

**SUPREME COURT OF NIGERIA**

7TH MAY, 2010, SC. 238/2004

**CORAM:- N. TOBI, A. M. MUKHTAR, I. F. OGBUAGU,  
C. M. CHUKWUMA-ENEH, J. A. FABIYI, JJSC**

PADA CHABASAYA ..... APPELLANT  
AND  
JOE ANWASI ..... RESPONDENT

---

EVIDENCE - Proof - Piece of evidence - Probative value - Once it is relevant and not successfully challenged - It has probative value - And ought to influence the judge - In the determination of the case (H1)

CONTRACTS - Enforceability - Failure to furnish consideration - Effect - A party who fails to furnish agreed consideration - Cannot enforce the contract - Indeed the innocent party may sue him for breach (H2)

APPEALS - Issues - Exhibit 2 as contract under seal - Whether raised *suo motu* - Appellant is wrong to say that Court of Appeal raised that issue *suo motu* - For the record shows that it was respondent who raised it (H3)

COURTS - Pleadings - Binding nature of - A court is not permitted to go outside the pleadings and issues joined - But trial court did so in his determination of the case - When it held that exhibit 2 was a contract under seal (H4)

***FACTS***

The plaintiff/respondent sued defendant/appellant in the High Court of Kaduna State. The action was initially brought under the undefended list but was later transferred to the general cause list. Respondent's claim was for sundry reliefs by which he laid claim to the property in dispute - No. 10 Kudandan Road, Kaduna - as the owner thereof. It is undisputed that respondent originally owned the property with a corresponding certificate of occupancy (C of O) issued in his name. He later decided to sell the property whereupon appellant indicated interest to buy same, provided respondent would

cooperate with him to help him secure the purchase price as a loan from a bank on the security of the property. The purchase price was agreed at N35,000.00 and the parties prepared and signed a contract agreement to this effect - Exhibit 2. In pursuance of the terms of Exhibit 2, respondent gave a photocopy of his C of O to appellant who subsequently had the same converted to another C of O in his own name.

Nevertheless appellant failed to pay the purchase price or any sum at all, despite repeated demands. Moreover, he stepped into the premises and started collecting rents from tenants therein. On being served with statement of claim, appellant counterclaimed to the effect that he was the new owner of the property and that respondent was merely entitled to be paid the agreed purchase price. After hearing, learned trial judge *suo motu* considered and held that Exhibit 2 was a contract under seal and was binding as such notwithstanding failure of appellant to furnish the agreed consideration. Accordingly, he gave judgment to appellant on his counterclaim and dismissed respondent's claim. Aggrieved, respondent appealed to Court of Appeal which court allowed the appeal as it held that Exhibit 2 was a simple contract which had failed for lack of consideration from appellant. So it entered judgment for respondent instead. Dissatisfied, appellant has brought this appeal against the judgment of Court of Appeal.

### **ISSUES FOR DETERMINATION**

*“1. Whether the Court below was right by holding that the Appellant did not furnish consideration, to make the contract between him and the Respondent for the sale of the disputed property enforceable or valid.*

*2. Whether the learned justices of the Court of Appeal was (sic) wrong when they held thus “The stand taken by the learned counsel for the respondent on this issue (The issue whether the contract was a contract under seal) is misconceived. It was the trial judge who held that Exhibit 2 was contract under seal. If he had held otherwise he would not have entered judgment in favour of the respondent. The appellant is therefore right to have raised the issue because it arose from the judgment he is challenging.”*

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

### ***Proof - Piece of evidence - Probative value***

1. It is manifestly clear that the plaintiff was not shaken on the price of the house before and after the repair, and also on the non payment of the price and absence of consideration in the contract. The law is trite that evidence that is relevant to the issue in controversy, and that is not successfully challenged, contradicted, and discredited is good and reliable evidence to which probative value, ought to be ascribed and, which ought to influence the judge in the determination of the case before it. A plaintiff who adduces such reliable and credible evidence is bound to succeed in his case, as civil cases are decided on preponderance of evidence and balance of probability, as he who asserts must prove. (p. 1755 D/F)

### ***CONTRACTS - Enforceability - Failure to furnish consideration***

2. In this vein, the Court of Appeal was right when it held thus in its judgment:-

*“In our present case, the consideration is N35,000.00 which the respondent promised to pay to the appellant. He failed to fulfill the promise. The respondent is therefore in breach of the term of the contract. He has failed to furnish the consideration. My answer is that since the respondent has not furnished any consideration, he cannot enforce the contract against the appellant”*

As the consideration in this agreement has not been fulfilled, the defendant/appellant was in breach of the contract and the plaintiff/respondent had a legal right to sue the defendant for breach of Contract. (p. 1756 B/E)

### ***Exhibit 2 as contract under seal - Whether raised suo motu***

3. On issue (2) supra the learned counsel for the appellant has argued that since nowhere in the pleadings was the issue of Exhibit 2 being a contract under seal raised by the parties, and since parties are bound by their pleadings, the Court of Appeal was not right to raise as the first issue for determination, the following, “whether Exhibit 2 is a contract under seal”

Learned counsel referred to page 165 of the record of proceedings. I disagree that it was the Court of Appeal which raised the said issue, as it was the appellant (who is now the respondent) himself who raised the issue in his brief of argument, as can be seen on page 111

of the record of proceedings, where it was raised as issue (2). To give the impression that it was the lower court that raised the issue suo motu is misleading. Moreover, ground 3 of appeal, to which it was married, clearly complained against the finding of the trial court.

