/granting to a party, what he did not claim. See the cases of Okoye v. F.B.I.R. (1974) 1 All NLR 314; Garba v. University of Maiduguri (1986) 1 NWLR (Pt. 18) 550 and Ilona v. Idaeno & Anor. (2003) 11 NWLR 5 (Pt.830) 53 at 87,

In the case of Olorunfemi & 8 Ors. v. Chief Asho & 2 ors. (1999) 1 NWLR (Pt.585) 1 at 9 also cited and relied on in the Appellants Brief (it is also reported in (1999) 1 SCNJ. 1 at 7) - per Belgore, JSC. (as he then was), it was held inter alia, as follows: ".....There ought to be a finding in trespass which the trial court did. Consequent upon findings in trespass there must be verdict of perpetual injunction asked for. Similarly for trespass there must be an award of damages [the underlining mine]

See also at page 10 - per Kutigi, JSC, (as he then was, now CJN). "I therefore, rest the issue on the above cases. The case of Yusuf v. Akindipe (2000) 8 NWLR (Pt.669) 376 at 385 cited in paragraph 4.22 of the Respondent's Brief about the award of damages and injunction and that it can only be made (by a person (sic) i.e. to a person in exclusive possession or who has a right to such exclusive

possession at the time of the alleged entry on the land, I note, supports the Appellant's case.

It is also settled that a plaintiff can sue for damages even where no damage was actually suffered or proved. See the case of Amakor v. Obiefuna (supra) where it was also held that it is no answer to the claim of a defendant, to show that title to the land, is in another person. That there can be no such thing as concurrent possession by two persons claiming adversely to each other. So, the learned counsel for the Respondent, can now see and appreciate that since trespass is actionable per se. - without any proof of damage, the answer that follows or flows from the settled law, or the two decided authorities of this Court in respect of their said issue is surely, in the Affirmative/Positive while in respect of the said issue of the Appellant, is in the Negative.

Before concluding this Judgment, I note that at page 9 paragraph 4.21) of the Respondent's Brief, the Court, is urged to note that there had been concurrent findings of facts on their said third (3rd) issue and that it has not been shown or proved to be perverse and further urged the Court, not to disturb the same. I have held in this Judgment, that the said holding of the court below relying on Adebajo v. Brown (supra) case, (where Kawu, J.S.C. in his lead Judgment, held that an Appellate Court, can interfere where such findings, are not borne out of certain circumstances and therein cited some other cases in respect thereof with respect, misconceived. I will add that the court below, was therefore, in error. It is now settled in a number of decided authorities, that findings of fact or inferences, from time to time, may be questioned in certain circumstances, See the cases of Akinola & Anor. v. Fatoyinbo Oluwo & 2 ors. (1962) All NLR 224 at 228; Awobibi & Sons v. Igbalaye Brothers (1965) 1 All NLR 163; Chief Fabumi & Anor v. Obaje & Anor. (1968) N.M.L.R 242; Kakarah & Anor v. Chief Imonikhe & 2 ors. (1974) 4 S.C. (reprint) 109; Adewunmi v. Aduroja (1975) (I) N.M.L.R. 125 @ 127; Onajobi v. Olanipekun [1985] 4 S.C. (pt. 2) 156 @ 163; Adebajo v. Brown (supra) - per Kawu, JSC. Chief Oje & Anor v. Chief Babalola & 2 Ors. [1991] 4 N.M.L.R. (pt. 185) 267 @ 282; [1991] 5 S.C.N.J. 110 and Azuetonma Ike & 3 Ors. V. Ugboajo & 5 ors. [1993] 6 NWLR (Pt.301) 539 @ 556; (1993) 7 S.C.N.J, 402 and so many others. I hold that the instant case, is among or is one of the circum-

stances in which this Court can interfere since the facts of the case leading to this appeal, were unfortunately, with respect, misconstrued by the court below. I so interfere and hereby set aside, the “offending” said concurrent findings of the two lower courts.

I have refrained from going into the merits of the defendant’s/ Respondent’s case. This is because of the said issues of the parties. It was also not an issue, decided by the court below. Just by way of observation, I note that while the DW3 testified that she sold her said plot of land to the Respondent in 1985, (see page 38 of the Records), the Respondent pleaded and testified that the DW3 sold the said plot of land to him “sometime in 1988” - see page 38 and page 35 - PW.1’s evidence (I note that it is/was a convenient date to/for the Respondent). This material contradiction should have been the end of the Respondent’s case.

