

SUPREME COURT OF NIGERIA
19TH FEBRUARY, 2010. SC. 103/2003
CORAM:- D. MUSDAPHER, W. S. N. ONNOGHEN,
F. F. TABAI, I. T. MUHAMMAD, O. O. ADEKEYE, JJSC

UNION BANK OF NIG. PLC. APPELLANT
AND
ASTRA BUILDERS (W.A.) LTD. RESPONDENT

WORDS & PHRASES - Exercise of discretion - Purport - It is an act based on ones personal judgment - In accordance with ones conscience - Free and unfettered by any external influence or suggestions (H1)

COURTS - Exercise of discretion - Factual basis - It is only upon known or undisputed facts that a court may exercise its discretion - Any exercise of discretion in absence of relevant facts - Cannot be regarded as judicially and judiciously done (H2)

ORDERS OF COURT - Refusal to set aside - Trial court's decision - Propriety - Court of Appeal acted properly - In view of its finding that trial court properly exercised its discretion - In the circumstance of the case (H3)

FAIR HEARING - Observance - Yardstick for determining - It is not whether any injustice has been occasioned on any party - Due to want of hearing - It is whether an opportunity of hearing was afforded to the parties (H4)

FACTS

The plaintiff/respondent sued defendant/appellant before the High Court of Lagos State. His claims were for a declaration of title and injunction by which he asserted ownership of the land in dispute by virtue of a sub-lease agreement made between him and the defendant. After the exchange of pleadings, appellant brought an application pursuant to O. 23 rr. 2 and 3 of the High Court of Lagos State (Civil Procedure) Rules, 1994, praying for an order dismissing the suit *in limine* on the ground that the sub-lease agreement, on

which respondent's claim was founded, was *inter alia*, tainted with illegality and was unenforceable. The basis of the illegality being that it did not receive the Governor's consent as required by the Land Use Act.

Respondent deposed to a twenty-one paragraph counter- affidavit in opposition to the application in which it deposed *inter alia* that a consideration of N1m had passed from him to appellant, the receipt of which was acknowledged by appellant, for the sub-lease and that it was for appellant to have obtained the consent. After hearing the motion, trial court ruled that it was premature to dismiss the suit *in limine* and that the justice of the case would be better met if the suit went to full trial. It ordered accordingly. Aggrieved, appellant appealed to Court of Appeal against the ruling of the trial court. Court of Appeal dismissed the appeal. Still dissatisfied, appellant has come on a further and final appeal to the Supreme Court.

ISSUES FOR DETERMINATION

(1) Was the Court of Appeal right in confirming the exercise of discretion of the trial court?

(2) Was the Court of Appeal not duty bound to dismiss the respondent's suit that arose out of a contract prohibited and declared unlawful by Section 22 of the Land Use Act and declared null and void by Section 26 of the said Land Use Act.

(3) Did the failure of the Court of Appeal to consider and pronounce on the propriety of appellant's issue No. 3 deny the appellant fair hearing which occasioned justice?

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

Exercise of discretion - Purport

1. An exercise of discretion is an act or deed based on ones personal judgment in accordance with one's conscience, free and unfettered by any external influence or suggestions. A judicial discretion means the power exercised in an official capacity in a manner which appears to be just and proper under a given situation. It must not flow from or be bound by a previous decision of another court in which a discretion was exercised. It is in short an antithesis to the doctrine of *stare decisis*. There is no hard and fast rule as to the exercise of a judicial discretion by a court for if that happens, a discretion becomes fettered. (p. 783 A)

Exercise of discretion - Factual basis

2. It is only upon known or undisputed facts and disclosed facts that a court seeking to do what is fair and equitable may exercise its discretion. The learned trial judge found herself at a stage where it will be premature to terminate this suit in limine as all the relevant facts to come to that decision were not before her. It is trite principle of law that the discretion of court cannot be regarded as judicially and judiciously exercised where the facts relevant were not there or were not fully disclosed. In order to exercise a just and proper discretion, facts of a case must be available and be reasonably appreciated. (p. 783 E)

Refusal to set aside - Trial court's decision - Propriety

3. The court of appeal found that the trial court in refusing to dismiss the suit in limine and holding that a full trial of the case would meet the justice of the matter, the learned trial judge has on the face of the materials placed before him, exercised his judicial discretion bona fide without allowing himself to be influenced by considerations not relevant until full trial. The court of appeal had performed its duty by not interfering with the discretion of the learned trial judge properly exercised in the circumstance of this case. I resolve issue two in favour of the respondent. (p. 788 A)

FAIR HEARING - Observance - Yardstick for determining

4. The learned trial judge clearly emphasized in the Ruling that there was a lack of facts to determine the suit at that preliminary stage and that the action be allowed to proceed to full trial and the lower court agreed with this decision. The provision of Section 36 (1) of the 1999 Constitution relating to fair hearing is truly far-reaching. It is not a technical doctrine but one of substance. The basic criteria and attributes have been outlined in our case law. The yardstick for determining the observance of fair hearing in trials is not the question whether any injustice has been occasioned on any party due to want of hearing. It is rather the question whether an opportunity of hearing was afforded to parties entitled to be heard. (788 H)

REPRESENTATION

Mr. Segun Idowu for the Appellant.

Mr. A. Olumide-Fusika with him, O. Aboderin for the Respondent.

