

**SUPREME COURT OF NIGERIA**  
10TH FEBRUARY, 2012. SC. 112/2002  
CORAM:- **W. S. N. ONNOGHEN, J. A. FABIYI, O. O.**  
**ADEKEYE, B. RHODES-VIVOUR,**  
**M. U. PETER-ODILI, JJSC**

1. MILITARY GOVERNOR  
OF LAGOS STATE  
2. THE ATTORNEY-GENERAL  
OF LAGOS STATE  
3. THE DIRECTOR OF TOWN  
PLANNING & LAND MATTERS ..... APPELLANTS  
4. LAND USE AND  
ALLOCATION COMMITTEE  
5. SAMUEL OLATUNDE SMITH  
AND  
1. ADEBAYO ADEYIGA  
2. ALHAJI T.O. ASHIRU  
3. EKUNDAYO KUPONIYI  
4. ALHAJI SIKIRU ADEYIGA ..... RESPONDENTS  
5. MOSES ADEWUNMI  
ADEKOYA  
6. SAMUEL ONATEMOWO  
7. PHILIPS OGUNBANWO  
(Suing for themselves and on  
behalf of other members of  
Shangisha Landlords Association as  
per order of court dated 21st  
November, 1988)

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WORDS & PHRASES - Statutes - Interpretation - High Court Rules  
of Lagos State O. 48 r. 5(1) - The word “or” denotes an alternative  
and not similarity (H1)

FAIR HEARING - Principles - Basis - 1999 Constitution s. 36(1) -  
Fair hearing is conducting of trial - According to legal rules formul-  
ated - To ensure that justice is done to parties (H2)

**840** Military Gov. Lagos State v. Adeyiga (2012) 2 KLR (pt. 307)

FAIR HEARING - Breach - Adjournments - Where opportunity to present case was granted - But appellants failed to utilize it - They cannot be heard to complain of denial of fair hearing (H3)

APPEALS - Fair hearing - Breach - Adjournments - Counsel that treated a procedure as regular before trial court - Cannot be heard to object to same on appeal (H4)

APPEALS - Record of appeal - Judicial notice of - Judges are permitted to glean through the records - In order to do substantial justice in appeal (H5)

TRESPASS - Basis - Trespass to land is actionable - At the suit of person in possession of the land (H6)

EVIDENCE - Evaluation - Trial court evaluates and assigns probative value to evidence - And appellate court does not interfere - Save where evaluation was improper (H7)

EVIDENCE - Unchallenged evidence - Effect - Such evidence is accepted as proof of fact it seeks to establish - And court is to rely on same (H8)

ESTOPPEL - Estoppel by conduct - Applicability - The State Government is estopped - To resile from representation made in Exhibit P25 (H9)

COURTS - Injunctions - Mandatory injunction - Grant of - Where injury done to plaintiff cannot be compensated by damages - Court can invoke its equitable jurisdiction and discretion - To grant the injunction (H10)

COURTS - Discretion - Exercise of - Appellate court does not interfere with discretion of trial judges - Save where same was done arbitrary (H11)

APPEALS - Concurrent findings - Supreme Court does not interfere - Save where the findings are perverse (H12)

### **FACTS**

Plaintiffs/respondents (representatives of Shangisha Landlords' Association) commenced this action against 1<sup>st</sup> - 4th defendants/appellants at the High Court of Lagos State, Ikeja. 5th defendant/respondent - Samuel Olatunde Smith was enlisted in the matter pursuant to leave granted by the court. Respondents claimed compensation for their houses that were demolished by appellants. Respondents contended that appellants did not serve any contravention or demolition notice on them prior to the demolition of their houses at Shangisha village. Subsequently, a panel was set up by then Governor of the State to inquire into the complaints about the demolition. Respondents submitted that there was no positive outcome from the panel.

On the other hand, appellants claimed that Shangisha village is a part of 7,300 acres of land compulsorily acquired by the State Government. Appellants stated further that respondents were not physically on the land at the time of the acquisition. They submitted that respondents were squatters on the said land. Appellants also claimed that contravention and demolition notices were duly served on the affected houses before the demolition was carried out. In order to give the matter the urgency it needed, the learned trial judge in agreement with both parties, decided to sit during the period of Christmas vacation. In its judgment, the court found in favour of respondents and gave an order of mandatory injunction directing the government to take necessary steps in ensuring justice to respondents. Being dissatisfied, appellants filed an appeal at the Court of Appeal, Lagos Division contending against the procedure adopted by the trial judge. The court upheld the decision of trial court and dismissed the appeal. Aggrieved further, appellants appealed to Supreme Court.

### **ISSUES FOR DETERMINATION**

1. Whether the court below was right when it held that it was not necessary for any of the parties to bring an application by way of summons for urgent hearing of the case during the court's Christmas vacation and particularly for the proceedings dated 29th and 31st of December 1993.

2. Whether there was any oral application made by Chief A.O.

Adefila of counsel to the plaintiffs/respondents that the case be heard urgently and during the courts Christmas vacation.

3. Whether the court was right in confirming the decision of the trial court that the defendants had agreed to allocate to the plaintiffs alternative plots of land and that Exhibit P25 “*would appear to*  
B *have confirmed the oral evidence of P.W.1 to that effect.*”

4. Whether the court below properly evaluated the evidence of the plaintiff before affirming the declaratory judgment of the trial court and granting mandatory injunction compelling the defendants  
C to allocate 549 plots of land to the plaintiffs.

**HELD** (Unanimously dismissing the appeal per **ADEKEYE JSC**)  
***Statutes - Interpretation***

1. The word “*or*” features in Order 48 Rule 5 (1). In such situation  
D the word “*or*” used is disjunctive and should therefore be given its ordinary plain meaning. It denotes an alternative and not implying similarity. It gives a choice of one amidst two or more things that is why in the literary sense it means either.

I agree with the reasoning of the lower court that the first option is a  
E matter for the discretion of the judge, while the second option is a matter for the parties. (p. 853 G)

***FAIR HEARING - Principles - Basis***

2. The bottom line to the doctrine of fair hearing envisaged by virtue  
F of Section 33 (1) of the 1979 now in pari materia with section 36 (1) of the 1999 constitution as applicable in the determination of civil rights and obligation of citizens, is a trial conducted according to all the Legal rules formulated to ensure that justice is done to all the  
G parties. It requires the observance of the twin pillars of the rules of natural justice namely audi alteram partem and nemo judex in causa sua.

A hearing cannot be said to be fair if any of the parties is re-  
H fused a hearing or denied the opportunity to be heard, present his case or call evidence. The right to fair hearing is a question of opportunity of being heard. The right lies in the procedure followed in the determination of a case and not in the correctness of the decision arrived at in a case. (p. 855 C)

***FAIR HEARING - Breach***

3. However whenever a party has been given ample opportunity to ventilate his grievances in a court of law but chooses not to utilize same, he cannot be heard to complain of breach of his right to fair hearing as what the court is expected to do by virtue of section 36 of the 1999 constitution is to provide a conducive atmosphere for parties to exercise their right to fair hearing. B

Furthermore a party complaining that he has been denied fair hearing during the trial of a case ought to remember that in a civil case, a balance has to be struck between the plaintiff's right to have his case heard expeditiously and the defendant's right to put across his defence to the plaintiffs suit. Where the party has been afforded the opportunity to put across his defence and he fails to take advantage of such an opportunity, he cannot later turn around to complain that he was denied a right to fair hearing. Hence a party who refuses or fails to take advantage of the fair hearing process created by the court cannot turn round to accuse the court of denying him fair hearing because equity aid the vigilant and not the indolent. In the instant appeal, the appellants failed to make use of the opportunity granted to them created by adjournments at their instance and abandoned their defence on the adjourned dates. A person who has abandoned his case cannot complain of lack of fair hearing. E  
(p. 855 G) F