(p. 1756 G)

B

### ***COURTS - Pleadings - Binding nature of***

4. As to the pleadings being devoid of the facts of the issue raised, it is a fact that the law does not permit a court to go outside the pleadings and issues joined.

C

However, the trial court either not mindful of this position of the law, or in a deliberate action went out of its way and limitation to dabble on the issue or nature of the contract that was not actually in issue before it. This was definitely an unnecessary journey of adventure.

D The learned counsel for the appellant's submission that it was wrong for the court below to delve into that issue, was met with the submission that in a situation like this such judgment ought to be a nullity because the trial judge would have been seen to have abandoned his jurisdiction which is to adjudicate on the case made by the parties

E

before him. (p. 1758 A)

### ***NOTABLE POINT OF INTEREST***

#### ***MUKHTAR JSC***

##### ***1. A court need not treat issues chronologically***

F

On the other hand if the appellant's complaint is that the lower court made the issue the first issue to discuss, I would say the complaint and argument is baseless. An appellate court is at liberty to choose any of the issues raised in the brief to treat first. It is not constrained to

G

treat issues the way they are set out in the briefs of argument or in their chronological order. In fact the law permits an appellate court to ignore some or all issues raised in the briefs of argument and formulate its own issues, the way it deems them to be material once they are distilled from the grounds of appeal. (p. 1757 E)

H

### ***REPRESENTATION***

Mr. S. T. Ologunorisa for the Appellant.

Mr. Chris C. Eze for the Respondent.

### ***CASES REFERRED TO***

Elias v. Omo-Bare - (1982) 5 SC. 25

Adeniyi v. Adeniyi and Ors (1972) 4 SC

U.T.C. Ltd. v. Hauri 6 WACA 148 @ 151

Kalio v. Daniel Kalio (1975) 2 SC 15 at 21.

Udengwu v. Uzuegbu 2003 13 NWLR part 836 page 136

Biyo v. Mrs. Victoria Aku (1996) 1 NWLR (Pt. 422) 1 @ 38 B

Niger Construction Ltd v. Okugbeni (1987) 4 NWLR (Pt. 67) 787 at 792

Oguma Associated Co. (Nig) Ltd v. I.B.W.A. 1988 1 NWLR part 73

Madam Odusoga & anor. v. Ricketts (1997) 7 NWLR (Pt. 511) @ 97 C

Dunlop Neumatic Co. Ltd. v. Selfridge & Co. Ltd. (1915) A.C. 847 @ 851-855

### **LEAD JUDGMENT BY MUKHTAR JSC**

The respondent as a plaintiff in the High Court of Kaduna State instituted an action on the undefended list for the following reliefs:-

*“1. The Plaintiff claims against the Defendant is (sic) the sum of (N70,000.00) only being the agreed purchase price of premises situate at No. AL 10 Kudandan Street/Kigo Road, Nassarawa Village, Kaduna property of the Plaintiff which the Plaintiff assigned to the Defendant, which sum the Defendant has neglected and refused to pay despite repeated demands.*

*2. Interest at the rate of 21% per annum from 15<sup>th</sup> January 1991 till the date of Judgment and 10% per annum from the date of Judgment until the claim is totally liquidated. WHEREOF the Plaintiff claim the said seventy thousand Naira (N70,000.00) from the Defendant and interest thereon at the rate of 21% from 15/1/91 and 10% until the debt is totally liquidated by the Defendant.”* G

The defendant who is the appellant in this appeal filed a notice of intention to defend the suit, and the suit was transferred to the general cause list, whereby pleadings were exchanged. The plaintiff as the owner of landed property situate at No. AL 10 Kudandan Street also known as No. 36 Kigo Road, Nassarawa Village Kaduna covered by Certificate of Occupancy No. CHLG/B/000/194 gave the defendant three rooms in the property to occupy at the rent of N25 per month per room. The plaintiff later put the property in the market, initially at N35,000.00 and later increased it to N70,000.00 after H

some repairs were carried out. The defendant had offered to purchase the house, and after the increase the plaintiff informed him of the increase. A new agreement reflecting the new price was signed by both parties. Whilst the defendant was sourcing for the funds to pay, the plaintiff gave consent to the Land Registry to process a new certificate of occupancy for the defendant. Unknown to the plaintiff, the defendant connived with the Land Registry Authorities to procure another certificate of occupancy of the property and started collecting rent from some tenants even though he had not paid anything for it. In his statement of claim the plaintiff claimed as follows:-

“(i) A DECLARATION that the plaintiff is still the owner of the property situated and being at NO. AL 10 Kudandan Road Alias NO. 36 Kigo Road Nassarawa Village Kaduna. Covered by Certificate of Occupancy NO. CHLG/B/000/194.

(ii) A DECLARATION that the Certificate of Occupancy purportedly procured by the Defendant in respect of the said property is null and void and of no effect whatsoever.

(iii) AN ORDER restraining the Defendant from parading himself as the landlord of the said premises.

(iv) AN ORDER directing the Defendant to pay to the plaintiff arrears of Rent of the two (2) Rooms occupied by the Defendant from March 1991 at the Rate of N25.00 per room until the date of his vacation from the said premises.