CASES REFERRED TO

- B Usani v. Duke (2004) 7 NWLR pt. 871 pg. 116
- Okere v. Nkem (1992) 4 NWLR pt. 234 pg. 132
- Fashanu v. Adekoya (1974) 1 ALL NLR pt.1 pg. 35
- Estenake v. Gbinije (2006) 1 NWLR pt. 961 pg. 228
- C Gbadamosi v. Alete (1998) 12 NWLR pt. 578 pg. 402
- Fagbule v. Rodrigues (2002) 7 NWLR pt. 765 pg, 188
- A.C.B. PLC v. Ezenwa (2004) 7 NWLR pt. 872 pg. 326
- Odusote v. Odusote (1971)1 ALL NLR 219 at page 222
- Olalomi Industries Ltd. v. N.I.D.B. (2009) 39 NSCQR 240
- D C.C.C. T. & C.S. Ltd. v. Ekpo (2001) 17 NWLR pt 743 649
- Oba Lawal Fabiyi v. Chief Solomon Adeniyi (2000) 5 SC page 3 at page 36
- Boothia Maritime Inc. v. Fareast Mercantile Co. Ltd (2001) FWLR pt. 50 pg. 1713
- E Magnusson v. K. Koiki & Ors. (1993) 9 NWLR pt.317 pg.287 at pgs.279 and 303
- Anyah v. African Newspapers of Nigeria Ltd. (1992) 6 NWLR (pt.247) pg. 317
- Union Bank of Nigeria Ltd. v. Odusote Bookstores Ltd. (1995) 9
- F NWLR pt.421 pg.558 at pg.595

STATUTES & RULES REFERRED TO

Land Use Act, ss. 22 & 26

- G High Court of Lagos, State (Civil Procedure) Rules, 1994, O. 23 rr. 2 & 3

LEAD JUDGMENT BY ADEKEYE JSC

- H This is an interlocutory appeal against the decision of the Court of Appeal, Lagos Division delivered on the 18th of March 2003. In the judgment, the lower court dismissed the appeal against the ruling of the High Court of Lagos State; Lagos Judicial Division delivered on the 14th of May 2002, and affirmed the ruling. In the application brought pursuant to Order 23 Rules 2 and 3 of the High Court of

Lagos State (Civil Procedure) Rules 1994, the appellant as defendant/applicant prayed for an order dismissing the Suit LD/2514/2001 instituted by the respondent, as plaintiff, in limine.

In the Suit LD/2514/2001 - the plaintiff/respondent Astra Builders (W.A.) Ltd. in the penultimate paragraph of its statement of claim and in the endorsement on his Writ of Summons both filed on the 23rd of October 2001 claimed against the defendant/appellant, Union Bank of Nigeria PLC for: -

(1) A declaratory order that the plaintiff is entitled to a statutory right of occupancy of the piece or parcel of land lying, situate, being and bounded by Nnamdi Azikiwe and Ali-Balogun Streets, Lagos for the unexpired residue of the term of the sub-lease agreement entered into between the defendant and the plaintiff.

(2) An injunction restraining the defendant whether by itself or by its servants, agents, privies, or otherwise howsoever from entering and or occupying the said piece or parcel of land.

Parties filed and exchanged pleadings. The parties joined issues on their pleadings. I shall quote from their relevant averments as follows -

Statement of Claim

Paragraph 3

On the strength of a written sub-lease agreement entered into between the defendant and the plaintiff, the plaintiff became entitled to a Right of Occupancy of a piece or parcel of land lying, situate, being and bounded by Nnamdi Azikiwe and Ali-Balogun Streets, Lagos measuring 3,025.17 square meters for a term of 40 years, with option for extension for a further term of 10 years. The plaintiff will at the trial of this action rely on the said written sub-lease agreement for its full terms and effects.

Paragraph 4

The plaintiff has been performing, is performing and shall continue to perform its conveniently, duties and obligations under the said written sub-lease agreement.

Paragraph 5

The plaintiff has erected a fence on the said piece or parcel of land.

Paragraph 6

The defendant has threatened to enter upon the piece or par-

cel of land without the plaintiff's consent or with force if necessary.

Statement of Defence

Paragraph 2

The defendant avers that it has a subsisting statutory right of occupancy evidenced by Certificate of Occupancy No. 39/39/1986M and duly registered as No. 39 at page 39 in volume 1986M of the Lagos State of Nigeria Land Registry Office, Ikeja and is dated 13th January 1987 and the certificate of occupancy covers the entire piece of land referred to in paragraph 3 of the claim.

Paragraph 3

The plaintiff is not entitled to a right of occupancy of any portion of land measuring 3025.17 sq. meters situate and lying at Nnamdi Azikiwe Street and bounded by Ali-Balogun Street, Lagos and covered by Certificate of Occupancy No. 39/39/1986M.

Paragraph 4

The defendant avers that the plaintiff has no substantial and legal right under the purported sub-lease agreement as asserted under paragraph 3 of the claim and asserts further that the purported sub-lease agreement is null and void.

The foregoing depicted the stand of the parties which to all intent and purpose should have been a convenient stage for the case to proceed to trial.

On the 7th of January 2002, the defendant/appellant filed a motion on notice in the same court praying for an order to dismiss the Suit No. LD/2514/2001 as its root is:-

- (1) Tainted with illegality
- (2) Unlawful
- (3) Null and void
- (4) Unenforceable and
- (5) For disclosing no reasonable cause of action at all.

The defendant/appellant as applicant filed a five paragraphs affidavit in support of the application.

The plaintiff/respondent as respondent to the application filed a twenty-one paragraph counter-affidavit to oppose the motion.

The court afforded the parties the opportunity to file written addresses in support of the application and the respondent to also file written address by way of reply. Fifteen exhibits were tendered as Exhibits A - L by the plaintiff/respondent/respondent.

The court considered the application on three grounds: -

(1) That the alleged sub-lease agreement is unenforceable, creates no legal interest, unlawful, null and void for the mandatory provision of Section 22 of the Land Use Act.

(2) That the defendant has a subsisting right of occupancy as evidenced by Certificate of Occupancy No. 39/39/1986M over lease agreement. B

(3) That the alleged sub-lease agreement is invalid, uncertain and inconclusive as its date of commission is unknown.

The court in its considered Ruling found as follows: - C

(a) That the defendant/appellant/appellant failed to establish that the transaction was tainted with illegality or unlawful.

(b) That reasonable cause of action has been disclosed but decision that the sub-lease is unenforceable, null and void can only be taken after oral and documentary evidence have been placed D before the court. It is premature at the stage of this application. The court has to be satisfied with all the surrounding circumstances which made it impossible for the Governor's consent to be procured.

(c) It is also premature to conclude that the date of commencement is unknown. E

The learned trial judge concluded that: -

"In essence and in the light of the foregoing, I hold that this application is premature and it is accordingly dismissed."

Being aggrieved by the Ruling, the appellant lodged an appeal F at the Court of Appeal, Lagos Division. The notice of appeal dated the 28th of May 2002 carried five grounds of appeal from which defendant/appellant settled three grounds of appeal.