***Fair hearing - Breach***

4. If a counsel treats a procedure as regular then he cannot be heard to object later before an appellate court. In the instant appeal when the learned trial Judge decided to hear the matter during those dates falling during the Christmas vacation because it was urgent, the counsel appearing for the appellants was not only in court; she consented to the dates fixed for hearing. The appellants could not turn round to complain about the sitting before the Court of Appeal and particularly in this court. The consent amounted to a waiver of the right of the appellants to complain or object. (p. 856 E) H

***Record of appeal - Judicial notice of***

5. I have gleaned through the record of Appeal bearing in mind that

the law permits me to take judicial notice of all relevant information therein which will assist me in doing substantial justice in the determination of this appeal. (p. 859 D)

**TRESPASS - Basis**

- B 6. I hold that the reasoning of the lower court is the answer to the foregoing submission of the appellants. At record, the lower court held that-

C *“The issues transcended ownership of the land. It was whether or not the defendants agreed to allocate alternative plots of land to each of the 549 plaintiffs having regard to the manner in which they were evicted and their structures demolished.”*

Further at page 727 of the record, the court held that -

- D *“When the plaintiffs case is taken as unchallenged the result to be arrived at on the evidence is that the plaintiffs who were shown to be in possession of their individual portions of the land were ejected therefore by the defendant. The position of the law on the point is as explained in Okoko v. Uzeku (1978) 4 SC 77 at page 87 the Supreme Court said:-*

- E *It is the law and this court had held times without number that trespass to land is actionable at the suit of the person in possession of the land. (p. 865 B)*

**EVIDENCE - Evaluation**

- F 7. It is the trial court alone has the primary function of fully considering the totality of evidence placed before it, ascribe probative value to it, put same on the imaginary scale of justice to determine the party in whose favour the balance of justice tilts makes the necessary  
G findings of fact and come to a logical conclusion. The evaluation remains the exclusive preserve of the trial court because of its singular opportunity of hearing and watching the demeanour of witnesses as they testify and thus it is the court best suited to assess their credibility. It is only when it fails to evaluate such evidence properly or at all  
H that an appellate court can intervene and re-evaluate such evidence otherwise the appellate court has no business interfering with the finding of the trial court on such evidence. (p. 866 E)

***EVIDENCE - Unchallenged evidence - Effect***

8. The evaluation of evidence in the instant suit before the trial court was based on the unchallenged evidence of the plaintiffs/respondents. The position of the law where evidence is unchallenged or uncontroverted is that such evidence will be accepted as proof of a fact it seeks to establish. A trial court is entitled to rely and act on the uncontroverted or uncontradicted evidence of a plaintiff or his witness. In such a situation, there is nothing to put or weigh on the imaginary scale of justice. In the circumstance the onus of proof is naturally discharged on a minimum proof. (p. 867 A)

***Estoppel by conduct - Applicability***

9. The appellants mentioned in their brief that what was on ground at the time the respondent went to court was the issue of formal application for re-allocation and unresolved proposals. Also that Exhibit P25 merely advised the Executive Secretary of the Land Use and Allocation committee to find alternative plots of land for those who are physically present on the land before the demolition exercise not as of right but just to keep them off from disturbing government allottees. I do not want to believe that the government was given the advice in Exhibit P25 without verifying the truth of the destruction of the properties of the respondents. Exhibit P25 and the meetings with the members of the association had committed the government to giving the respondents replacements for their plots of land. It will be inequitable to resile from such representation. As a matter of fact, Estoppel by conduct/representation can readily be invoked in the circumstance. (p. 868 C)

***Injunctions - Mandatory injunction - Grant of***

10. Against this background, it was necessary for the trial court to grant a mandatory injunction as a consequential order to direct the government to take necessary steps having entered judgment for the respondents on their claim. The court will always invoke its equitable jurisdiction and exercise its discretion to grant a mandatory injunction where the injury done to the plaintiff cannot be estimated and sufficiently compensated by damages and the injury to the plaintiff is so serious and material that the restoration of things to their former condition is the only method whereby justice can be adequately done.

The two lower courts were satisfied that the respondents proved special circumstance to warrant the grant of the mandatory injunction. (p. 868 F)

***COURTS - Discretion - Exercise of***

- B 11. In this case, the learned trial Judge exercised his discretion in considering the trial of this case as a matter deserving urgency and thereby heard same during Christmas vacation and furthermore acted judicially and judiciously in granting the mandatory injunction. Where  
C the exercise of discretion by a trial court is in issue, an appellate court is usually reluctant to interfere with the decision except where the discretion was exercised in an arbitrary or illegal manner or without due consideration of the issues by the trial court. In the instant case, the Court of Appeal affirmed that the trial court rightly exercised its  
D discretion during the trial of this case. This court has no reason to disagree with that conclusion. (p. 869 B)

***APPEALS - Concurrent findings***

12. In the instant appeal at this juncture, there are two concurrent  
E findings of fact of the two lower courts. The Supreme Court will not ordinarily disturb concurrent findings of fact made by the High Court and the Court of Appeal unless a substantial error apparent on the face of the record of proceedings is shown or when such findings are  
F perverse. On going through the record, it is my conclusion that the court has no duty to interfere with the decisions of the two lower courts. (p. 869 E)

***REPRESENTATION***

- G Lawal Pedro SAN, Solicitor-General, Lagos State with Mrs. Y. Kolawole DCR; O.K. Akerele ACSC and Justin I. Jacob State Counsel, for the Appellants  
Olumide Sofowora with Oge Nwakanma (Miss); Lekan Olarewaju; Adenrele Adegborioye and Moshood Abdullahi Ore, for the Respond-  
H ents

***CASES REFERRED TO***

Ndoma-Egba v. Chkwuogor (2004) 6 NWLR (pt.869) 382  
Kabirikim v. Emefor (2009) 14 NWLR (pt. 1162) 602



Anie v. Uzorka (1993) 8 NWLR (pt.309) 1

FBN PLC v. TSA Ind. Ltd. (2010) 15 NWLR (pt. 1216) 247

Bamgboye v. University of Ilorin (1999) 10 NWLR (pt. 622) 290

Araka v. Ejengwu (2001) 5 WRN 1

Okafor v. A-G. Anambra State (1991) 6 NWLR (pt. 200) 659

Mohammed v. Olawunmi (1990) 2 NWLR (pt. 133) 458

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Oyeyipo v. Oyinloye (1982) 1 NWLR (pt. 50) 356

Chime v. Ude (1996) 7 NWLR (pt. 461) 979

Asakitipi v. State (1993) 5 NWLR (pt. 296) 641

Olukade v. Alade (1926) All NLR 67

C

Etim v. Ekpe (1983) 1 SCNLR 120

Teniola v. Olofunkan (1990) 5 NWLR (pt. 602) 280

Okonji v. Njokanma (1999) 14 NWLR (pt. 638) 250

### **STATUTES & RULES REFERRED TO**

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Lagos State Legal Notice No.7 1976, Public Land Acquisition Vesting order

High Court of Lagos State (Civil Procedure Rules) 1994, O. 50 rr. 4(c) and 5(2)

High Court of Lagos State (Civil Procedure Rules) 1972, O. 48 rr. 4 E and 5

Constitution of Federal Republic of Nigeria 1999, s. 36 (1)

### **LEAD JUDGMENT BY ADEKEYE JSC**

F

This is an appeal against the judgment of the Court of Appeal, Lagos Division delivered on 25th of September 2001. The suit was filed before the High court of Lagos State on the 17th of June 1988. The seven plaintiffs now respondents in this appeal sued in a representative capacity for themselves and on behalf of other members of Shangisha Landlords Association as per order of court dated 21/11/1988 against the 1st - 4th defendants now appellants seeking for declaratory order as follows:-

*“An order that members of the Shangisha Landlords Association whose lands and/or buildings at Shangisha Village were demolished by the Lagos State Government and/or its servants or agents during the period of June 1984 to May 1985 are entitled to first choice preferential treatment in the allocation and/or (as soon as possible) re-allocation of their particular plots as agreed in the meet-*