(v) AN ACCOUNT of all monies collected by the Defendant in the said premises while parading himself as the Landlord from the said four tenants at N25.00 per room from March 1991 to 16/1/92 and thereafter until the final determination of this Suit.”

The defendant stated that he and the plaintiff signed an agreement dated 12/3/90, whereof the plaintiff agreed to co-operate with the defendant to obtain loan from the Federal Mortgage Bank for the purchase of the plaintiff's house and towards this the plaintiff gave him his Local Government Certificate of Occupancy No. CHLG/3/000/94 for conversion. According to the defendant it was he who renovated the premises, and there was no other agreement dated 15/1/91 between them. A new certificate of occupancy No. 17828 was issued to the defendant on the said property after the conversion. However, the defendant admitted in his statement of defence that he had not paid anything to the plaintiff in respect of the sale of

the house, as the Federal Mortgage Bank refused to give him the loan. Upon that the defendant counter claimed against the plaintiff as follows:-

*“(1) In COUNTER-CLAIM against the Plaintiff, the Defendant repeats all the averments contained in paragraph 1-21 of the statement of defence and they are hereby adopted as part of this counter-claim.* B

*(2) With reference to paragraph 14 of the statement of defence, the Defendant will aver at the hearing that by reason of the said publication the Defendant had been injured in his credit character and reputation, and had been brought into public scandal, hatred, ridicule and contempt.* C

*(3) Further to the above, the Defendant avers that by the words contained in the said letter and the public notice the plaintiff meant and was understood to mean:- (1) That the Defendant is a thief rogue and a fraudulent person popularly known as “419”* D

*(2) That the Defendant had fraudulently deceived the Governor of Kaduna State into granting him a certificate of occupancy over the property in dispute in this case.*

*(3) That the Defendant had been guilty of dishonest and dishonourable conduct.* E

*(4) That the Defendant was an unfit person to be associated with*

*(4) (Sic) On the premises of the above, the Defendant has suffered severe damages.* F

*(5) WHEREUPON the Defendant claims against the Plaintiff as follows:-*

*(A) A DECLARATION that the Defendant is the rightful owner and the holder of the right of occupancy over the property situate and known as No. 36 Kigo Road, Nassarawa Village, Kaduna.* G

*(B) AN ORDER of perpetual injunction restraining the plaintiff or his agents, servants from committing any act of trespass on the premises situate at No. 36 Kigo Road, Nassarawa Village, Kaduna, AL 10 Kadanda Street, Nassarawa Village, Kaduna.* H

*(C) AN ORDER holding that the sale agreement between the Plaintiff and the Defendant dated the 12/2/90 is valid and subsisting.*

*(D) A DECLARATION that the Plaintiff is only entitle (sic) to*

*the sum of thirty-five thousand (N35,000.00) being the consideration for the sale and purchase of the said property less the sum of 12,220.00 (twelve thousand, two hundred and twenty-two Naira), that had been collected by him as rent on the said property.*

(E) *AN ORDER of perpetual injunction restraining the Plaintiff from further publishing any other defamatory statement against the Defendant.*

(F) *The sum of fifty thousand (N50,000.00) as damages for defamation and costs."*

The evidence adduced by both parties were evaluated by the learned trial judge who at the end of the day dismissed the plaintiff's claim, and entered judgment in favour of the defendant in his counter-claim. Dissatisfied with the judgment, the defendant appealed to the Court of Appeal, Kaduna division, and the court found merit in the appeal, allowed it and granted his claims.

The defendant was aggrieved by the decision and appealed to this court on four grounds of appeal. As is the practice in this court and in accordance with the rules of court both appellant and respondent exchanged briefs of argument, which were adopted at the hearing of the appeal. Two issues for determination were formulated in the appellant's brief of argument. They are:-

"1. *Whether the Court below was right by holding that the Appellant did not furnish consideration, to make the contract between him and the Respondent for the sale of the disputed property enforceable or valid.*

2. *Whether the learned justices of the Court of Appeal was (sic) wrong when they held thus "The stand taken by the learned counsel for the respondent on this issue (The issue whether the contract was a contract under seal) is misconceived. It was the trial judge who held that Exhibit 2 was contract under seal. If he had held otherwise he would not have entered judgment in favour of the respondent. The appellant is therefore right to have raised the issue because it arose from the judgment he is challenging."*

The respondent also formulated two issues for determination but I will adopt the issues in the appellant's brief of argument for the treatment of this appeal. In canvassing argument under issue (1) the learned counsel for the appellant has submitted that the important issue before the lower court was not whether Exhibit 2 was a

contract under seal, but whether the court was right in view of the terms of the agreement between the parties, he referred to the following paragraphs of the statement of claim and defence which are:-

*“9. It happened that the Plaintiff who had now retired from the said Civil Service had decided to sell the said property.*

*10. The Defendant whom the Plaintiff has now taken as a close friend came to know about this and offered to purchase the house.*

*11. Initially the Plaintiff had agreed to sell the said property to the Defendant for the sum of thirty five thousand naira (N35,000.00). The Plaintiff shall rely on document signed by the Plaintiff and Defendant on 12/3/90 in that behalf.*

*15. All this while the plaintiff had taken the Defendant as genuine purchaser who genuinely wanted the plaintiff's assistance towards securing Loan from (sic) Bank to enable him to pay for the house.*