The plaintiff/respondent also formulated three issues for the determination of the lower court. In the considered view of the court, the G learned justices made findings as follows: -

"(1) To hold by the appellant that because the judge has not treated the issue of the Governor's consent in full is a denial of fair hearing of its motion is a misconception of what the term connotes."

(2) The learned trial judge in refusing to dismiss the suit in H limine has on the face of the materials placed before him exercised his judicial discretion bona fide without allowing himself to be influenced by considerations not relevant until full trial. An appellate court will not ordinarily interfere with the exercise of that discretion."

(3) Order 23 Rules 2 and 3 confer a lot of judicial discretion on the learned trial judge. He had on the facts and circumstances correctly come to a conclusion based on law and equity, honest and in the best interest of justice in the Ruling."

The court found the appeal unmeritorious and dismissed it.

B The appellant being dissatisfied with the decision of the lower court made a further appeal to this court. The parties exchanged briefs. When the appeal was heard on the 23rd of November 2009 – the appellant relied on the appellant's brief of argument filed on 28/7/03 wherein three issues were settled for determination as follows:-

(1) Was the Court of Appeal right in confirming the exercise of discretion of the trial court?

(2) Was the Court of Appeal not duty bound to dismiss the D respondent's suit that arose out of a contract prohibited and declared unlawful by Section 22 of the Land Use Act and declared null and void by Section 26 of the said Land Use Act.

(3) Did the failure of the Court of Appeal to consider and pronounce on the propriety of appellant's issue No.3 deny the appellant E fair hearing which occasioned justice?

The respondent relied on the respondent's brief filed on 8/10/03 where one lone issue was distilled for determination -

F *"Whether special circumstance exist to warrant interference (by this court) with the concurrent findings of the two lower Courts (the trial court and the court of appeal) that the defendant's (appellant's) application to dismiss the plaintiffs suit in limine was premature."*

G The grounds of appeal in the Notice of Appeal and issues raised from them by the appellant are specific in nature. The respondent formulated a single issue not raised from any of the grounds of appeal but lifted directly from the judgment of the lower court. The respondent is not permitted to couch any issue outside the perimeters of the appellant's grounds of appeal unless it has filed a H respondent's Notice or a Cross-appeal. I intend to be guided by the issues raised by the appellant in the determination of this appeal.

Issue One

Was the Court of Appeal right in confirming the exercise of discretion of the trial court?

The appellant drew attention to the enabling Rule for bringing the application for the dismissal of the suit as Order 23 Rules 2 and 3 of the High Court of Lagos State (Civil Procedure) Rule 1994 and the inherent jurisdiction of the court. The relevant portion of the Ruling of the trial court was quoted as saying-

"This is because the Act does not prohibit a written agreement to transfer or alienate land. Thus to hold that a confirmation of or non compliance with Section 22 of the Act occurs at the time when the holder of a statutory right of occupancy executed or seals the deed of the mortgage will be contrary to the spirit and intendment of Section 22 of the Act. Even at that it is premature at this preliminary stage to say that the agreement is unenforceable and creates no legal interest. It will not be right in law to come to such conclusion until the parties have had the opportunity of presenting to the court oral and documentary evidence. In other words, the court must be satisfied with all the surrounding circumstances which made it impossible for the Governor's consent to be procured." Pages 109 lines 20-23 and pages 26-28 of the Record. The Court of Appeal confirmed the exercise of discretion of the learned trial judge when it held at pg 194 lines 23-26 of the Record that

In short, the trial judge has not acted illegally or arbitrarily and for the reason the court (an Appellate Court) will not ordinarily interfere with the exercise of that discretion."

The appellant held that the exercise of discretion by the trial court and the confirmation by the appellate court was wrong for reasons that:-

(1) The exercise of discretion was prompted by the trial judge's desire to be satisfied with all the surrounding circumstances which made it impossible for the Governor's consent to be procured, and not based on the desire, pleadings or prayers of the parties. The practice did not seek the resistance of the learned trial to conduct an inquiry into the surrounding circumstances which made it impossible to procure Governor's consent. Any exercise of discretion not based on pleaded facts is wrong.

The appellant cited the case *Oba Lawal Fabiyi v. Chief Solomon Adeniyi* (2000) 5 SC page 3 at page 36.

(2) The lower court was by the confirmation encouraging a contract, a sublease Exh. OA4 which has been declared unlawful by

the provisions of Section 22 and 26 of the Land Use Act. Whereas the law is that once a court becomes aware of an illegality, it behoves on the judge to dismiss the claim for being void and unenforceable. The appellant referred to the case *Union Bank of Nigeria Ltd. v. Odusote Bookstores Ltd.* (1995) 9 NWLR pt.421 pg.558 at pg.595.

B (3) The confirmation exercise by the appellate court violates the principle of stare decisis without justification.

(4) A court can decide a case on affidavit evidence to which were annexed exhibits. It is an established principle that deposition in an affidavit and the exhibits are evidences on oath. The appellant supported this with the case of *Magnusson v. K. Koiki & Ors.* (1993) 9 NWLR pt.317 pg.287 at pgs.279 and 303.

Both courts relied on the case of *Awojugbagbe* which is irrelevant and not on all fours with the instant case. It is a wrong exercise of discretion to rely on and apply an irrelevant case. This court is urged the exercise of discretion of the trial court and confirmed by the lower court, and allow this appeal on this issue.

The respondent replied that the application of the defendant/appellant before the trial court was made and considered within the context of Order 23 Rules 2 and 3 of the High Court of Lagos State (Civil Procedure) Rules 1994. The defendant/appellant applied to dismiss the plaintiff/respondent's case because according to it, no consent of the Governor had been obtained to the Deed of Sublease between the parties. The trial court found that it would be wrong to treat the issue of the alleged want of Governors consent in isolation of the other facts and circumstances of the transaction between the parties as contained in their respective pleadings and affidavit depositions before the court. It would be premature to dismiss the plaintiff's suit at the stage reached in the proceedings before the trial court. The court had not arrived at any decision on the point of law raised but only concluded that it was best to consider same after trial of the case. The trial court is entitled to do so under Order 23 Rule 2 of the Rules of Court of Lagos High Court. The lower court affirmed the decision of the trial court. This court has no binding duty to decide the point of law raised in the appeal before it by the appellant and dispose of it immediately. By virtue of the provisions of Order 23 Rules 2 and 3 of the High Court Civil Procedure Rules 1994, the trial court has discretion on when to hear and make a decision on the

point of law raised, the court has a duty to make any order considered just. The Court of Appeal found that the trial court exercised its discretion in a judicial and judicious manner. The court is urged to resolve this issue in favour of the respondent.