H

*ing held on the 16/10/84 with the Ministry of Lands, Housing and Development Matters.”*

The 5th respondent Samuel Olatunde Smith was joined as a defendant pursuant to the leave granted by the trial court on the 15th of October 1993. Parties were allowed to amend their pleadings. The summary of the claim of the plaintiffs/respondents based on the averments in their pleadings was that members of the Shangisha Landlords Association purchased various plots of land from the different families who owned the entire Shangisha Village. Shangisha village which is situated behind Centre for Management Development, opposite the Lagos State Government Secretariat in Alausa had been in existence for more than a century. The plaintiffs built their houses on the plots purchased by them and were in possession for several years. The plaintiffs were not served with any contravention or demolition notices by the 1st - 4th defendants or their agents before they demolished their houses and development at Shangisha village. The demolition exercise continued from June 1984 to May 1985. The Association made representation to the Governor of Lagos State culminating in several meetings held at the office of the Permanent Secretary, Lands, Housing and Development Matters to resolve the outcome of the demolition exercise. A panel was set up by the Lagos State Governor under a principal secretary in the Governor's office to inquire into the complaints about the demolition. Though the reports were submitted, there was no positive move over the complaint.

The case of the defendants/appellants based on the averments in their pleadings was that Shangisha village is a part of the 7,300 acres of land compulsorily acquired by the Lagos State Government by Government Notice No.236 of 14th October 1969 published in the Lagos State official Gazette No.35 Vol.2 of 24th October 1969. As a result of the acquisition the land became vested in the Lagos State Government by virtue of the Public Land Acquisition Vesting order of 1976 published as Lagos State Legal Notice No.7 of 1976 in the Lagos State Extraordinary Gazette No.25 Vol.9 of 18th June, 1976. The plaintiffs/respondents were not physically on the site at the time of the acquisition. They squatted and erected buildings on the land without the knowledge and approval of the Lagos State Government. As no building plans were issued to them to erect the

illegal structures contravention and demolition notices were duly served on the affected buildings and structures before the Lagos State Government carried out the demolition of the illegal structures. The Lagos State Government set up a panel whose term of reference was to inquire into various encroachments by squatters on Lagos State Government Estate. B

The trial in the suit commenced in May 1993 and due to the delays caused by various interlocutory applications filed by both parties, it extended till the 29th of December 1993 and judgment was delivered on the 31st of December 1993. The learned trial Judge found in favour of the plaintiffs/respondents. Being aggrieved by the judgment, the defendants filed an appeal in the Court of Appeal Lagos. At the Court of Appeal, two applications were filed to regularize the Record of appeal as proceedings of the 23rd of December 1993 was omitted from the record. The lower court heard and determined the appeal and gave its judgment on the 25th of September 2001 dismissing the appeal of the 1st - 4th appellants. Being dissatisfied with the decision of the lower court, they further appealed to this court. C D

At the hearing of this appeal on the 15th of November 2011, E the appellants adopted and relied on the appellants' brief of argument filed on 13/7/05. Mr. Lawal Pedro learned senior advocate and Solicitor-General Lagos State announced the withdrawal of issues five and six of the six issues formulated for determination by the appellants in this appeal. F

The four issues for determination read as follows: -

1. Whether the court below was right when it held that it was not necessary for any of the parties to bring an application by way of summons for urgent hearing of the case during the court's Christmas G vacation and particularly for the proceedings dated 29th and 31st of December 1993.

2. Whether there was any oral application made by Chief A.O. Adefila of counsel to the plaintiffs/respondents that the case be heard urgently and during the courts Christmas vacation. H

3. Whether the court was right in confirming the decision of the trial court that the defendants had agreed to allocate to the plaintiffs alternative plots of land and that Exhibit P25 "*would appear to have confirmed the oral evidence of P.W.1 to that effect.*"

4. Whether the court below properly evaluated the evidence of the plaintiff before affirming the declaratory judgment of the trial court and granting mandatory injunction compelling the defendants to allocate 549 plots of land to the plaintiffs.

B     The respondents adopted and relied on the brief deemed filed on 4/6/08 wherein five issues were distilled for determination as follows:-

C     1. Whether the Court of Appeal was right in holding that the appellants were not denied their constitutional right of fair hearing at the trial court but rather that the appellants were given the opportunity to appear and defend the suit but they failed to avail themselves of the opportunity afforded them.

D     2. Whether the Court of Appeal was right in affirming the decision of the trial court that there was an urgency by the fact the learned trial Judge was retiring with effect from 1st January 1994 which fact the trial court brought to the knowledge of all the parties and their counsel and that all the parties and their counsel consented to the further hearing of the case being heard during the 1993 Christmas vacation so that the learned trial Judge may complete the case before proceeding on his retirement with effect from 1st January 1994.

F     3. Whether the Court of Appeal had jurisdiction and competence to hear and determine the application of the respondents dated 12th January, 2000 (hereinafter in this brief referred to as the second application) on the accuracy of the Record be amended as sought thereby so as to make it complete and accurate record in terms thereby sought, notwithstanding that the same court had heard a similar application of the respondents on the same matter on 28th June, 1999 and gave its Ruling thereon on that date refusing the same and whether G     the Court of Appeal in those circumstances had purported to sit as an appellate court over its aforesaid earlier decision refusing the first application on the same issue.

H     4. Whether the Court of Appeal was right in affirming the finding of the trial court that the 1st - 4th defendants agreed to allocate alternative plots of land to each of the 549 plaintiffs having regard to the manner in which the plaintiffs were evicted and their structures demolished by the defendants but the defendants breached the said agreement and in holding that Exhibit P25 confirmed the oral evi-

dence of PW.1 to that effect.

5. Whether whereas as in this present case these concurrent findings of fact in the decision of both the trial High court and the Court of Appeal and where those findings are reasonable, justified and supported by evidence (including in this case Exhibit P25) and the appellants have not shown any special circumstances why the Supreme Court should interfere therewith but it would dismiss the appeal brought to it by the appellants' against those findings of fact or the two lower courts as lacking in substance. B

I intend to be guided by the issues raised for determination by the appellants being succinct statements of the legal argument in this appeal. Issues one and two were argued together. C

#### Issue One

Whether the court below was right when it held that it was not necessary for any of the parties to bring an application by way of summons for urgent hearing of the case during the court's Christmas vacation and particularly for the proceedings dated the 29th and 31st of December, 1993. D

#### Issue Two

Whether there was any oral application made by Chief A.O. Adefila of counsel to the plaintiffs/respondents that the case be heard urgently and during the court's Christmas vacation. E

The appellants argued and submitted that the lower court misconstrued the provisions of order 48 rules 4, 5 and 7 of the High court of Lagos State Civil Procedure Rules 1972 which is in pari materia with order 50 Rules 4 and 5 of the High Court of Lagos State civil procedure Rules 1994 which are unambiguous as to their purport and application. Rule 4 (c) provides that no cause or matter will be heard during the period beginning on Christmas Eve and ending on the 2nd January next following save where such a matter is urgent or at the request of the parties concerned. Rule 5(2) states that an application for an urgent hearing shall be made by summons - the rules do not anticipate a judge determining the urgency. In reading Rule 4 (c) and 5 (2) together, it is the parties that will try to satisfy the court that the matter is urgent and not the court determining such. The court is supposed to react to the needs and request of the parties not its own circumstances which neither party must be made subject to. In the overall circumstance the appellants concluded that the pro- F G H

ceedings of 29th and 31st of December, 1993 were conducted during the Christmas vacation. The consent of all the parties to the suit was sine qua non for the proceedings to be valid. The urgency anticipated by the Rules is a situation that would affect the subject matter of the suit like a destruction of the res or an irreversible event that  
B would permanently prejudice the right of the parties. As it was, the retirement of the judge would have compelled the hearing of the case before another judge with the rights of the parties intact. The urgency envisaged is in the cause or matter and not an urgency arising from the disposition, transfer or retirement of the trial Judge. The  
C appellants cited the case of *Itaye v. Ekaidere* (1978) All NLR 247.