*16. Still thinking that the Defendant was a genuine purchaser the plaintiff had at the Defendant's request given consent to the Land Registry to process the Defendant (sic) documents for a new Certificate of Occupancy which the Defendant falsely represented was necessary to procure the said Loan from the Bank.”*

Statement of Defence:-

*“(5) (a) The Plaintiff approached the Defendant for the sale of the house in dispute in this case in the early month of 1990.*

*(b) The Defendant told the Plaintiff that he had not got money, but if he knows that he could wait until the loan he was processing with the Federal Mortgage Bank Ltd. materialized, then he would buy.*

*(c) The Plaintiff agreed to this proposal, hence the property which should normally sale for eighteen thousand Naira (N18,000.00) because the Defendant did not have immediate cash to pay.*

*(d) That as a result, on the 12/3/90, the parties entered into a written agreement wherein the property was sold to the Defendant.*

*(e) The Plaintiff thereafter agreed to co-operate with the Defendant in obtaining the loan from the Federal Mortgage Bank, to this end he had given the Local Government Certificate of Occupancy No. CHLG/3/000/94 to the Defendant for conversion, so that*

*it would be acceptable by the bank. Apart from this, the Plaintiff also informed the world in writing; that he had sold the house to Defendant."*

In reply to the above submissions, the learned counsel for the respondent has submitted that the Court of Appeal was perfectly right when it held that the appellant did not furnish consideration to make the contract between him and the respondent i.e Exhibit 2 enforceable or binding against the respondent. In order to do justice to the argument, I will have to consider the supporting pieces of evidence adduced by the parties, starting with that of the plaintiff. The plaintiff's evidence reads in part thus:-

*"The Defendant who was living close to me approached me to buy the house. I agreed to sell the house to the Defendant in 1990. He told me he had no enough money to buy the house and asked me to assist him to obtain a bank loan to pay for the house. In April, 1990 the Defendant came to see me in the company of his friend and told me that a storm had blown off the roof of his house and he wanted to move into the house. I allowed the Defendant to move into the house I gave him 2 rooms initially. He was paying rents for the 2 rooms. He approached me again and I gave him another 2 rooms. The defendant paid N25.00 per room per month. I issued receipts to him. In January, 1990 I and the Defendant entered into an agreement for the sale of the house to him at N35,000.00....."*

*The Defendant requested me to give him a photocopy of the C. of O. Exhibit 1 and I gave him to enable him obtain a loan from the bank. After about 2 months I asked the Defendant the progress made at the bank with regards to securing the loan and he said all was going fine. Instead of using the photocopy of Exhibit 1 to obtain the loan the Defendant used it to obtain another C. of O. from the State Government I went to the Ministry of Land and Survey where I confirmed that the Defendant had been issued a C. of O. in respect of the disputed property in his own name and a photocopy of same was given to me....."*

*When the Defendant could not pay me the N35,000.00 I informed him I was going to repair the house.....  
After the repairs the Defendant maintained that he was still interested in the house. I told him I could not sell the house to him at the old*

*price since I have effected some repairs in the house. He agreed and we agreed on a new price of N70,000.00. The defendant has not paid the N70,000.00 up to now. The new agreement for the sale of the house at N70,000.00 was reduced to writing and I signed same and the Defendant also signed.”*

Under cross-examination the plaintiff testified thus:-

*“The price for the house was to be paid after the loan had been obtained ..... I issued document dated 15/1/91 authorising the Defendant to take all steps necessary to procure a loan from the bank. I was prepared to allow the Defendant to procure a loan before payment for the house until after the repairs, I effected in the house. All the documents I gave the Defendant were for him to secure a loan from the bank and not to obtain conversion of the C. of O. from the Ministry of Lands and Survey. I published a notice denouncing the claim of the Defendant to the house.”*

***It is manifestly clear that the plaintiff was not shaken on the price of the house before and after the repair, and also on the non payment of the price and absence of consideration in the contract. The law is trite that evidence that is relevant to the issue in controversy, and that is not successfully challenged, contradicted, and discredited is good and reliable evidence to which probative value, ought to be ascribed and, which ought to influence the judge in the determination of the case before it.*** (See Omoregbe v. Lawani 1980 3-4 SC 105, Oguma Associated Co. (Nig) Ltd v. I.B.W.A. 1988 1 NWLR part 73, page 638, Nwabuoku v. Otti (1961) SCNLR page 233, and A. G. Lagos State v. Purification Tech. (Nig.) Ltd 2003 1 6 NWLR part 85.

***A plaintiff who adduces such reliable and credible evidence is bound to succeed in his case, as civil cases are decided on preponderance of evidence and balance of probability, as he who asserts must prove.*** See Elias v. Omo-Bare -(1982) 5 SC. 25, Woluchem v. Gudi 1981 5 SC. 291, Odulaja v. Haddad 1973 11 SC 357, and George v. U.B.A. 1972 8 - 9 SC 264.

With the above reproduced pieces of evidence the plaintiff/respondent has satisfied and met the above principles of law, most especially when viewed against the back drop of the evidence of the defendant/appellant, which reinforced the said reproduced evidence supra. The relevant evidence of the defendant read as follows:-

*"I did not pay the Plaintiff the purchase price as I had told him from the word go that I had no money and he promised to assist me to secure a loan from the bank."*

There is no gain saying that the plaintiff proved his case on preponderance of evidence and balance of probabilities required by law, and the defendant has not been able to dislodge the plaintiff's case, but rather has supported the plaintiff's case on the lack of the payment of the consideration of the alleged contract in dispute.