On a careful consideration of the arguments and submission of counsel for both parties - I cannot but come to the conclusion that the arguments of the defendant/appellant are not only contradictory in terms but also a misconception of Order 23 Rules 2 and 3 of the Lagos High Court Civil Procedure Rules 1994. B

Rule 2

Any party shall be entitled to raise by his pleading any point of law and unless that court or a judge in chambers otherwise orders any point so raised shall be disposed of by the judge who tries the cause at or after the trial. C

Rule 3

If in the opinion of the court or a judge in chambers, the decision of such point of law substantially disposes of the whole action or of any distinct cause of action, ground of defence, set-off, counter-claim or reply therein, the court or judge may thereupon dismiss the action or make such order therein as may be just. D

It is crystal clear that the above rule is designed to achieve the undermentioned goals - E

(1) To enable a defendant who not liable to the plaintiff by the operation of law to plead such legal point in its statement of defence and then apply to court for the immediate consideration and disposal of that point of law. F

(2) To enable the trial court to exercise its discretionary power to consider and determine the point of law so raised, that is whether before or after the trial. G

(3) Empowers the court to decide on after due consideration of the point of law and relate same to the claim before it whether to dismiss the suit or make any further orders as may be fair and justice in the prevailing circumstance.

The germane question for the consideration of court under this issue is the exercise of discretion by the trial court which got the condonation and affirmation of the lower court - the Court of Appeal Lagos. The appellant/applicant premised this prayer on the reason that the claim of the plaintiff/respondent for declaratory is tainted H

with statutory illegality. The Governor's consent was not obtained by the plaintiff/respondent to alienate the interest in the land covered by the sub-lease agreement, Exhibit OA4, in accordance with Sections 22 and 26 of the Land Use Act 1978. The resultant effect is to render the deed of sub-lease agreement unlawful, null and void.

B The appellant's motion on notice seeking a dismissal of the respondent's suit in limine under Order 23 Rules 2 and 3 of the High Court of Lagos (Civil Procedure) Rules 1994 was supported by a 5-paragraphs affidavit. Of particular importance to this legal point are paragraphs 1(d-e) and 2. The plaintiff/respondent reacted to the application by filing a 21 paragraphs counter-affidavit. Worthy of note and relevant to the argument canvassed by the appellant/applicant under this issue are paragraphs 3 (i), (ii) and (iii) 5, 12 and 14. In order to give a vivid picture of the scenario and the immediate stance of the trial court on this legal point, I shall reproduce them. Paragraphs 1 (d) {e} and 2 of the supporting affidavit reads: -

Paragraph 1 (d)

The written consent of the Governor of Lagos State was not first had and obtained to the sub-lease agreement which gave rise to this suit and annexed by the plaintiff to its Motion on Notice dated 22nd October 2001 as Exhibit A and the said sub-lease agreement is herein annexed as Exh. OA4.

Paragraph 1 (e)

F The said sub-lease agreement does not contain the date of commencement of the said sub-lease agreement.

Paragraph 2

G The defendant has a subsisting Certificate of Occupancy over the parcel of land upon which the plaintiff seeks a declaratory order that it is entitled to a statutory right of occupancy and the said Certificate of Occupancy is herein annexed as Exhibit OA5.

Paragraph 3 (1)

H The defendant/applicant under the consideration clause of the sub-lease Agreement duly executed by the parties concerned and stamped on 24/5/95 covenanted to receive once and for all premium of N1,000,000 (one million Naira only) with the consent of the Governor of Lagos State which implied that the consent of the Governor to the sub-lease Agreement was first had and obtained before receiving the said N1,000,000 (one million Naira).

Paragraph 3 (2)

That by letter dated 20th July 1992 (copy marked “A” in the bundle of Exhibits) and also letter dated 21st September 1992 (marked “B” in the bundle of Exhibits) the defendant/applicant acknowledged receipt of the said sum of N1,000,000 (one million Naira only) and cannot therefore be heard to say that the Governor’s consent to the said sub-lease agreement had not been obtained. B

Paragraph 5

That I have further been informed by the said M.M. Princewill Esq. and verily believe that even though the said sub-lease agreement was not dated, it was duly stamped on 24/5/95 and by necessary implication, the date 24/5/95 became the commencement date of the said sub-lease agreement and is valid and subsisting. C

Paragraph 12

By letter dated 15th September 1992 and 7th October 1992 D respectively, the bank agreed on the date of commencement of the sub-lease agreement to be the date of execution of the sub-lease agreement (copy of the said letters are hereby attached and marked Exhibits D and J).

Paragraph 14 E

By letter dated 30th June 1997 the plaintiff/respondent reminded the defendant/applicant that it has not fulfilled its own part of the agreement by returning the Governor’s consent forms which the plaintiff/respondent had signed its own part and forward same to the defendant/applicant for signature. The said forms have not been returned till date. Copy of the letter is hereby attached and marked “L”. In addition to the foregoing, the learned trial judge had at her disposal the pleadings of the parties. I have earlier in this judgment reproduced the relevant paragraphs. F G

The learned trial judge gave due consideration to the grounds on which the application was premised and arrived at conclusion on page 108 of the Record as follows: -

I have looked through the papers and have gone through the submissions of learned counsel and cannot lay my hands on any evidence to establish illegality. H

On issues 3, 4 and 5 that the sub-lease is null and void, it is unenforceable and it discloses no reasonable cause of action - the learned trial judge said that -

“I proceed to state that these 2 points cannot be determined at this stage of the procedure. It is premature for this court to come to a conclusion one way or the other. The decision can only be taken after oral and documentary evidence have been placed before the court.”