It is from the foregoing and the more detailed Judgment of my learned brother, Oguntade, JSC, which I had the privilege of reading before now and agree with his reasoning and conclusion, that I too, allow the appeal which I also hold is meritorious. I abide by all the consequential orders in the said lead Judgment including that in respect of costs.

TABAI JSC

I have read the lead judgment of my learned brother, Oguntade, J.S.C. and I agree also that the appeal be allowed. I also abide by the consequential orders including the orders as to costs

ADEREMI JSC

This is an appeal against the judgment of the Court of Appeal (Abuja Division) hereinafter referred to as the court below. The judgment of the trial court (High Court of the Federal Capital Territory) had dismissed the claim of the plaintiff/appellant against the defendant in the court but now respondent before us which claim is for damages for trespass and perpetual injunction restraining the defendant/respondent from trespassing on the plaintiff/appellant’s land.

Being dissatisfied with the judgment of the trial court, the plaintiff/appellant appealed to the court below. Distilled from the five grounds of appeal contained in the Notice of Appeal before the court below on the issue for determination by the court below which issue is as

follows:

“Whether taking into consideration the facts and circumstances of this case, the learned trial judge was right in law and on the fact, in his decision dismissing the appellant’s claim.”

B I now pause to give the brief facts of the case leading to this
 appeal; the plaintiff/appellant was at the time material to this case,
 the grantee of a statutory right of occupancy granted to him over a
 parcel of land known and described as plot 496 covered by a Certifi-
 cate of Occupancy No. FCT/ABU/IM/502 issued in 1989. Sequel to
 C the issuance of the said Certificate of Occupancy, the Federal Capital
 Development Authority formally granted the application of the plain-
 tiff/appellant moved to develop the said plot 496, she (plaintiff/ap-
 pellant) and her agents discovered that the respondent had encroached
 on the said plot under the mistaken belief that he was on plot 495
 D which was adjoining the said plot 496. Thereupon, the plaintiff/ap-
 pellant caused the Federal Capital Development Authority to issue a
 “STOP WORK NOTICE” and caused same to be served on the re-
 spondent thus restraining him from further trespassing on plot 496.
 Realising that he could no longer proceed with the construction work,
 E the respondent resorted to negotiation and he offered the plaintiff/
 appellant the sum of N250,000,00 (two hundred and fifty thousand
 naira) in settlement, The plaintiff/appellant refused the offer and im-
 mediately proceeded to issue a writ of summons against the respon-
 dent as follow

F (a) *“The sum of thirteen million three hundred and eighty thou-
 sand naira (N13,380,000,00) being general and special damages
 for trespass to the land.*

G (b) *A perpetual injunction restraining the defendant from fur-
 ther trespassing on the plaintiff’s land.”*

Both parties settled and exchanged pleadings. As I said above;
 the case proceeded to trial before the trial court which after the final
 addresses of counsel on both sides, dismissed the plaintiff/appellant’s
 suit, in so doing the trial court held:

H *“In the case in issue the plaintiff found out that the Defendant
 had encroached onto (sic) her land and the two tried to negotiate
 with the help of the lawyers to either pay for the land or swap the
 land for the adjacent one. The plaintiff cannot therefore be heard to
 be complaining over spilled milk after having waived to her detri-*

ment the right to sue for trespass until much later. The learned counsel for the plaintiff, S. T. Ologun Orisa, wants the court to depart from this line of argument by trying to relate same to the holding of Agbaje JSC (as (sic) then was) in the same case of Adebajo v. Brown where the learned jurist held the view that price of land is a fundamental term of any negotiation for sale of land, and where it fails then there is no contract. I vouch to say that there is a departure here from the point being canvassed (sic). In fact if the price of land is agreed upon then the case itself will never come before the court. In view of the fact that the plaintiff has condoned the trespass she has waived her right to sue the defendant. Her claim for general damages of N3 million naira fails. The injunction sought is hereby not granted."

Again, as I have said supra, being dissatisfied with the said judgment of the trial court, the plaintiff/appellant appealed to the court below raising two issues from the four grounds of appeal contained in her Notice of Appeal. The two issues are in the following terms:

(1) That based on the pleadings and the evidence adduced at the trial whether the learned trial judge came to the right conclusion in his application of the case of Adebajo v. Brown (1990) part 141 at 661 as it relates to waiver in trespass?

(2) That based on the findings of the learned trial judge that the respondent was in trespass to the appellant's land, was the learned trial judge right in refusing to go further and grant the reliefs of injunction and damages?