***In this vein, the Court of Appeal was right when it held thus in its judgment:-***

***"In our present case, the consideration is N35,000.00 which the respondent promised to pay to the appellant. He failed to fulfill the promise. The respondent is therefore in breach of the term of the contract. He has failed to furnish the consideration. My answer is that since the respondent has not furnished any consideration, he cannot enforce the contract against the appellant"***

A contract in which consideration has not been met is one that can be said has been breached and is unenforceable as consideration is one of the terms of the contract. This fact has been supported by evidence of both sides as stated above. ***As the consideration in this agreement has not been fulfilled, the defendant/appellant was in breach of the contract and the plaintiff/respondent had a legal right to sue the defendant for breach of Contract.*** See Pan Bisbilder (Nigeria) Limited v. First Bank of Nigeria Limited 2000 1 NWLR part 642 page 684.

The court below was therefore right when in its lead judgment it held the above.

In the circumstances I resolve issue (1) supra in favour of the respondent, and I dismiss the related ground of appeal. ***On issue (2) supra the learned counsel for the appellant has argued that since nowhere in the pleadings was the issue of Exhibit 2 being a contract under seal raised by the parties, and since parties are bound by their pleadings, the Court of Appeal was not right to raise as the first issue for determination, the following, "whether Exhibit 2 is a contract under seal"***

***Learned counsel referred to page 165 of the record of proceedings. I disagree that it was the Court of Appeal which***

**raised the said issue, as it was the appellant (who is now the respondent) himself who raised the issue in his brief of argument, as can be seen on page 111 of the record of proceedings, where it was raised as issue (2). To give the impression that it was the lower court that raised the issue suo motu is misleading. Moreover, ground 3 of appeal, to which it was married, clearly complained against the finding of the trial court.** The said ground of appeal in the Court of Appeal reads:-

*“Ground 3*

*The learned trial Judge erred in law when he held that the Exh. 2 and the entire circumstances amounted to an Agreement under Seal which did not require consideration before it could be enforceable and therefore came to a wrong decision in Law.*

**PARTICULARS OF ERROR**

*(a) The Agreement between the appellant and the Respondent Exh. 2 is clearly not an agreement under seal and therefore consideration must move from the promise i.e the respondent before it can be enforceable in favour of the respondent against the appellant.*

*(b) Exh. 2 cannot be elevated under any guise or colour from a simple contract into an agreement under Seal.”*

On the other hand if the appellant’s complaint is that the lower court made the issue the first issue to discuss, I would say the complaint and argument is baseless. An appellate court is at liberty to choose any of the issues raised in the brief to treat first. It is not constrained to treat issues the way they are set out in the briefs of argument or in their chronological order. In fact the law permits an appellate court to ignore some or all issues raised in the briefs of argument and formulate its own issues, the way it deems them to be material once they are distilled from the grounds of appeal. See *Opara v. D.S. (Nig.) Ltd.* 1995 4 NWLR part 390 page 440, *Bankole v. Pelu* 1991 8 NWLR part 211 page 523, and *Uko v. Mbaba* 2001 4 NWLR part 704 page 460.

In reply to the supra submission of the learned counsel for the appellant, the learned counsel for the respondent has submitted that the Court of Appeal was perfectly right when it identified the issue as its first issue for determination. I subscribe to this submission, and I have already given my answer in the discussion above.

***As to the pleadings being devoid of the facts of the issue raised, it is a fact that the law does not permit a court to go outside the pleadings and issues joined.*** See the cases of Udengwu v. Uzuegbu 2003 13 NWLR part 836 page 136, and F.A.T.B. Ltd v. Partnership Investment Co. Ltd. (2003) 18 NWLR part 851 page 35  
 B cited by the learned counsel for the appellant. ***However, the trial court either not mindful of this position of the law, or in a deliberate action went out of its way and limitation to dabble on the issue or nature of the contract that was not actually in issue before it. This was definitely an unnecessary journey of adventure. The learned counsel for the appellant's submission that it was wrong for the court below to delve into that issue, was met with the submission that in a situation like this such judgment ought to be a nullity because the trial judge would***  
 C ***have been seen to have abandoned his jurisdiction which is to adjudicate on the case made by the parties before him.*** See the case of Adeniyi v. Adeniyi and Ors (1972) 4 SC. 10 cited by learned counsel.  
 D

It is ironic that the learned counsel for the appellant would in  
 E his brief of argument rely on the case of African Continental Seaways Ltd v. Nigerian Dredging Road and General Works Ltd. 1977 5 SC 235, from which he reproduced the following excerpt of the judgment:-

*"The court itself is much bound by the pleadings of the parties as they are by themselves. It is not part of the duty or function of the court to enter upon any inquiry with the case before it other than to adjudicate upon specific matters in dispute, which the parties themselves have raised by their pleadings. Indeed the court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties"*  
 F  
 G

I find it ironic in that it is like the appellant has in fact shopped for an authority to support the respondent's appeal, as the above reproductions is apposite and reinforces the merit in the complaint of  
 H the respondent in the lower court, and by extension assists him in this appeal. The court below did not go outside its jurisdiction to deal and treat the issue of the contract being under seal or not. It was the appellant (who is now the respondent) who made it a ground of appeal, and in the circumstance the court below was constrained to

consider the argument canvassed in respect of the issue for determination distilled from the ground, and to pronounce on it. On the contrary it was the trial court that went on a wild goose chase.