B Upon the issue of non-compliance with Sections 22 and 26 of the Land Use Act on the sub-lease - the learned trial court held that -

“Even at that, it is premature at this preliminary stage to say that the agreement is unenforceable and creates no legal interest. It will not be right in law to come to such conclusion until the parties have had the opportunity of presenting to the court oral and documentary evidence. In other words, the Court must be satisfied with all the surrounding circumstances, which made it impossible for the Governor’s consent to be procured.”

D By way of conclusion of the Ruling, the learned trial judge held on page 110 of the Record that

“Pronouncements on important issues such as these should be dealt with when document and oral evidence are placed before the court. In essence and in the light of the foregoing, I hold that this application is premature and it is accordingly dismissed.”

F Throughout the ruling the decision and pronouncement of the learned trial judge are an embodiment of exercise of judicial discretion - poured out in the peculiar circumstance of this case backed up by affidavit evidence and pleadings. These legal points were raised at the stage of pleadings. It is trite law that pleadings however strong and convincing the averments may be, without evidence of proof thereof go to no issue. Through pleadings people know exactly the points which are in dispute with the other. Evidence must be led to prove the facts relied on by the party or to sustain allegations raised in pleadings.

A mere averment in pleadings prove nothing unless admitted.

H Adeponle v. Saidi (1956) 3 SCNLR 203

Imana v. Robinson (1979) 3-4 SC 1

George v. Dominion Flour Mills Ltd. (1963) 1 SCNLR 117.

The defendant/appellant gave four reasons in the brief why the Court of Appeal was wrong in confirming the trial court’s exercise of its discretion in this suit. On gleaning through the argument and

submission on the reasons, I am practically convinced that the defendant/appellant misconceived the principles governing the exercise of discretion by court.

An exercise of discretion is an act or deed based on ones personal judgment in accordance with one's conscience, free and unfettered by any external influence or suggestions. A judicial discretion means the power exercised in an official capacity in a manner which appears to be just and proper under a given situation. It must not flow from or be bound by a previous decision of another court in which a discretion was exercised. It is in short an antithesis to the doctrine of stare decisis. There is no hard and fast rule as to the exercise of a judicial discretion by a court for if that happens, a discretion becomes fettered.

Odusote v. Odusote (1971)1 ALL NLR 219 at page 222

Anyah v. African Newspapers of Nigeria Ltd. (1992) 6 NWLR (pt.247) pg. 317

Issues fall within a judge's discretion if being governed by no rule of law its resolution depends on the individual judge's assessment of what is fair and just to do in a particular case. Where the situation is governed by a rule of law, where the interpretation of the provision of a statute is in question, any direction exercised must be exercised in accordance with the provision of the Statute.

It is only upon known or undisputed facts and disclosed facts that a court seeking to do what is fair and equitable may exercise its discretion. The learned trial judge found herself at a stage where it will be premature to terminate this suit in limine as all the relevant facts to come to that decision were not before her. It is trite principle of law that the discretion of court cannot be regarded as judicially and judiciously exercised where the facts relevant were not there or were not fully disclosed. In order to exercise a just and proper discretion, facts of a case must be available and be reasonably appreciated. This informed the trial judge's exercise of her discretion in favour of dismissing the motion so as to proceed to trial and accommodate oral evidence and documentary evidence. Both parties relied on affidavit evidence in this application where the depositions in an affidavit filed in support of an application is sufficiently challenged by a

counter- affidavit filed by the opposing party, the conflicting affidavits cannot be basis of exercising properly the discretion of the court without taking oral evidence from the parties to resolve the conflicting evidence. In the instant case where the deposition of parties conflict, the trial court was correct to hold that the issues on which the parties
 B joined issues should be dealt with when document and oral evidence are placed before the court.

Falobi v. Falobi (1976) 9-10 SC 1

Akinsete v. Akindulire (1966) 1 SCNLR 389

C Fashanu v. Adekoya (1974) 1 ALL NLR pt.1 pg. 35

A.C.B. PLC v. Ezenwa (2004) 7 NWLR pt. 872 pg. 326

Ikpana v. RTPCN (2006) 3 NWLR (pt. 966) pg. 106

Gbadamosi v. Alete (1998) 12 NWLR pt. 578 pg. 402

FSB International Bank Ltd. v. Imano Nigeria Ltd. (2000) 7
 D SC pt. 1 pg. 1;

Ezechukwu v. Onwuka (2006) 2 NWLR pt. 963 pg.

Equally when cases are tried upon affidavit evidence, the facts or deposition in such an affidavit have to be proved like averments in pleadings.

E Boothia Maritime Inc. v. Fareast Mercantile Co. Ltd (2001)
 FWLR pt. 50 pg. 1713

In my view, the lower court had rightly confirmed the exercise of judicial discretion of the trial court by holding at page 194, lines
 F 18-26 of the Record that-

G *"In refusing to dismiss the suit in limine and holding that a full trial of the case would meet the justice of the matter, the learned trial judge has on the face of the materials placed before him exercised his judicial discretion bona fide without allowing himself to be influenced by considerations not relevant until after full trial. In short the trial judge has not acted illegally or arbitrarily, and for that reason this court (an appellate court) will not interfere with the exercise of that discretion."*

H An appellate court will however reverse an exercise of discretion by a trial court where there has been a wrongful exercise of discretion by the trial court because it did not give due weight to relevant considerations upon which judicial discretion is exercised.

Okere v. Nkem (1992) 4 NWLR pt. 234 pg. 132

Oyeyemi v. Irewole Local Government (1993) 1 NWLR pt.