The respondent, in his own brief before this below identified three issues for determination before that court; and they are as follows;

1) "Whether taking into consideration the totality of the facts and circumstances of this case including the pleadings and the evidence led before the High Court, the Court of Appeal is right in upholding the judgment of the High Court that dismissed the plaintiff's claim for damages for trespass and injunction on the principle of the case of Adebajo v. Brown decided by the Supreme Court and reported in (1990) 3 NWLR (Pt. 141) 661

2) Whether the evidence adduced and the findings of the trial judge, judgment for damages for trespass and injunction could have been properly entered in favour of the plaintiff in the High Court or in the Court of Appeal.

(3) Whether an alleged error or mistake in a supporting judgment can initiate the judgment of the court.”

Arguments of counsel for the two parties based on their respective brief of argument were taken by the court below. In a reserved judgment delivered on the 15th of January 2002, the court below, in a unanimous decision, dismissed the appeal. In so doing the court below held inter alia:

“The facts in Adebajo’s case showed that after the discovery of the initial trespass, an agreement was reached between the parties whereby the land was surveyed as a condition precedent to determining how much monetary compensation would be paid to the plaintiff. The plaintiff later changed his mind and asked the defendant to remove his building from the land. The agreement earlier reached had induced the defendant to believe that the plaintiff had waived his right to prosecute him for the initial trespass and continued with the construction of his building.

The trial court found for the defendant, the Court of Appeal reversed the decision while the Supreme Court affirmed the decision of the trial court holding that there can only be trespass if the person in possession withholds his consent to the entry into his land. If there is a mistaken entry and when the mistake is discovered, approach is made to the person in possession and he consents the right to claim in trespass abates as his consents relates back to the initial entry without permission. The above findings can aptly be applied to the instant case, for the plaintiff upon the discovery of the initial trespass went into possession to either swap the land or get a monetary compensation for her land. It was only on the failure of the negotiations that she took out a writ against the respondent. I am therefore more inclined in upholding the submission of the learned counsel for the respondent that the principle in Adebajo’s case was properly applied to the facts of this case. The trial court had found that the appellant having gone into negotiation to either swap the land for another or get monetary compensation for the land upon her discovery of the initial trespass had condoned the trespass and therefore waived her right to sue. This is the principle as enunciated in Adebajo’s case, and the trial court ought on the facts and circumstances of the case to find for the respondent. Having been no finding for trespass by the trial court, the appellant is similarly not entitled to damages for

same nor injunction for trespass.

In the circumstances this appeal must fail as it lacks merit,”

Also dissatisfied with the judgment of the court below, the plaintiff/appellant appealed to this court. His Notice of appeal dated 10th April, 2002 carries five grounds of appeal. Distilled from the said ‘five grounds are three issues for determination by this court. As set out in the appellant’s brief of Argument filed on the 9th of June 2003, they are in the following terms:

(1) “Whether the respondent’s negotiations with the appellant without more, is sufficient to stop the appellant from asserting her rights arising from the respondent’s trespass on her (the appellant’s) parcel of land,

(2) Whether the findings by the court below that the appellant allowed the respondent to continue with the construction exercise on the appellant’s parcel of land (the subject matter of his action) could be supported or substantiated by the evidence presented before the trial court,

(3) Whether the court below was justified in its finding that the appellants not entitled to damages or injunction in the light of the trial court’s finding that the respondent wrongfully entered and remained on the appellant’s parcel of land.

The respondent also raised three issues for determination. As contained in his brief of argument filed on the 14th of October, 2003; they are as follows:

(1) “whether taking into consideration the totality of the facts and circumstances of this case including the pleadings and the evidence led before the High Court, the Court of Appeal is right in upholding the judgment of the High Court that dismissed the plaintiffs(sic) claim for damages for trespass and injunction on the principle of the case of Adebajo v. Brown decided by the Supreme Court and reported in 1990 3 NWLR Pt. 141 661

(2) Whether with the evidence adduced and the findings of the trial judge, judgment for damages for trespass and injunction could have been properly entered in favour of the plaintiff in the High Court or in the Court of Appeal

(3) Whether an alleged error or mistake in a supporting judgment can vitiate the judgment of the court.