At any rate the complaint of the respondent, as appellant in the court below was premised on a decision of the trial court, which he was at liberty to attack as an appellant that was aggrieved by any decision of a court can and is allowed to challenge such decisions. B

The appellant in the court below was quite in order to have made his grievance and complaint a ground of appeal, as the law does not frown on it. In the light of the above discussions I resolve this second issue in favour of the respondent. The first issue having also been resolved in favour of the respondent, the grounds of appeal in this appeal have no substance and merit, so they fail and are hereby dismissed. The end result is that the appeal fails in its totality and it is hereby dismissed. I affirm the decision of the Court of Appeal, Kaduna Division, and give judgment to the plaintiff/respondent. I award costs of N50,000.00 to the respondent against the appellant. C D

---

***TOBI JSC***

I have read the judgment of my learned brother Mukhtar, JSC and I agree with her reasoning and conclusion that this appeal should be dismissed. I hereby affirm the judgment of the Court of Appeal and give judgment to the plaintiff/respondent. I also award N50,000.00 costs in favour of the respondent. E F

---

***OGBUAGU JSC***

This is an appeal against the Judgment of the Court of Appeal, Kaduna Division (hereinafter called “the court below”) delivered on 27<sup>th</sup> January, 2000, allowing the appeal of the Respondent and setting aside, the judgment of the trial court - per Mallam J. delivered on 5<sup>th</sup> February, 1996, wherein, he granted the relief in the Appellant’s counter-claim except part of claim (d) therein. G

Dissatisfied with the said judgment, the Appellant, has appealed to this Court on (4) four grounds of appeal with leave of the court below, to argue grounds two and three which are of mixed law and fact. He has formulated two (2) of issues for determination, namely- H

*"1. Whether the court below was right by holding that the Appellant did not furnish consideration, to make the contract between him and the Respondent for the sale of the disputed property enforceable or valid (Grounds 2, 3 and 4).*

*2. Whether having regard to the state of pleading in the matter the court below was right in entering upon an enquiry into whether Exhibit 2 was a contract under seal or not Ground 1)".*

On his part, the Respondent, has also formulated two (2) issues for determination. They read as follows:

*"1. Whether the Court of Appeal was WRONG by holding that for the appellant to enforce the contract Exhibit 2 against the respondent, there must be consideration which must MOVE from the appellant to the respondent.*

*2. Whether the learned Justices of the court of appeal was (sic) wrong when the (sic) held thus:*

*"The stand taken by the learned counsel for the respondent on this issue (The issue whether the contract was a contract under seal) is misconceived. It was the trial judge who held that Exhibit 2 was a contract under seal. It was the kernel of his decision because he based his decision on it. If he had held otherwise he would not have entered judgment in favour of the respondent. The appellant is therefore right to have raised the issue because it arose from the judgment he is challenging".*

This is a very unfortunate and despicable case or matter, which depicts in a very sad way, the attitude of some human beings or mortals. It is a pity. The facts of this case leading to the instant appeal, is very short, clear and unambiguous. The Respondent is the undisputed owner of the property or house containing twenty seven (27) rooms occupied by tenants and which is situate at No. 10 Kudandan Street, Nasarawa, Kaduna. The Respondent decided to sell the house when he was transferred from Kaduna to Katsina and informed the Appellant, who was a friend of the family and a co-teacher in the same elementary school in Nasarawa, Kaduna with the wife of the Respondent. The Appellant, agreed to buy the house, but told the Respondent he had no money at that time to pay. The parties agreed on the selling price of N35,000.00 (thirty-five thousand naira) and prepared and signed, Exhibit 2 with their witnesses and which is, the contract of Agreement.

At the instance of the Appellant, the Respondent, promised to assist and in fact, assisted the Appellant in his effort or bid, to obtain a loan from the Bank to enable him pay for the property but was unsuccessful.

I note that Exhibits contained the following clause:

*"I THE SELLER AGREE THAT I WILL NEVER CLAIM BACK THE HOUSE AS SOON I RECEIVE THE MONEY AND THE BUYER WILL NOT DEMAND BACK HIS MONEY AS WELL".* <sup>B</sup>

After several demands by the Respondent to the Appellant to pay but to no avail, the Respondent, in the circumstances, instituted the action in the State High Court. <sup>C</sup>

In paragraph 27 of his Statement of Claim, the Respondent claimed as follows:

*(i) A DECLARATION that the plaintiff is still the owner of the property situated and being at No. AL 10 Kudandan Road Alias No. D 36 Kigo Road Nassarawa Village Kaduna covered by Certificate of Occupancy No. CHLG/B/000/194.*

*(ii) DECLARATION that the Certificate of Occupancy purportedly procured by the Defendant in respect of the said property is null and void and of no effect whatsoever.* <sup>E</sup>

*(iii) AN ORDER Restraining the Defendant from parading himself as the Landlord of the said premises.*

*(iv) AN ORDER Directing the Defendant to pay to the plaintiff arrears of Rent of the two (2) Rooms occupied by the Defendant from March 1991 at the Rate of N25.00 per room until the date of his vacation from the said premises .* <sup>F</sup>

*(v) An ACCOUNT of all monies collected by the Defendant in the said premises while parading himself as the Landlord from the said four tenants at N25.00 per room from March 1991 to 16/1/92 and thereafter until the final determination of this Suit".* <sup>G</sup>