270 P9-462

The lower court concluded that the discretion was exercised, based on facts and circumstances presented to the court and the court had correctly come to a conclusion based on law and equity in the Ruling. This court agrees with the sound reasoning and conclusion of the lower court. Issue One is resolved in favour of the respondent. B

Issue Two

Was the Court of Appeal not duty bound to dismiss the respondent's suit that arose out of a contract prohibited and declared unlawful by Section 22 of the Land Use Act and declared null and void by Section 26 of the said Land Use Act. C

The defendant/appellant argued that the sub-lease agreement executed by the parties and Exhibit OA4 in this application is unlawful, illegal, unenforceable, null and void. The sub-lease agreement violates Section 22 of the Land Use Act 1978, in that written consent of the Governor of Lagos State was not first had and obtained to the sub-lease agreement which gave rise to the suit. It was the contention of the defendant/appellant that the plaintiff/respondent admitted at page 55 of the Record that the sub-lease agreement does not contain the Governor's consent. By virtue of Section 26 of the Act, any agreement that alienates interest in land without the Governor's consent is null and void. The lower court was duty bound to dismiss the respondent's suit for violating the Land Use Act. D E F I have reproduced the relevant paragraphs of the pleadings and in the affidavit of both parties on the sub-lease agreement earlier on in this judgment. The stand of the plaintiff/respondent was that both parties had signed the sub-lease and a consideration of N 1,000,000 (one million Naira) had passed to the defendant/appellant with an intention to create legal relationship. The agreement was capable of being forwarded to the Governor for procuring his consent or approval - to transfer the interest of the holder of the Certificate of Occupancy to another. The learned trial judge in his Ruling concluded on this issue at pg. 109 of the Record as follows – G H

“Even at that, it is premature at this preliminary stage to say that the agreement is unenforceable and creates no legal interest. It will not be right in law to come to such conclusion until the parties have had the opportunity of presenting to the court oral and docu-

mentary evidence. In other words, the court must be satisfied with all the surrounding circumstances, which made it impossible for the Governor's consent to be procured."

The lower court summarized the reasoning of the trial court as

B *"Although the deed of sub-lease does not carry government consent on the face of it. There are no obvious circumstances which makes it imprudent for me to dismiss the plaintiffs suit as heavily canvassed by the defendant, but it is giving the parties opportunity to proffer further evidence, oral as well as documentary at trial to clean the aspects of the suit which appears rusty to me at this stage. I am convinced only a full trial will meet the justice of the case."*

Vide page 193 of the Record.

D The law on this issue according to Sections 22 (1) and 26 of the Land Use Act 1978 and as confirmed by this court in a number of decided authorities is that Section 22 (1) stipulates that –

E *"It shall not be lawful for the holder of a certificate of occupancy granted by the Governor to alienate his right of occupancy or any part thereof by assignment, mortgage or sub transfer of possession, sub-lease or otherwise howsoever, without the consent of the Governor first had and obtained."*

Section 26 states that -

F *"Any transaction or any instrument which purports to confer on or vest in any person any interest or right over land other than in accordance with the provisions of the Act shall be null and void."*

G It is the contention of the defendant/applicant that the sub-lease Exh. OA4 was illegal for having infringed the foregoing provisions of the Land Use Act. The plaintiff/respondent held that the defendant/appellant had the responsibility to obtain the consent of the Governor of Lagos which would be attached to the sub-lease to make it a viable document at that stage of the existing transaction between the parties. According to decided cases of this court Savannah Bank of Nigeria Limited & Anor. V. Ammel O. Ayilo & Anor. H (1989) NWLR pg. 97 page 305 at page 349, My Lord, Karibi-Whyte JSC (as he then was)

"I think the Court of Appeal was right to hold that every holder of a right of occupancy whether statutory or otherwise is regarded as having been granted the right by the Military Governor or local

government as the case may be, for the purpose of control and management of all land comprised in the State. Accordingly every such holder, whether under Sections 5, 34 or 36 of the Land Use Act requires the prior consent of the Military Governor before he can transfer mortgage or otherwise dispose of his interest in the right of occupancy. This means that Section 22 is of general application to every holder under the Act pursuant to Section 5, 34 or 36 thereof." ^B

In the case *International Textile (Nig.) Ltd. v. Dr. Ademola Oyekanmi Aderemi & Ors* (1996) 8 NWLR pt. 464 pg. 15 at pg. 42, My Lord, Iguh JSC (as he then was) held that –

"It cannot be disputed that Section 22(1) of the Land Use Act prohibits the holders of a statutory right of occupancy, such as the defendants in the present case, from purporting to alienate, as a completed action, their right of occupancy whether by assignment, sub-lease or otherwise however without the consent of the Governor first had and obtained. Section 26 of the Act proceeds to render any transaction which purports to vest in any person any interest or right over land other than in accordance with the provisions of the Act as null and void." ^C

Union Bank of Nig. Ltd. v. Ayodare & Sons Nig, Ltd. (2007) E 13 NWLR pt. 1052 pg. 567

Awojugbagbe Light industries Ltd. v. Chinukwe (1995) 4 NWLR pt. 390 pg. 379

C.C.C. T. & C.S. Ltd. v. Ekpo (2001) 17 NWLR pt 743 649 ^F

Olalomi Industries Ltd. v. N.I.D.B. (2009) 39 NSCQR 240

In the statement of defence and the affidavit in support of the motion, the defendant/appellant claimed to have a subsisting certificate of occupancy over the parcel of land upon which the plaintiff/ respondent seeks a declaratory order that it is entitled to a statutory right of occupancy. A copy of the certificate of occupancy was attached as Exhibit OA5. It is apparent in law on whom the duty of obtaining the Governor's consent to the sub-lease Exh. OA4 fell at the time this application was before the learned trial judge. This was also at the stage of conflicting pleadings and depositions in affidavit which have to be supported by oral evidence. It was the view of the trial court that the matter should proceed to trial to take evidence from parties to clear certain issues and facilitate a just and equitable ^H

decision in the matter. ***The court of appeal found that the trial court in refusing to dismiss the suit in limine and holding that a full trial of the case would meet the justice of the matter, the learned trial judge has on the face of the materials placed before him, exercised his judicial discretion bona fide without allowing himself to be influenced by considerations not relevant until full trial. The court of appeal had performed its duty by not interfering with the discretion of the learned trial judge properly exercised in the circumstance of this case. I resolve issue two in favour of the respondent.***

Issue Three

Did the failure of the Court of Appeal to consider or pronounce on the propriety of appellant's issue No. 3 deny the appellant fair hearing which occasioned injustice.

D Issue No.3 before the court of appeal reads –

“Upon concluding by inference and implication that the Governor’s consent was not procured is the court competent to, dismiss the appellant’s application and continue to adjudicate.”

E The learned trial judge in the ruling at page 109 of the Record said –

“It is pertinent to note that from the documents before this court, a document was duly signed by both parties with an intention to create legal relationship, which is capable of being forwarded to the Governor for his consent. It will not be right in law to come to such conclusion until the parties have had the opportunity of presenting to the court oral and documentary evidence.”