The respondents argued and submitted that in the interpretation of order 48 Rules 4 and 5 of the High Court of Lagos State Civil Procedure Rules 1972, the learned trial Judge found that there was a  
D compelling urgency for the trial court to dispose of the case before him before he proceeded on retirement on 1st of January, 1994 as the case was part-heard and nearing conclusion; as failing to complete it would necessitate a rehearing of the whole case before another judge. The learned trial Judge had informed the parties that he  
E was retiring from the bench as from the 1st of January 1994 and that it was imperative that the matter be concluded before his retirement.

The counsel for the respondents vehemently opposed the adjournment sought on the 20th of December 1993 by counsel for the  
F appellant on the ground that it was a plan by the appellants to ensure that the judge did not conclude the case before his retirement. The adjournment by reason of which the case was adjourned to the 22nd, 23rd and 24th of December 1993 was at the instance of the appellants. The respondents further stated that it was not necessary for the  
G parties to bring an application by way of summons as the rules permitted the learned trial Judge to hear a matter during the period of Christmas vacation if same was urgent. The appellants consented to the dates fixed during vacation; it is therefore inconsistent with such consent for the appellants to hold that they were denied their constitutional rights of fair hearing by the trial court. The respondents cited  
H the case of *Military Administrator Delta State v. Olu of Warri* (1997) 7 NWLR (pt. 513) pg. 430. The respondents urged the court to resolve these issues in their favour.

In the consideration of the two issues - it is convenient at this

onset to restate the Rules of Lagos State High Court as regards sitting during vacation.

Order 48 Rules 4 and 5 of the High court of Lagos State (Civil Procedure Rules) 1972 stipulates that -

Rule 4

Subject to the directions of the Chief Judge, sitting of the High Court for the dispatch of civil matters will be held on weekdays except:

(a) On any public holidays

(b) During the week beginning with Easter Monday

(c) During the period beginning on Christmas Eve and ending on the 2nd January next following.

(d) During long vacation i.e. the period beginning on the first Monday in August and ending on a date not more than six weeks later as the Chief Judge may by notification in the Gazette appoint.

Rule 5

1. Notwithstanding the provisions of Rule 4, any cause or matter may be heard by a judge during any of the period mentioned in paragraphs (b), (c) and (d) of rule 4 except on a Sunday or public holiday where such cause or manner is urgent or a judge at the request of all parties concerned, agreed to hear a cause or matter.

2. An application for an urgent hearing shall be made by summons in chambers and the decision of the judge on such an application shall be final.

In construing order 48, it is obvious that Rule 5 makes room for two exceptions to the rule that matters may not be heard during any of the days specified in order 48 Rule 4. These exceptions are:-

(i) Where the matter is urgent or

(ii) Where the parties consent that the case be heard during that period.

***The word “or” features in Order 48 Rule 5 (1). In such situation the word “or” used is disjunctive and should therefore be given its ordinary plain meaning. It denotes an alternative and not implying similarity. It gives a choice of one amidst two or more things that is why in the literary sense it means either.*** Ndoma-Egba v. Chkwuogor (2004) 6 NWLR (pt.869) pg. 382, Kabirikim v. Emefor (2009) 14 NWLR (pt. 1162) pg. 602, Anie v. Uzorka (1993) 8 NWLR (pt.309) p.1

***I agree with the reasoning of the lower court that the first option is a matter for the discretion of the judge, while the second option is a matter for the parties.***

The prevailing circumstances in the instant case are as follows-

B 1) At that time of hearing of the case this matter had been in court for five years.

2) The hearing had prolonged before the same judge throughout the year, 1993.

C 3) As at the 20th of December, 1993 when the appellants applied for an adjournment, the learned trial Judge made it clear that he was going to retire from the bench on 1st January, 1994 and it was therefore imperative that the part-heard matter be concluded before his retirement.

D 4) The counsel for the respondent Mr. Adefala according to the record vehemently opposed the adjournment sought by counsel for the appellants on the grounds that there appeared to be a plan by the appellants to ensure that the learned trial Judge did not conclude the case before he retired from the bench as the appellants had failed to appear at the trial after having been served as many as seven E hearing notices since 29th November 1993 to conclude a matter that was part-heard.

The learned trial Judge exercised his discretion and fixed continuation of hearing for the 22nd - 24th December, 1993. The circumstance of urgently prevailing in the hearing of the suit does not F require compliance with order 48 Rule (2). The court and counsel had accepted the first option to treat the part-heard suit as an urgent matter; which can be heard during vacation. It was the learned trial Judge and not the parties who had rightly decided that the matter G was urgent in the prevailing circumstance. *Military Administrator of Delta State v. Olu of Warri (1997) 7 NWLR (pt.513) pg. 430.*

H The counsel for appellants came to court unprepared to continue to participate in the trial on the 22/12/93 and to ask for further adjournment for reason that Mrs. Adeyemi handling the suit had not reported for duty after her sick leave. The suit was adjourned to the 23/12/93. There was ample and credible evidence before the lower court deposed to by the learned trial Judge that the court sat on the 23rd, 29th - 31st of December 1993 the dates of adjournment of the suit and gave judgment on the 31st of December.



The appellants' counsel who applied for the adjournment to those days and the appellants themselves were not in court. The court completed the evidence and closed the case of the plaintiffs/respondents. The counsel for the respondents addressed the court. The appellants failed to defend the suit in view of their non appearance. The appellants condemned the sitting of the court on those days as it was supposed to be on vacation. They argued that the court did not give the appellants the opportunity to be heard before exercising its discretion to adopt extraordinary measures. In as much as the appellants had not waived their rights under the rules, there was a denial of fair hearing.

***The bottom line to the doctrine of fair hearing envisaged by virtue of Section 33 (1) of the 1979 now in pari materia with section 36 (1) of the 1999 constitution as applicable in the determination of civil rights and obligation of citizens, is a trial conducted according to all the Legal rules formulated to ensure that justice is done to all the parties. It requires the observance of the twin pillars of the rules of natural justice namely audi alteram partem and nemo judex in causa sua.***

***A hearing cannot be said to be fair if any of the parties is refused a hearing or denied the opportunity to be heard, present his case or call evidence. The right to fair hearing is a question of opportunity of being heard. The right lies in the procedure followed in the determination of a case and not in the correctness of the decision arrived at in a case.*** FBN PLC v. TSA Ind. Ltd. (2010) 15 NWLR (pt.1216) pg. 247, Bamgboye v. University of Ilorin (1999) 10 NWLR (pt.622) pg.290, Awoniyi v. The Registered Trustees of the Rosicrucian order Amorc (Nigeria) (2000) 6 SC (pt.1) pg.103, Araka v. Ejengwu (2001) 5 WRN pg.1, Okafor v. A-G. Anambra State (1991) 6 NWLR (pt.200) pg.659, Mohammed v. Olawunmi (1990) 2 NWLR (pt.133) pg.458.

***However whenever a party has been given ample opportunity to ventilate his grievances in a court of law but chooses not to utilize same, he cannot be heard to complain of breach of his right to fair hearing as what the court is expected to do by virtue of section 36 of the 1999 constitution is to provide a conducive atmosphere for parties to exercise their right to fair hearing.*** Bill Construction Ltd. v. Imani & Sons

Ltd/Shell Trustees (2006) 19 NWLR (pt. 1013) pg. 1, Newswatch Communications Ltd. v. Attah (2000) 12 NWLR (pt.993) pg. 144.