When this appeal came before us for argument on the 7th of

October 2008, the appellant was represented by Mr. Dele Oye while the respondent was not represented by any counsel but was, from the records, seen to have been served with hearing notice on the 25th of March, 2008. Suffice it to say that the respondent's brief of argument had been filed on the 14th of October 2003. Mr. Oye
B formally adopted the brief of argument of his client duly filed on the 9th of June 2003 and urged that the appeal be allowed. Since the briefs of both parties were in, under the Supreme Court Rules, we deemed the appeal to have been duly argued by the two parties.

C I have read, in depth the briefs of arguments of the appellant and the respondent. Both parties, through their respective brief of arguments predicate their submissions on the application of the doctrine of equitable estoppel or estoppel in pais. The appellant, in his brief has argued strenuously that, based on the facts of the case at
D hand, that the doctrine does not apply and consequently the decision in *Adebanjo v. Brown* (1990) NWLR (Pt.141) 691 (a decision of this court) whose facts he argued, are quite different from the facts of the present case, is not applicable, while urging that this appeal be allowed. In support of his submission, reliance was heavily placed on
E the decisions in (1) *Oyerogba v. Olaopa* (1998) 13 NWLR (Pt. 583) 509, (2) *Nsirim v. Nsirim* (2002) 3 NWLR (Pt.755) 697 15(3) *Taiwo v. Taiwo* (1958) SCNLR 244. On the other hand, the respondent, through his brief of argument, contended that the facts of the case of
F *Adebanjo v. Brown* (supra) are materially similar to the facts of the present case and therefore the decision of this court, on that case, is applicable to the case at hand. He went further to submit that there had been concurrent findings of facts on this issue by the trial court and the court below; the findings not being perverse, he further submitted; must not be disturbed while praying in support of this sub-
G mission the decision in *Usman v. Carke* (2003) 7 SCNJ 38.

I shall begin the consideration of the first leg of this appeal by examining, in detail, the facts of the case in *Adebanjo v. Brown* (supra) which are thus; the respondent as plaintiff in the trial court had
H taken out a writ of summons against the appellant as defendant claiming N2,000.00 as special and general damages for trespass committed by the defendant on the plaintiff's land in Surulere District of Lagos; he also claimed perpetual injunction restraining the defendant from further trespass. To establish his case, the plaintiff averred

that three plots, were sold and conveyed to him in fee simple absolute and that he had remained in an undisturbed possession of same. At a point in time, the defendant, without his permission, trespassed into one of the plots destroying crops therein. It was at this stage that the plaintiff caused his solicitor to write a warning letter to him to desist. The defendant made approach to the plaintiff that he would purchase the land whilst at the same time he continued to build on the same land. While going on with his construction, the defendant discovered that part of his plot fell into the said plaintiff's plot and he quickly reported the matter to his (defendant) vendors who, in turn, approached the plaintiff for settlement. The, plaintiff agreed to release the whole of his said plot on exchange for another one to be given by the defendant's vendors. On the basis of this agreement the defendant proceeded with the construction of his building. But surprisingly, when the plaintiff now 'started his own building construction he extended it to the plot he had earlier agreed to release to the defendant. When his attention was drawn to the encroachment, the plaintiff said he would no longer insist on having whole or the equivalent plot of land offered to him by the defendants vendor but would only have so much of that plot which was equivalent to what was left of the plot the subject matter of the earlier discussion. The defendant's vendors suggested to the plaintiff that he should accept monetary compensation, as according to them, they had no half plot. After the land had been surveyed as required by the plaintiff as a condition to determining how much compensation he would demand, the plaintiff reneged from his earlier position and ordered the defendant to remove his building already completed on the said land. In summary these are the facts of that case. After taking the evidence of the parties and the addresses of their counsel, the learned trial judge believed the evidence of the defendant and held that the plaintiff had not made out a case for trespass against the defendant and accordingly dismissed the suit. Order of injunction" was also refused. On appeal to the Court of Appeal, that court allowed the appeal found in favour of the plaintiff. On a further appeal to this court (Supreme Court), it set aside the decision of the Court of Appeal in part; the claim for damages for trespass was set aside, while the claim for an order of injunction in respect of the small area encroached upon by the defendant's building was dismissed.