G The learned justices of the Court of Appeal considered issue No.3 contrary to the submission of the defendant/appellant. On page 209 of the record in the leading judgment it was held -

“While I answer issue No.2 on the respondent’s brief in the negative thus resolving in favour of the respondent, issue No.3 flowing from all I have said with respect to issues Nos.1 and 2 must be answered in the affirmative and I so do.”

H The lower court adequately considered issues Nos.1 and 2 from the bottom of page 204 to page 209 of the Record. ***The learned trial judge clearly emphasized in the Ruling that there was a lack of facts to determine the suit at that preliminary stage and that the action be allowed to proceed to full trial and the***

lower court agreed with this decision. The provision of Section 36 (1) of the 1999 Constitution relating to fair hearing is truly far-reaching. It is not a technical doctrine but one of substance. The basic criteria and attributes have been outlined in our case law. The yardstick for determining the observance of fair hearing in trials is not the question whether any injustice has been occasioned on any party due to want of hearing. It is rather the question whether an opportunity of hearing was afforded to parties entitled to be heard.

J. J.C. Inter Ltd. v. N.G.I. Ltd. (2002) 4 WRN 91 104

Saieh v. Monguno (2003) 1 NWLR pt. 801 pg. 221

Usani v. Duke (2004) 7 NWLR pt. 871 pg. 116

Fagbule v. Rodrigues (2002) 7 NWLR pt. 765 pg. 188

Estenake v. Gbinije (2006) 1 NWLR pt. 961 pg. 228

I must explain further that fair hearing lies in the procedure followed by a court at a particular time in arriving at its decision and not necessarily in the soundness of the decision. Sam Fam Financiers Ltd. v. Aina (2004) 2 NWLR pt.857 page 297.

This court in agreement with the lower court is of the opinion that the trial court had exercised its discretion judicially and judiciously in the prevailing circumstance of the application before it. This court refuses to interfere with same particularly with the concurrent findings of the two lower courts.

I resolve this issue in favour of the respondent.

I cannot conclude this judgment without passing a few remarks about this suit. The escapade of prosecuting the action from the trial court to the apex court on a preliminary issue, consuming a period of nine years in the process leaves a sour taste in the mouth. It is practically a wild goose chase, and a gross abuse of judicial process. The application is frivolous as the law applicable to obtaining of Governor's consent to backup any transfer or alienation of land by a holder of a certificate of occupancy has been under limelight in this country for long. Even an ordinary tout or land speculator in Alausa- Lagos is conversant with the procedure. This action is nothing but a calculated ploy to harass or frustrate the plaintiff/respondent out of the transaction. Our court shall not be a party to its process being trampled upon by any unscrupulous litigant.

In sum, this appeal lacks merit and it is accordingly dismissed.

The judgment of the lower court is affirmed. N50,000 the costs of this appeal is awarded in favour of the respondent.

B **MUSDAPHER JSC**

I have read before now the judgment just delivered by Adekeye, JSC with which I entirely agree. For the same reasons so comprehensively set out, I too dismiss this appeal and affirm the decisions of the courts below.

C I abide by the order for costs proposed in the lead judgment aforesaid.

D **ONNOGHEN JSC**

This is an appeal against the judgment of the Court of Appeal, Holden at Lagos in appeal NO.CA/L/201/2002 delivered on the 18th day of March, 2003 dismissing the appeal of the appellant against the ruling of the High Court of Lagos State in suit NO. LD/2514/2001 delivered on the 14th day of May, 2002 in which the court dismissed the motion of the appellant praying for the dismissal of the suit.

F The respondent had issued a writ of summons in which it claimed against the appellant the following reliefs as contained in paragraph 11 of the statement of claim at page 4 of records:

G “(1) *A DECLARATORY ORDER that the plaintiff is entitled to a statutory Right of Occupancy of the piece or parcel of land lying, situate, being and bounded by Nnamdi Azikiwe and Alli-Balogun Streets, Lagos for the unexpired residue of the term of the sub-lease agreement entered into between the defendant and the plaintiff.*

H “(2) *AN INJUNCTION restraining the defendant whether by itself or by its servants, agents, proves or otherwise howsoever from entering and or occupying the said piece or parcel of land*”.

The appellant filed a statement of defence in which it averred, *inter alia* that the respondent has no substantive and or legal right under the purported sub-lease agreement as the said sub-lease is null and void as the same lacks the essentials of a sub-lease and the

absence of the written prior consent of the Governor of Lagos State to the transaction.

The appellant then followed the filing of the statement of defence with a motion on notice praying the court for an order dismissing the suit on the ground that the suit is tainted with illegality; it is unlawful, null and void, unenforceable and disclosed no reasonable cause of action. B

The trial court dismissed the application on the ground that the same is premature as the issues raised cannot and should not be determined on affidavit evidence but should be dealt with when document and oral evidence are placed before the court. C

Appellant was dissatisfied with that decision and appealed to the Court of Appeal which, after considering the issues raised sustained the decision of the trial court. The present appeal is a further appeal by the appellant. D

Learned counsel for the appellant, *SEGUN IDOWU ESQ.*, in the appellant's brief filed on 28th day of July, 2003 has submitted three (3) issues for the determination of the appeal. The issues are as follows:-

"1. Was the Court of Appeal right in confirming the exercise of discretion of the trial court.

2. Was the Court of Appeal not duty bound to dismiss the respondent's suit that arose out of a contract prohibited and declared unlawful by section 22 of the Land Use Act and declared null and void by section 26 of the said Land Use Act. F

3. Did the failure of the Court of Appeal to consider or pronounce on the property of appellant's issue NO. 3 deny the appellant fair hearing which occasioned injustice".

It should be noted that the appeal originates from the exercise of the discretion of the trial court either to grant or refuse the grant of the application in issue. It is equally important to note that the application being interlocutory the law is that the court should not decide the substantive matter at the interlocutory stage of the proceedings. The above observation becomes necessary having regards to appellant's issue No.3 which attacked the failure of the lower court to pronounce on appellant's issue 3 before that court. G H

That issue is as follows:-

"Upon concluding by inference and implication that the

Governor's consent was not produced is the court competent to dismiss the appellant's application and continue to adjudicate"

I hold the view that to resolve the above issue, other than the way the lower court did it, the court would have decided on the competence of the suit having regards to the consent or lack of consent of the Governor etc. , etc., at that stage when the appeal before that court was based mainly on the refusal of the trial court to exercise its discretion in favour of the appellant by terminating the proceedings at that stage which that court found to be premature.