**Furthermore a party complaining that he has been denied fair hearing during the trial of a case ought to remember that in a civil case, a balance has to be struck between the plaintiff's right to have his case heard expeditiously and the defendant's right to put across his defence to the plaintiffs suit. Where the party has been afforded the opportunity to put across his defence and he fails to take advantage of such an opportunity, he cannot later turn around to complain that he was denied a right to fair hearing. Hence a party who refuses or fails to take advantage of the fair hearing process created by the court cannot turn round to accuse the court of denying him fair hearing because equity aid the vigilant and not the indolent. In the instant appeal, the appellants failed to make use of the opportunity granted to them created by adjournments at their instance and abandoned their defence on the adjourned dates. A person who has abandoned his case cannot complain of lack of fair hearing.** Oyeyipo v. Oyinloye (1982) 1 NWLR (pt.50) pg.356, Chime v. Ude (1996) 7 NWLR (pt.461) 979, Asakitipi v. State (1993) 5 NWLR (pt.296) pg.641.

**If a counsel treats a procedure as regular then he cannot be heard to object later before an appellate court. In the instant appeal when the learned trial Judge decided to hear the matter during those dates falling during the Christmas vacation because it was urgent, the counsel appearing for the appellants was not only in court; she consented to the dates fixed for hearing. The appellants could not turn round to complain about the sitting before the Court of Appeal and particularly in this court. The consent amounted to a waiver of the right of the appellants to complain or object.** Olukade v. Alade (1926) All NLR pg.67, Etim v. Ekpe (1983) 1 SCNLR pg. 120.

I resolve this issue in favour of the respondents.

H I shall consider Issues three and four together.

Issue Three

Whether the court below was right in confirming the decision of the trial court that the defendants had agreed to allocate to the plaintiffs alternative plots of land and that exhibit P25 would appear

to have confirmed the oral evidence of P.W.1 to that effect.

Issue Four

Whether the court below properly evaluated the evidence of the plaintiff before affirming the declaratory judgment of the trial court and granting mandatory injunction compelling the defendants to allocate 549 plots of land to the plaintiffs. B

The appellants submitted that the two lower courts misdirected themselves on the facts and erred in deciding that a binding agreement in respect of the land had occurred on the facts of this case and particularly at the meeting of 16th October 1984. In the event which transpired between the parties the appellants referred to the letter tendered as Exhibit P27 in which the respondents rejected the 50 plots offered by the Lagos State Government and demanded for 550 plots. The issue was never resolved between the parties. Secondly, that the letter P25 relied upon heavily by the two lower courts to have confirmed the claim of the plaintiffs did not categorically state the number of the plots at stake, while the government did not agree to give priority of allocation or any allocation at all to the respondents. The emphasis of the respondents was that they be given first choice preferential treatment by the Lagos State Government in the allocation or re-allocation of plots in Shangisha village. There is no evidence that the appellants actually allocated land to the respondents or to grant them preferential treatment in respect of any land not to talk of 549 plots. The mandatory injunction granted by court exposes the claim of the respondents to a claim for title or right to land in the absence of the necessary preponderance of evidence to justify such a claim. The respondents did not claim for compensation for acquisition, declaration that they were the persons entitled to statutory grants of occupancy or damages for trespass. They merely stated that they were on the land and the government took possession of the land. The minutes of the meeting of the 16th of October 1984 was not tendered. The plaintiffs have failed in the circumstance of this case to establish rights to the 549 plots of land within the Shangisha village in accordance with the five ways in which title to land can be proved outside of the grant of a right of occupancy. E F G H

The court below failed to advert properly to the onus of proof on the respondents seeking declaratory judgment and to the requisite standard of proof. Where a trial court fails to evaluate such evi-

dence at all or properly as in the instant appeal and the evaluation does not involve credibility of witnesses, the appellate court can intervene to re-evaluate such evidence. The appellants cited cases like: *Teniola v. Olofunkan* (1990) 5 NWLR (pt.602) at 280, *Okonji v. Njokanma* (1999) 14 NWLR (pt.638) pg.250, *Nanimal & Sons Ltd v. Niger Benue Transport* (1989) 2 NWLR (pt.106) p. 730 at pg.742, *Abis v. Ekwealor* (1993) 6 NWLR (pt.302) pg.643.

The respondents replied to these two issues by a brief summary of the case of both parties as averred in paragraphs 9, 14-20, 25, 27 and 31 of the averments in the plaintiffs/respondents amended statement of claim and paragraphs 10, 11, 12, 15, 24 and 29 of the defendants/appellants amended statement of defence. The Court of Appeal affirming the judgment of the trial court held that the issue before the parties transcended ownership of land. It was whether or not the appellants agreed to allocate alternative plots of land to each of the 549 plaintiffs/respondents having regard to the manner in which they were evicted and their structures demolished. The courts held that Exhibit P25 confirmed the aforesaid agreement by 1st - 4th appellants to allocate alternative plots of land to each of the 549 plaintiffs/respondents and in the circumstances the appellants breached that agreement. The respondent submitted and drew the attention of this court to the concurrent findings of fact of the two lower courts of the foregoing claim of the respondents which are justified and supported by evidence. The respondents emphasized that parties knew the area of land they were litigating on and there was no dispute about it. As at the time the trial court heard the case of the parties, the appellants abandoned their defence as they failed to give evidence in support of the averments in their amended statement of defence. The trial court acted on the unchallenged evidence and deemed same to have been admitted. The appellants cannot interfere with findings of fact and conclusions of law of a trial court unless the findings of fact were perverse or that any conclusion of law thereon was wrong or that the Court of Appeal acted wrongly in law or on the facts affirming the judgment of the trial Judge. The respondents submitted that all the arguments in the appellants' brief have not provided any tenable arguments on fact or law to show that the findings of facts of the learned trial Judge, which were affirmed by the Court of Appeal, are perverse. The respondents cited numerous cases

on this issue particularly Atolagbe v. Shorun (1985) NWLR (pt.2) pg.360. Abisi v. Ekweator (1995) 6 NWLR (pt.302) pg.643. The respondent urged this court to dismiss the appeal and affirm the judgments of the lower court.

The foregoing is the summary of the argument and submission of both parties on these two issues. I shall re-state the claim of the respondents as plaintiffs before the trial court by way of emphasis; it reads:-

*“An order that members of the Shangisha Landlords Association whose Lands and/or buildings at Shangisha village were demolished by the Lagos State Government and/or its servants or agents during the period of June 1984 to May 1985 are entitled to first choice preferential treatment in the allocation of their particular respective plots as agreed in the meeting held on the 16th of October, 1984 with the Ministry of Lands, Housing and Development Matters.”*

***I have gleaned through the record of Appeal bearing in mind that the law permits me to take judicial notice of all relevant information therein which will assist me in doing substantial justice in the determination of this appeal.*** I refer to the cases of: Daggash v. Bulama (2004) 14 NWLR (pt.892) pg.144, S.B.M. Services (Nig.) Ltd. v. Okon (2004) 9 NWLR (pt.879) pg.529, Dingyadi v. INEC (2011) 10 NWLR (pt.1255) pg.347.

Besides the evidence of PW.1, documents tendered in evidence by the 1st PW. were application forms, receipts, offer of settlement, list of members of plaintiff association - 549 names, exhibits P5 - P27 The record is replete with letters of protest, letters of appeal to the Governor of Lagos State, to the Head of State of the Federal Republic of Nigeria, series of applications for interim order of restraint, applications for committal, letters of threat from allottees of land to members of the Landlords Association etc.

1. As at the time this case went to court in 1988, the situation over the tract of land in dispute at Shangisha village now Magodo Estate Scheme Two was tense and there were letters of protest and appeals from allottees of land and the Landlords Association now respondents before this court to the governors of Lagos State and even the Head of State of the Federal Republic of Nigeria.

2. Committees were set up to find ways and means of restor-

ing normalcy in the exercise of land allocation in the area.

3. There were clashes of interest between members of the Association - the respondents, officials and agents of the Lagos State government and the genuine allottees of the disputed land and reports were made to the police in the environs at random.

B 4. The Association complained that plots of lands were allocated to favour the rich and wealthy in the society rather than the people who were already on the land and those whose properties were destroyed on the land.