When this appeal came up for hearing on 16 February, 2010, both learned counsel for the parties, adopted their respective Brief. While Ologunorisa, Esq. - the learned counsel for the Appellant, urged the Court to allow the appeal. Eze Esq. - learned counsel for the Respondent, urged the Court to dismiss the same. Thereafter, Judgment was reserved till to-day. <sup>H</sup>

Ironically, the Appellant who filed a Statement of Defence, also counter-claim. I will not bother myself reproducing the counter-claim,

as that is not the issue in this Court. I note that at page 54 of the Records, the learned trial judge, stated inter alia, as follows:

“The learned counsel for the Plaintiff contended that the sale agreement exhibit 2 could not amount to a valid contract of sale between the Plaintiff and the defendant because the Defendant has not furnished any consideration. Exhibit 2 is like a conveyance and the contract between the parties was a contract under seal which derived its validity not from the fact that the agreement or the consideration to be furnished but from the mere form of its making i.e. an agreement under seal. In other words the Defendant did not need to furnish any consideration to exhibit 2 before it could become valid. The contract was valid from the date of its making or execution. What remained was for the parties to carry out the terms of the contract agreement. A contract is a contract from the time it is made and not from the time performance of the contract is due. See the case of HOCHESTER VS. DELATOUR (1853) 2 E & B page 678. It is my view that a proper and reasonable construction of Exhibits 2 and D1 would reveal that the parties had concluded the contract between them and what only remained was the payment of the contract price.....”  
[the underlining mine]

It could be seen that it was the learned trial judge, who suo motu in his said judgment, held the fact of the contract being under seal. This was without the parties, addressing him and this failure to call for address is deprecated by this court. Because the learned counsel for the Appellant at the court below had urged the court to strike out the issue because according to him, it was not pleaded, the court below at page 166 of Records, stated as follows:

“The stand taken by the counsel for the respondent on this issue is misconceived. It was the trial judge who held that Exhibit 2 was a contract under seal. It was the kernel of his decision because he based his decision on it. If he has (sic) held otherwise, he would not have entered judgment in favour of the respondent....”.

It then dealt with what a contract under seal, means or postulates. It stated that for a contract under seal to be valid, it must be in writing and must be SIGNED, SEALED AND DELIVERED. It then considered Exhibit 2 and after reproducing its contents, it found as a fact and held firstly, that the Agreement, is not a contract under seal

simply because, none of the parties, affixed his seal to the agreement. That the trial judge, was clearly in error when he held that it was an agreement under seal.

Secondly, whether Exhibits 2, is a valid contract which could be enforced. It dealt with the contentions of the learned counsel for the Respondent who submitted that since the Appellant, did not furnish any consideration, the Agreement could not be enforced citing and relying on the cases of *U.T.C. Ltd. v. Hauri* 6 WACA 148 @ 151; *Dunlop Neumatic Co. Ltd. v. Selfridge & Co. Ltd.* (1915) A.C. 847 @ 851-855 and *Yaunia v. Rasheed Chidials* (1970) 1 All NLR. 188.

It noted that the Learned Counsel for the Appellant on the other hand, submitted that Exhibit 2 is a valid and subsisting agreement between the parties. That is satisfied all the conditions necessary in a memorandum of sale under the provision of section 84 of the Statute of Frauds 1884 citing and relying on the case of *Rosenje v. Bakare* (1973) ALL NLR 459. That Exhibit 2 contained the consideration to be given and that the consideration was executory and valid. That Exhibit 2, had satisfied all the requirements of a valid contract and as such, is binding on all the parties. Surely, with the above concession by the Appellant's learned counsel, this should have been the end of this appeal. I so hold.

The court below stated the elements of a valid contract which are, offer, acceptance, consideration and an intention to enter into legal relations. That for a simple contract to be binding, there must be consideration which must be consideration which must move from the promisee. It referred to Dunlop's case (supra) which is also reported in (1914-15) All E.R. 333 @ 334 and the pronouncement of Viscount Haldane, L.C. which it reproduced. It referred to the definition of consideration in the case of *Currie v. Misa* (1875) L.R. 10 Exhibit 153 @ 162 which it also reproduced, it found as a fact that the Appellant, failed to pay the said purchase price of N35,000.00 (thirty-five thousand naira) and therefore, was in breach of the term of the contract by his failure to furnish the said consideration. It then held that since the Appellant had not furnished any consideration, he could not enforce the contract against the Respondent. I completely agree. See also the cases of *Attorney-General, Kaduna State & ors. v. Attah & ors.* (1986) 4 NWLR (pt.38) 785; and *Biyo v. Mrs. Victoria Aku* (1996) 1 NWLR (Pt. 422) 1 @ 38.

It also noted that in a dispute over sale of land, it has been held that to constitute a valid sale of land, three essential ingredients are required, namely;

*“1. Payment of the purchase price.*

*2. Purchaser is let into possession by the vendor and*

B *3. In the presence of witnesses”.*

It referred to the cases of Cole v. Folani (1956) SCNLR 180; (it is also reported in (1956) 1 FSC 66; Ogumbabi v. Abowab (1951) 13 WACA 222 and Akingbade v. Elemosho (1964) 1 All NLR 154. See also the cases Oloto v. Administrator-General (1946) 12 WACA C 76 and Odufuye v. Fatoye (1977) 4 S.C. 11 and Ashaye v. Akerele (1968) NMLR 190.