At page 186 - 195 particularly at page 194, the lower court found and/or held as follows:-

"... In refusing to dismiss the suit in limine as holding that a full trial of the case would meet the justice of the matter, the learned trial judge has on the face of the materials placed before him, exercised his judicial discretion bona fide without allowing himself to be influenced by consideration not relevant until after full trial. In short, the trial judge has not acted illegally or arbitrarily; and for that reason this court [An Appellate Court] will not Interfere with the exercise that discretion".

To me and having regards to the facts and circumstances of this case, the only relevant issue to be determined in this appeal is whether the lower court is in error in holding as above or whether there exists any special circumstance to warrant any interference with the concurrent findings of the lower courts that the application to dismiss the suit in limine is premature. That, to me is the crux of the matter. The attack ought to have been directed at the concurrent findings of the lower courts as regards the exercise of the discretion of the trial court not in rearguing the same issues which were considered in the exercise of the discretion by the lower courts and rejected. The attack ought to have been on the rejection - whether special circumstance exist to warrant this court interfering with those findings.

In the circumstance of this case, it is clear that before this court can interfere with the concurrent findings the appellant must satisfy the court that there has been an error in substantive and/or procedural law or that there has been a miscarriage of justice - see in the Mogaji (1986) 1 NWLR (Pt 19) 759. The appellant has failed to do so in this appeal. All that the lower courts are saying is that a full trial

be gone into before determining whether the action is competent or not. I agree with them as I too will not want to be tempted to comment, at this stage, on the facts and circumstances surrounding the institution of the action as it is the duty of the appellant to seek and obtain the necessary consent after granting a sub-lease of the property in question to the respondent.

B

At the end of the day the court may agree with the appellant that the sub-lease is null and void etc., etc. but let there be a full trial of the case so that specific findings of facts can be made on the matter. The courts are not only courts of law but also of equity.

C

It is for the above and the more detailed reasons contained in the lead judgment of my learned brother *ADEKEYE JSC*, that I too find no merit in the appeal and consequently dismiss same. I abide by the consequential order made in the lead judgment including the order as to costs.

D

Appeal dismissed.

TABAI JSC

E

This action was commenced at the Lagos High Court on or about 23/10/2001. The parties filed and exchanged their pleadings. In paragraph 4 of the Statement of Defence the Defendant raised the issue that the purported sub-lease lacks the essentials of a sub-lease and that before it was purportedly made the prior consent of the Governor was not obtained.

F

This was followed by a motion on Notice dated and filed on the 7/1/2002. The motion prayed for an order dismissing the suit on the ground that it is:

G

(i) tainted with illegality

(ii) unlawful

(iii) null and void

(iv) unenforceable and

(v) disclosing no reasonable cause of action at all.

H

In its ruling the trial court held that the application was premature and dismissed it.

The appeal to the Court below was dismissed. The Defendants have come on further appeal to this Court.

I have examined the application filed on the 7/1/2002. In the concluding paragraph of its ruling at page 110 of the record the trial Court said:-

B *"It is therefore not proper for the Court at this premature stage to conclude that there is no date of commencement. These are issued that cannot and should not be determined on affidavit evidence. Pronouncements on important issues such as this should be dealt with when document and oral evidence are placed before the Court."*
The Court of Appeal endorsed this finding of the trial court. At page C 194 of the record the Court said:-

"in refusing to dismiss the suit in limine and holding that a full trial of the case would meet the justice of the matter, the learned trial judge has on the face of the materials placed before him, exercised his judicial discretion bonafide without allowing himself to be influenced by considerations not relevant until after full trial. In short, the trial judge has not acted illegally or arbitrarily; and for that reason this Court (An appellate court) will not ordinarily interfere with the exercise of that discretion"
D

E In the Respondent's Brief of Argument only one issue for determination was formulated. I am equally inclined to the view that the single issue proposed by the Respondent effectually disposes of the appeal. The issue is whether special circumstances exist to warrant interference (by this Court) with the concurrent findings of the two lower courts.
F

Mr. Adeyinka Olumide-Fusika for the Respondent submitted that before this Court can interfere with or depart from the concurrent decisions of the two courts below, it must be shown that there has been an error in substantive and procedural law or there has been a miscarriage of justice. This submission represents the correct position of the law. I have earlier above reproduced portions of the judgments of the two courts below. I cannot identify any error in substantive and procedural law in the two decisions. Order 23 Rules 2 and 3 of the High Court of Lagos State (Civil Procedure) Rules G 1991 provides.
H

(2) Any party shall be entitled to raise by his pleading any point of law and, unless the court or a Judge in chambers otherwise orders, any point so raised shall be disposed of by the Judge who tries the cause at or after the trial.

(3) If in the opinion of the Court of a Judge in chambers, the decision of such point of law substantially disposes of the whole action, or any distinct cause of action, ground of defence, set off, counter-claim or reply thereon, the court or Judge may thereupon dismiss the action or make such order therein as may be just.

Although the word “shall” is used, a global reading of the two provisions shows clearly that the Court has a discretion to invoke the provision at or after the trial. The trial court was therefore perfectly in order when it held that it was premature at the stage at which the application was brought to make pronouncements on important issues on affidavit evidence and that such important issue are best determined after full trial at which the documentary and oral evidence would be placed before the court.

The Court of Appeal did not see any reason to interfere with the decision of the trial court and so endorsed it. Equally I cannot fancy any reason to interfere with the concurrent decisions of the two courts below.

In my view the appeal lacks merit and should be dismissed. For these and the fuller reasons in the lead judgment of my learned brother Adekeye JSC I also dismiss the appeal for lack of merit. I adopt the issue of costs as contained in the lead judgment.

MUHAMMAD JSC

I read before now the judgment of my learned brother, Adekeye, JSC. I am in agreement with her reasoning and conclusion that the appeal lacks merit. I too, dismiss the appeal. I abide by orders made by my learned brother, Adekeye, JSC, including order as to costs.