C The respondents based their demand for first choice preferential treatment on the averments in their pleadings - the under-mentioned paragraphs of the further amended statement of claim are worthy of note -

Paragraph 8

D *"The 1st, 2nd, 3rd, 4th, 5th, 6th and 7th plaintiffs are members of Shangisha Landlords Association and duly authorized to institute this action for themselves and on behalf of the entire members of the said Association."*

Paragraph 9

E *"The numerical strength of the members of the Association is more than 1000 and comprise mainly persons whose buildings put on various parcels of land purchased from diverse families who owned Shangisha village were pulled down by the Lagos State Government between 1984 and 1985 without any warning."*

F Paragraph 15

*"The plaintiffs aver that within the last 15 years members of the Shangisha Landlords Association erected buildings on various parts of the Shangisha village to the knowledge and tacit approval of the Lagos State Government."*

G Paragraph 16

*"The plaintiffs aver that the building operations on the Shangisha village were being carried on in the glare of Lagos State Government and its officials visible even from the Lagos State Secretariat Alausa."*

H Paragraph 17

*"The plaintiffs aver that several certificates of occupancy relative to the plots of land which the buildings were being put were in the process of being issued while some had already been issued."*

Paragraph 18

*"The plaintiffs aver that not only did (had) town planning authority processed relative building plans for approval but the Kosofe and Ikeja Local Governments processed application for street Naming in Shangisha village."*

Paragraph 19

*"The plaintiffs aver that throughout the several years of these developments in the buildings operations, no member of the Shangisha Landlords Association was ever served with any contra-vention and/or Demolition Notice."*

Paragraph 20

*"Surprisingly in June 1984, the plaintiffs were startled to see bulldozers mowing down their houses built in Shangisha village by men who claimed to be acting on the instructions of the defendant."*

Paragraph 25

*"The meeting took place on the 16th day of October 1984 in the office of the Military Governor under the Chairmanship of Mr. R.K. Raheem, Permanent Secretary."*

Paragraph 27

*"The plaintiffs aver that at the meeting it was agreed that the members of the Shangisha Landlords Association should obtain and complete Re-Allocation Forms in respect of their respective original plots which majority of the members did on payment of N50.00."*

Paragraph 28

*"The plaintiffs aver that in the interval, the Lagos State Government appointed one Mrs. E.A. Olawoye Principal Secretary in the Governor's Office to look into complaints regarding demolition of houses in several areas within Lagos State in which Shangisha village was one."*

Paragraph 29

*"The plaintiffs aver that the Panel completed its assignment and submitted its Report to the Military Governor as far back as February 1986, yet the Report is still to reach the Nigerian Public and the plaintiffs despite repeated demands."*

Paragraph 30

*"The plaintiffs aver that it came to their knowledge that some persons who are not members of the Shangisha Landlords Association are being issued with Allocation letters."*

Paragraph 30

*“The plaintiffs aver that none of their members had been given allocation as agreed in the meeting held on the 16th day of October, 1984 despite the fact that inspection for the purpose of Ratification of plots of each had been carried out between October 1986 to January, 1987.”*

The appellants reacted to the foregoing in the averments in their 2nd Further Amended Statement of Defence. At the hearing of the case, the respondents gave evidence in support of the averments in their pleadings and tendered the exhibits P5-P27. The appellants and their counsel did not appear in court on the dates fixed for the hearing of the case. The dates were based on the appellants’ counsel’s application for adjournment. In short these dates were fixed with the consent of the counsel for the appellant. It was also imperative that the matter be heard on those dates in view of the urgency of the situation. In short the appellants abandoned their case though they were given the opportunity to defend same.

The case of the respondents was that they were in possession of parcels of land at Shangisha village which they purchased from the original owners of the village. Shangisha village had been in existence for over a century. They erected buildings on the land with approved building plans by Town Planning Authority. The respondents were never served with any contravention or demolition notice in respect of their holdings. Nevertheless, Lagos State government agents came to demolish their buildings between 1984-1985. After the buildings were demolished, representatives of the respondents and appellants had meetings to resolve the disagreement. It was agreed that the defendants would offer to each of the appellant’s alternative plots of land in substitution for the land from which the respondents had been evicted. The appellants refused to honour the agreement.

The case of the appellants was that the government had acquired the entire land upon which the respondents erected their buildings in 1969. The Lagos State government then only offered alternative allocation of land to people who were legal owners of their plots unlike the respondents who were squatters. They were not physically on the land in 1969 when the land was acquired and they did not have any known legal interest in the land. It is apparent from the record that the lower court on the available evidence from both sides



determined:

a. Whether respondents had buildings on the disputed land which were destroyed or demolished by the defendants.

b. Whether the respondents were allowed to continue to build on the land with their plans approved.

c. Whether the appellants went into negotiation with the respondents and eventually agreed with them to give each alternative plot in substitution for the land from which each of the plaintiffs was being evicted. B

d. Whether the defendants honoured the agreement if the one had been reached. C

The respondents emphasized that certificate of occupancy was issued by the Lagos State government to the respondents' association. The Planning Authority of Lagos State processed building plans for structures to be erected at Shangisha village; that Kosofe and the Ikeja Local governments processed applications of members of the Shangisha village for street naming. Meetings were held with the government officials to find solution to the stalemate. List of members of the Association with 549 names was exhibited. D

The learned trial Judge held in the judgment at pages 409-410 of the Record that - E

*"At the trial, the 1st P.W. gave evidence in great details in support of the plaintiffs' case and his pieces of evidence (save as to the number of the members who are not entitled to the reliefs hereby sought in this action) were totally in line with the pleaded case. What is most important is that even during the proceedings and trial in this action meetings were still held between the plaintiffs and the Lagos State Government (defendant) herein to find an amicable settlement out of court to the disputes herein. Unfortunately, this has not been achieved. As the evidence of 1st P.W. stood unchallenged and uncontradicted, I accept the same in toto. From all these Exhibits it stood very clear that the Government of Lagos State has committed itself to allocate plots in the scheme involved to members of the Plaintiffs Landlords Association and is therefore bound in law to do so. I pay special attention to the letter of the Lagos State Government date d 17th May 1983, Exhibit P25". F G H*

*"Exhibit P25 reads:-  
17th May, 1993.*

*Reference No. LJC/1431/148*  
*The Executive Secretary,*  
*Land Use and Allocation Committee,*  
*Block 13/12,*  
*The Secretariat,*  
B *Ikeja.*  
*Confidential*

*Re: Suit No. ID/795/88*

I am directed to refer to the above mentioned suit which is  
C *pending before the High Court No.1 Ikeja.*

*You will recall that the plaintiffs in this suit have obtained an interlocutory order of the court against us restraining the defendants from taking any further action in respect of the subject-matter of this suit.*

D *Meanwhile the government allottees could not take possession of their properties. In order to save the government from further embarrassment you are hereby advised to find alternative plot of land for those who were physically present on the land before the demolition exercise of 1984/1985. We are not giving these people*  
E *consideration as of right but just to keep them off from disturbing the government allottees. Further please, note that they should be made to pay like any allottees.*

*Please expedite action.*

F *Sgd*  
*O.P. Adeyemi (Mrs.)*  
*For Attorney-General and*  
*Commissioner for Justice”*

In the letter dated 23/7/93 tendered as Exhibit P257 the re-  
G spondents rejected 50 plots offered by the Lagos State Government and put forward a substantial claim for 550 plots. The appellants submitted that beyond the issue of formal application for re-allocation and the unresolved proposals, there is absolutely no evidence that the appellants ever actually allocated land to the plaintiffs which  
H was their exclusive right to do, nor at any time and by any document did they promise or bind themselves to or oblige to grant preferential treatment to the plaintiffs in respect of any land or plots of land, not to talk of 549 plots of which have not been identified, numbered, individually allocated or paid for. The appellants further held that the

grant of mandatory injunction by the two lower courts exposes the claim to a claim for title or right to land. Whereas the respondents did not claim for compensation for acquisition or damages for trespass or declaration that they were the persons entitled to statutory grants of occupancy in respect of their specific holdings.