It referred to the case of Madam Odusoga & anor. v. Ricketts (1997) 7 NWLR (Pt. 511) @ 97 (it is also reported in (1997) SCNJ. D 1 - per Ogundare, JSC. (of blessed memory). It referred to the case of Mayson v. Clout (1924) A.C 980 as to the option of a vendor who has not been paid the purchase price and that is that he may still treat the contract as existing and then, sue for specific performance or he may elect to hold the contract at an end i.e. no longer binding on E him. Of course, that is the settled law.

It finally held that the Appellant had failed to pay the purchase price, and that the Respondent, is/was entitled to rescind the contract. I also agree. See also Salami's (JCA) now President/concurring Judgment at page 175 of the Records thus:

F *“In the instant appeal it is common ground there was no consideration tendered by the Respondent. The respondent does not dispute that he had not paid in spite of repealed demand. I am therefore of the view that the appellant is entitled to resile from the sale and resell the properly or convert it to am other use”.* G

This is the truth. He who comes to equity, must come with clean hands as the saying goes. The Appellant's hands are soiled. I so hold.

H Honestly, with the said concession aforesaid and the issues of the Appellant in this Court, in my respectful view, having regard also to the findings of facts and holdings of the court below, this appeal, is a gross abuse of the process of this Court. Although an Appellant has the constitutional right to appeal where he is genuinely aggrieved, but where a learned counsel knows and ought to know that their

appeal, has not the remotest chance of success as in the instant case, there is no harm in his throwing in the towel so to speak or say more so, as he is also a Minister in the temple of justice. Certainly, Exhibit 2, is a simple contract, that is binding on the parties who, with their eyes open, signed it in the presence of their witnesses. Afterwards, the parties are very literate. I will refrain from comments on what the Appellant has done to his hitherto cordial relationship with the Respondent in this matter. I will leave him to battle with his conscience, which I believe he has. My answers therefore, to the two issues of the Appellant, are in the Affirmative/Positive while my answers to the two issues of the Respondent are in the Negative.

I have had the privilege of reading before now, the fuller lead Judgment or my learned brother, Mukhtar, JSC just read and delivered and with which I entirely agree. This appeal I also hold, is unmeritorious and it fails abysmally. I too, dismiss it. Costs follow the event. I too, award N50,000.00 (fifty thousand naira) costs in favour of the Respondent.

---

**CHUKWUMA-ENEH JSC**

I have had the advantage of reading in draft the judgment prepared by my learned brother Mukhtar, JSC. The appeal is so totally without any merit whatsoever that I have no hesitation in agreeing that it should be dismissed.

And I so dismiss it with costs as stated in the lead judgment.

---

**FABIYI JSC**

I have had a preview of the judgment just delivered by my learned brother, Mukhtar, JSC. I agree with the reasons advanced to arrive at the conclusion that the appeal is devoid of merit and should be dismissed.

I wish to chip in a few words of my own. Vide Exhibit 2, the respondent herein agreed to sell his house to the appellant at the price of N35,000.00 (Thirty Thousand Naira Only). None of the parties pleaded that the agreement was one made under seal. The learned trial judge, on his own volition, strangely imported the idea that it was under seal. It was not under seal since none of the parties affixed his seal to Exhibit 2. As far as the parties were concerned, they treated

Exhibit 2 as simple contract of sale between them.

It is not the business of a court to set up for the parties a case which is different from the one set up by the parties themselves as done by the trial judge. See: *Oniah v. Onyiah* (1989) 1 NWLR (Pt. 99) 514; *Ojo-Osagie v. Adonri* (1994) 6 NWLR (Pt. 349) 131.

B It is also clear that parties and the court are bound by the pleadings before the court. Evidence which is at variance must be disregarded. See: *Emegokwe v. Okadigbo* (1973) All NLR 314, 317; *NIPC v. Thompson Organisation* (1969) ALL NLR 134; *Kalio v. Daniel Kalio* (1975) 2 SC 15 at 21.

C The contract between the parties to wit: Exhibit 2 is a simple contract which demands offer, acceptance and consideration. Perhaps one should remind the appellant that consideration has been defined in *Black's Law Dictionary*, Sixth Edition at page 306 as 'the inducement to a contract, a basic, necessary element for the existence of a valid contract that is legally binding on the parties'.

The appellant agreed that he did not pay the agreed price for the house as contained in Exhibit 2. Since there was failure of consideration on the part of the appellant, the respondent was entitled to rescind the agreement and resume possession of his property. See: *Odunuga v. Ricketts* (1997) 7 NWLR (Pt. 511) 1.

F Despite the fact that the appellant did not pay the agreed price for the sale of the house, his counsel embarked upon alluring address in his bid to tilt the truth and reality of the matter. He should realise that addresses are designed to assist the court. No amount of brilliance in a fine speech can make up for the lack of evidence to prove and establish or else disprove and demolish a salient point in issue. See: *Niger Construction Ltd v. Okugbeni* (1987) 4 NWLR (Pt. 67) 787 at 792; *Obodo v. Olumo & Anor* (1987) 3 NWLR 111 at 123.

H It is for the above reasons and more especially the fuller ones contained in the lead judgment that I too, feel that this appeal is devoid of merit. It is hereby dismissed by me. I endorse all the consequential orders contained in the lead judgment, that relating to costs inclusive.