It is very clear that the facts of the case in *Adebanjo v. Brown* are very different from those of the case at hand. While in the *Adebanjo v. Brown* (supra) the plaintiff led the defendant to change his position that he would accept monetary consideration for that portion of land trespassed upon; there was no agreement between the parties in the present case as to settlement which would have led the defendant to change his position, albeit to his own detriment by continuing to incur expenses on the building. No representation was made by the plaintiff to the defendant which could reasonably lead the defendant to believing that the plaintiff was agreeable to monetary compensation or an out-right sale of the land to him (defendant). As soon as the defendant made an offer of money in full and final settlement of the dispute, the plaintiff promptly refused it and proceeded to seek redress in the court of law. From the evidence led by both sides it is common ground that there was a move on the part of the defendant to have the matter resolved. The defendant, under cross-examination said:

"After that I started building, I completed building the duplex and started plastering when the FCDA ordered stoppage of the construction work. The new boy (sic) quarters was at roofing level then. It was a written notice pasted on the wall. I then went to FCDA to find out why stop order should be given. It was then I was informed that I encroached on the land of one Mrs. Chukwuma. I asked to see the owner as there was a mistake somewhere. The plots are 495 and 496.1 meet (sic) the plaintiff who told me that we should have a meeting with our lawyers together. During the meeting I agreed to pay the expenses of shwarpping (sic) the two plots. That of the plaintiff to be mine, while mine to be that of the plaintiff As the plaintiff felt not satisfied she came to court. I even gave a cheque of N250,000.00 to enable the plaintiff take care of the plot shwarpping (sic). But she rejected the money."

The plaintiff in her testimony said inter alia:

"It is not true that he took possession of the land since 1988 because my Certificate of Occupancy is dated 1989.... We tried to settle with the assistance of FCDA staff but the settlement failed and I refused to accept the cheque though I had not seen the cheque. I refused to accept the cheque because the man he brought by name Ibrahim and my son, Charles Chukwuma who is now in USA to-

gether with a Quantity Surveyor from. Peter Okolo agreed to N900,000.00 and this was to compensate for my land that was higher than his and the new set of plans to be made and approved. The defendant said he would not pay N900,000.00 instead I should take the house and pay him N300.000.00. It was at that point I brought in my lawyer.” B

What was the finding of the court below? After referring to the principles of law and the findings enunciated in the Adebajo’s case, the court below, in the leading judgment, held inter alia:

“The above finding can aptly be applied to the instant case for the plaintiff upon the discovery of the initial trespass went into negotiation to either swap the land or get monetary compensation for her land. It was only, on failure of the negotiation that she took out a writ against the respondent. I am therefore more inclined in upholding the submission of the learned counsel for the respondent that the principle in Adebajo’s case was properly applied to the facts of this case. C

The trial court had found that the appellant having gone into negotiations to either swap the land for another or get monetary compensation for her land upon her discovery of the initial trespass had condoned the trespass and therefore waived her right to sue. This is the principle as enunciated in Adebajo’s case and the trial court ought to, on the facts and circumstances of the case, find for the respondent. Having been no finding for trespass by the trial court, the appellant is similarly not entitled to damages for same nor injunction for trespass In the circumstances this appeal must fail as it lacks merit.” D E F

From the pieces of evidence given by both parties as reproduced by me supra can it be said that at any time material to this suit, both reached an agreement from where it could be inferred that one party relying on the representation made to him by the other which representation that party making it expected the other to act upon and he (the defendant) acted upon it to his detriment? In other words, could the findings of the court below as reproduced above be said to be correct? Could a mere negotiation or proposed settlement which is devoid of support by any consideration debar one party from suing for his right in the court of law? In the case of Adebajo v. Brown; Agbaje JSC at pages 689/690 of that report referred to the dictum of G H

Lord Denning M.R in COURTNEY LTD case and I quote it in extenso:

“As regards the estoppels which the learned trial judge found, the following passage in the judgment of Lord Denning M.R in 351 Courtney Ltd vs Tolaini Brothers Ltd.^{supra} at 301 shows that when negotiations are fruitless and end without any contract ensuing neither side to the bargain can rely on anything done by him, in the course of negotiations as estopping the other from resiling from the bargain. Bui then this point was raised, even if there was not a contract actually to build, was not there a contract to negotiate? In this case Mr. Tolaine did instruct his quantity surveyor to negotiate but the negotiations broke down. It may be suggested that the quantity surveyor was to blame for the failure of the negotiations. But does that give rise to a cause of action? There is very little guidance in the books about a contract to negotiate. It was touched upon by Lord Wright in Hillas & Co. Ltd Vs Arcos Ltd (1932) 147 L.T 503 at 515 where he said:

“There is then no bargain except to negotiate and negotiations may be fruitless and end without any contract ensuing; yet even then, in strict theory there is a contract (if there is good consideration) to negotiate; though in the event of repudiation by one party the damages may be normal, unless a jury think that the opportunity to negotiate was of some appreciable value to the injured party.”