***I hold that the reasoning of the lower court is the answer to the foregoing submission of the appellants. At record, the lower court held that-*** B

***“The issues transcended ownership of the land. It was whether or not the defendants agreed to allocate alternative plots of land to each of the 549 plaintiffs having regard to the manner in which they were evicted and their structures demolished.”*** C

***Further at page 727 of the record, the court held that -***

***“When the plaintiffs case is taken as unchallenged the result to be arrived at on the evidence is that the plaintiffs who were shown to be in possession of their individual portions of the land were ejected therefore by the defendant. The position of the law on the point is as explained in Okoko v. Uzeku (1978) 4 SC 77 at page 87 the Supreme Court said:-*** D

***It is the law and this court had held times without number that trespass to land is actionable at the suit of the person in possession of the land. Amakor v. Obiefuna (1979) 1 All NLR (pt. ) pg.119 Adesoye v. Shiwoniku 14 WACA 347 Emigwara & ors v. Nwaimo & ors 14 WACA 347 Tongi v. Kalu 14 WACA 331.”*** E

The unchallenged evidence of PW1 and the documentary evidence tendered, supplied ample evidence that the appellants demolished the structures of the respondents on the disputed land. This brings me to the issue whether the court below properly evaluated the evidence of the respondents before affirming the declaratory judgment of the trial court granting mandatory injunction compelling the appellants to allocate 549 plots of land to the respondents. G

The judgment of the lower court reads -

***“In the end therefore and for the simple reasons I have given, I hereby enter judgment for the plaintiffs against the defendants as follows -*** H

***A declaration that members of the Shangisha Landlords Association whose lands and or buildings at Shangisha village were de-***

*molished by the Lagos State Government and/or its servants or agents during the period of June 1984 to May 1985 are entitled to the first choice preferential treatment by the Lagos State Government before any other person(s) in the allocation or re-allocation of plots in Shangisha village and I make the order against the 1st, 2nd, 3rd and*  
 B *4th defendants (particularly the Lagos state Government and Land Use and Allocation committee) as agreed in the meeting held on 16th October 1984 with the Ministry of Lands and Housing and Development Matters, Lagos State.*

C *2. An order of Mandatory Injunction is hereby made that the said defendants shall forthwith allocate 549 (five hundred and forty nine) plots to the plaintiffs in the said Shangisha village scheme in the Shangisha village aforesaid."*

When the evaluation of evidence by a particular trial Judge is  
 D being challenged, the principles that are examined are:

- a. Whether the evidence is admissible.
- b. Whether the evidence is relevant.
- c. Whether the evidence is credible.
- d. Whether the evidence is conclusive.
- E e. Whether the evidence is probable than that given by the other party Magaji v. Odojin (1978) 4 SC 91.

***It is the trial court alone has the primary function of fully considering the totality of evidence placed before it, ascribe probative value to it, put same on the imaginary scale of justice to determine the party in whose favour the balance of justice tilts makes the necessary findings of fact and come to a logical conclusion. The evaluation remains the exclusive preserve of the trial court because of its singular opportunity of hearing and watching the demeanour of witnesses as they testify and thus it is the court best suited to assess their credibility. It is only when it fails to evaluate such evidence properly or at all that an appellate court can intervene and re-evaluate such evidence otherwise the appellate court has no business interfering with the finding of the trial court on such evidence.***  
 F  
 G  
 H Agbi v. Ogbe (2006) 11 NWLR (pt.990) pg.65, Bashaya v. State (1998) 5 NWLR (pt.550) pg.351, Ojokolobo v. Alamu (1998) 9 NWLR (pt.565) pg.226, Sha v. Kwan (2000) 5 SC pg.178, State v. Ajie (2000) 7 SC (pt.1) pg.24, Adebayo v. Adusei (2004) 4 NWLR

(pt.862) pg.44, Fagbenro v. Arobadi (2006) 7 NWLR (pt.978) pg.174, Woluchem v. Gudi (1981) 5 SC pg.391, Mogaji v. Odofin (1978) 4 SC 91, Mogaji v. Cadbury (Nig.) Ltd. (1985) 2 NWLR (pt.7) pg.393, Ebba v. Ogodo (1984) 1 SCNLR pg.372.

***The evaluation of evidence in the instant suit before the trial court was based on the unchallenged evidence of the plaintiffs/respondents. The position of the law where evidence is unchallenged or uncontroverted is that such evidence will be accepted as proof of a fact it seeks to establish. A trial court is entitled to rely and act on the uncontroverted or uncontradicted evidence of a plaintiff or his witness. In such a situation, there is nothing to put or weigh on the imaginary scale of justice. In the circumstance the onus of proof is naturally discharged on a minimum proof.*** Mogaji v. Cadbury (Fry) Ltd. (1972) 2 SC 97, Omoregbe v. Lawani (1980) 3-4 SC 108, Fasoro v. Beyioku D (1988) 2 NWLR (pt.76) pg. 263, Nwabuoku v. Ottih (1961) 2 SCNLR pg.232, Omo v. JSC Delta State (2000) 12 NWLR (pt.682) pg.444, WAEC v. Oshionelo (2006) 12 NWLR (pt.994) pg.272.

The trial court accepted and believed the evidence of the respondent after proper evaluation; the Court of Appeal affirmed the judgment. The lower court had no cause to interfere with it or re-evaluate the findings of fact of the trial court. The Court of Appeal affirmed the declaratory judgment of the trial court which based on the nature of the claim before the court amounted to a judicial pronouncement on the legal state of affairs between the parties in the claim of the respondent to their right to preferential treatment in allocation of plots of land by the Lagos State Government in Shangisha village.

The appellants also challenged the propriety of the lower court granting a mandatory injunction compelling the defendants to allocate 549 plots of land to the respondents and the lower court affirming same. I shall quote from the judgment of the lower court at page 728 of the record which reads:-

*“Finally the appellants’ counsel argued that the plaintiffs did not testify that their buildings were demolished. The answer is that this was a representative action in which P.W.1 testified for and on behalf of the 549 plaintiffs whose buildings were allegedly demolished. At page 305 of the record P.W.1 in his evidence on 11/5/93*

testified.

*'Before the buildings were demolished no demolition notices or contraventions notice were pasted on the building or served on the occupiers before the demolition were carried out from June 1984 to May 1985 by the Lagos State Government. Thereupon the members of the Association sent a letter of protest to the Military Governor of Lagos State and made appeals.'*

*From the evidence of PW.1 and the other documentary exhibits tendered, there could have been no doubt that the defendants demolished the buildings erected by the plaintiffs. I affirm the judgment of Balogun J. given on 31/12/93."*

***The appellants mentioned in their brief that what was on ground at the time the respondent went to court was the issue of formal application for re-allocation and unresolved proposals. Also that Exhibit P25 merely advised the Executive Secretary of the Land Use and Allocation committee to find alternative plots of land for those who are physically present on the land before the demolition exercise not as of right but just to keep them off from disturbing government allottees. I do not want to believe that the government was given the advice in Exhibit P25 without verifying the truth of the destruction of the properties of the respondents. Exhibit P25 and the meetings with the members of the association had committed the government to giving the respondents replacements for their plots of land. It will be inequitable to resile from such representation. As a matter of fact, Estoppel by conduct/representation can readily be invoked in the circumstance. Against this background, it was necessary for the trial court to grant a mandatory injunction as a consequential order to direct the government to take necessary steps having entered judgment for the respondents on their claim. The court will always invoke its equitable jurisdiction and exercise its discretion to grant a mandatory injunction where the injury done to the plaintiff cannot be estimated and sufficiently compensated by damages and the injury to the plaintiff is so serious and material that the restoration of things to their former condition is the only method whereby justice can be adequately done.***

***The two lower courts were satisfied that the respondent-***

**ents proved special circumstance to warrant the grant of the mandatory injunction.** Abubakar v. JMDB (1997) 10 NWLR (pt.524) pg.212, CBN v. UTB (Nig.) Ltd. (1996) 4 NWLR (pt.445) pg.694, CBN v. Industrial Bank Ltd. (1997) 9 NWLR (pt.522) pg.712, A-G Anambra State v. Okafor (1992) 2 NWLR (pt.224) pg. 396.