Commenting on the above dictum of Lord Wright, in the same judgment, Lord Denning opined:

“The tentative opinion of Lord Wright does not seem to me to be well founded. If the law does not recognise a contract to enter into a contract (when there is a fundamental term yet to be agreed) it seems to me it cannot recognise a contract to negotiate.”

I do not want to lose sight of the fact that in the present case, it is the defendant/respondent who is contending that the plaintiff/appellant had made some representations to him which representations find expression on her desire to give up all her legal rights on the parcel of land on which he (defendant/respondent) has built on or was building on, and that for a consideration. That promise or undertaking is, what in law, is called PROMISSORY ESTOPPEL. Thinking or reasoning in a logical sequence, it is my view that such promissory ‘estoppel can only be used as a shield not as a sword, It is a

contractual defence to an assertion of contractual rights; where one party has given a promise or an undertaking to the other that he would not assert his legal right, if a condition is fulfilled by the other party and that other party, on his part, fulfilled that condition, thus changing his position to the advantage of the promisor; that promisor will not, on good law and equity, be allowed to renege from the position he has voluntarily carved for himself. It will be an unconscionable act or behavior on the part of the promisor. Lord Denning L.J. put this doctrine beautifully in *Combe v. Combe* (1951) 2 K. B 215 when at page 220 in these glowing words he said:

“The principle, as I understand it is that where one party has, by his conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept that that legal relations subject to the qualification which he himself has so introduced.”

The principle does not give a cause of action in itself as it does not stand alone and it can never do away with the necessity of consideration when that is an essential part of the cause of action. See *Nsirim v. Nsirim* (2002) 3 NWLR (Pt. 775) 697 called in aid by the appellant in support of his submissions in his brief of argument. From the facts of the present case, can it be said that there was a consideration acceptable to the plaintiff/appellant and which she has accepted from the defendant/respondent which would make it inequitable or unconscionable on the part of the plaintiff/appellant to renege from the undertaking she (plaintiff/appellant) had given to the defendant/respondent not to enforce her legal right? It is common ground between the parties that the monetary offer made by the defendant/respondent to the plaintiff/appellant in consideration of her undertaking not to enforce her legal right on the piece of land trespassed upon by the defendant/respondent was rejected by the plaintiff/appellant. Consideration which is an essential factor in this type of relationship is therefore absent. The appellant is therefore not caught by the doctrine of promissory estoppel. Issues Nos. 1 and 2, in the appellant’s brief are consequently resolved in her favour. I answer

Issue No.1 on the respondent's brief in the negative.

The plaintiff/appellant has claimed for damages for trespass and perpetual injunction. Averments on these two legs of claim are contained in her statement of claim. She has claimed special damages amounting to N3,380,000.00 and for general damages in the sum of N10,000.00. There is no scintilla of evidence in proof of special damages. The learned trial judge made a finding of trespass in favour of the plaintiff/appellant. It was also held that at the time material to this case, the plaintiff/appellant was in exclusive possession of the land. It is not in dispute, indeed it was admitted by the defendant/respondent that he went in to the land without the permission of the plaintiff/appellant. That is a clear admission of trespass. The appellant, in my judgment, is entitled to general damages. The appellant has also claimed an order of perpetual injunction to prevent further trespass in her land. But, by the nature of the Certificate of Occupancy issued in her favour in respect of the land, she is a limited owner in the sense that she is a lessee of the land allocated to her by the Federal capital Development Authority, the owner of the absolute interest of the land has not been made a party to this case. In Chief Dada, the Lojaoke vs. Chief Shittu Ogunremi & Anor. (1967) NMLR 181, this court (Supreme Court) has said that it is improper to grant an order of perpetual injunction at the instance of a limited owner (the like of the plaintiff/appellant) when the owner of the absolute interest is not a party to the case, It is for the reason of the pronouncement of this court, in the Chief Dada's case cited supra that I say that the appellant is entitled only to an order of injunction as opposed to perpetual injunction.

For all I have said but most especially for the comprehensive and lucid reasoning contained in the leading judgment of my learned brother Oguntade, JSC with which I am in full agreement, that I also say that this appeal is meritorious, it is hereby allowed. The judgment of the court below and that of the trial court are hereby set aside. In its place, I hereby pronounce that the claims of the plaintiff laid before the trial court, subject to what I have said about the claim for special damages and the prayer for order of perpetual injunction are meritorious. I abide by the orders including the order as to costs contained in the leading judgment.

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