**In this case, the learned trial Judge exercised his discretion in considering the trial of this case as a matter deserving urgency and thereby heard same during Christmas vacation and furthermore acted judicially and judiciously in granting the mandatory injunction. Where the exercise of discretion by a trial court is in issue, an appellate court is usually reluctant to interfere with the decision except where the discretion was exercised in an arbitrary or illegal manner or without due consideration of the issues by the trial court. In the instant case, the Court of Appeal affirmed that the trial court rightly exercised its discretion during the trial of this case. This court has no reason to disagree with that conclusion.** R. v. Benkay Nig. Ltd. v. Cadbury (Nig) Plc. (2006) 6 NWLR (pt.676) pg.338, Williams v. Hope Rising Voluntary Services (1982) 1-2 SC pg.145, Ehidimhen v. Musa (2000) 4 SC (pt.11) pg.166, Oyekanmi v. NEPA (2000) 12 SC (pt.1) pg.70, Biocon Agro Chemicals v. Kudu Holding (2000) 12 SC (pt.1) pg.139.

**In the instant appeal at this juncture, there are two concurrent findings of fact of the two lower courts. The Supreme Court will not ordinarily disturb concurrent findings of fact made by the High Court and the Court of Appeal unless a substantial error apparent on the face of the record of proceedings is shown or when such findings are perverse. On going through the record, it is my conclusion that the court has no duty to interfere with the decisions of the two lower courts.** Akeredolu v. Akinremi (No.3) 1989 3 NWLR (pt.108) pg.164, Ibodo v. Enarofia (1980) 5-7 SC pg.42, Ige v. Olunloyo (1984) 1 SCNLR pg.158, Durosaro v. Ayorinde (2005) 8 NWLR (pt.927) pg.407.

I resolve these issues in favour of the respondents. This court appreciates the magnanimity of the Lagos State Government in the proposals to effect an amicable settlement of this matter. The ball is now in the court of the respondents who has a statutory duty to advise them properly to give the government their maximum co-

operation in the execution of this judgment.

In sum the appeal lacks merit and it is dismissed. The judgments of the two lower courts are affirmed. The costs of this appeal is assessed as N50,000 in favour of the respondents.

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B

### **ONNOGHEN JSC**

I have had the benefit of reading in draft the lead judgment of my learned brother ADEKEYE, JSC just delivered. I agree with the reasoning and conclusion that the appeal has no merit and should be dismissed.

The right to fair hearing is not only a Constitutional right, it is also a principle of law fundamental/pivotal to any adjudication. It has been long settled that failure to adhere to it or any breach of the right will automatically render the proceeding in which the breach occurred null and void and of no effect whatsoever, however well conducted. However, what is required of the court/tribunal/adjudicating body is to create the conditions necessary for a party to avail himself of the right to fair hearing. The court/tribunal etc cannot compel a party to utilise the opportunity so offered in the proceedings if the beneficiary fails, neglects or refuses to avail himself of the opportunity. In such a case, the law is that the party who fails/neglects to avail himself of the opportunity cannot be heard to complain later of a breach of his right to fair hearing.

From the record, learned counsel for the appellants was in court and did agree with the matter being adjourned by the trial court to particular dates for hearing/continuation but failed and/or neglected to attend the hearing, neither did he offer any reasonable explanation as to his inability to attend as demanded by courtesy. In the circumstances appellants cannot be heard to complain of breach of right of fair hearing when they were the ones who refused to utilise the opportunity given them to be heard. The breach is clearly self-induced.

I therefore find no merit whatsoever in the appeal which is accordingly dismissed by me. I abide by the consequential orders made in the said lead judgment including the order as to costs.

Appeal dismissed.



**FABIYI JSC**

I have read before now, the judgment just delivered by my learned brother - Adekeye, JSC. I agree with the lucid reasons therein advanced to arrive at the conclusion that the appeal deserves to be dismissed.

I wish to chip in a few words of my own in respect of the issue relating to fair hearing as raised by the appellants. It is extant in the record of appeal that counsel for the parties consented that hearing should continue during Christmas recess because of the impending retirement of the learned trial Judge. The appellants' counsel failed to show up on the agreed date to wit: 23-12-93 when the case was adjourned to 29-12-93. The complaint that the appellants were not served with hearing notice against 29-12-93 was most untenable. A court of record should not view fair hearing in the abstract. Based on the scenario set up by the appellants' dilatory stance, I cannot surmise how the principle of fair hearing was eroded. See: *Magit v. Uni-Agric Makurdi* (2006) 133 LRCN 46; *Saburi Adebayo v. Attorney-General Ogun State* (2008) 7 NWLR (Pt. 1085) 201 at 221-222.

Apart from the above, the two courts below made concurrent findings of fact on most material points. Such findings have not been found wanting or perverse. This court does not make it a practice to interfere in such a situation. - See: *Kale v. Coker* (1982) 12 SC 252. I shall not interfere.

For the above reasons and those carefully set out in the lead judgment, I too, feel that the appeal should be dismissed. I order accordingly and abide by all consequential orders therein contained; that relating to costs inclusive.

**RHODES-VIVOUR JSC**

I have had the privilege of reading in draft the leading judgment delivered by my learned brother Adekeye, JSC. I am in full agreement with it. I would dismiss the appeal and make the orders which Adekeye JSC proposes.

The issue in this case is whether or not the defendants/appellants agreed to allocate alternative plots of land to each of the 549 plaintiffs/respondents having regard to the manner in which they were evicted and their structures demolished.

In line with their pleadings the plaintiffs called a sole witness and tendered several exhibits. The witness was not cross-examined and the defendants/appellants did not lead evidence in Support of their pleadings. Evidence led by the plaintiffs/respondents sole witness was unchallenged. The position of the law is that where evidence given by a party is not challenged by the opposite party it is open to the court hearing the matter to act on the unchallenged evidence before it. See: *Omoregbe v. Lawani* 1980 3-4 SC p.117, *Odulaja v. Haddad* 1973 11 SC P.35, *Nwabuoku v. Ottih* 1961 2 SC P.232.

In the absence of evidence to support the statement of defence, the pleadings of the defendants/appellants were abandoned. The defence is deemed abandoned for all time. See: *Okechukwu v. Okafor* 1961 2 SCNLR p.369.

Exhibits P25, P27 and other exhibits confirmed the oral evidence of PW1 that the defendant agreed to give the plaintiffs/respondents alternative plots of land. Where documentary evidence supports oral evidence, oral evidence becomes more credible. This is so because documentary evidence serves as a hanger from which to assess oral testimony. *Kindley v. M.G. Gongola State* 1988 2 NWLR pt. 77 p.473, *Buraimoh v. E.S.A.* 1990 2 NWLR pt.135 p. 406.

The learned trial Judge, Balogun J. (Rtd) relied on the plaintiffs/respondents unchallenged evidence to enter judgment for them in the following term:

*"In the end therefore and for the simple reasons I have given, I hereby enter judgment for the plaintiff's against the defendants as follows:*

*1. A declaration that members of the Shangisha Landlords Association whose lands and or buildings at Shangisha village were demolished by the Lagos State Government and/or its servants or agents during the period of June, 1984 to May, 1985 are entitled to the first choice preferential treatment by the Lagos State Government (before any other persons) in the allocation or Re-allocation of Plots in Shangisha village and I make the order against the 1st, 2nd, 3rd and 4th defendants (particularly the Lagos State Government and Land Use and Allocation Committee) as agreed in the meeting held on 16th October, 1984 with the Ministry of Lands Housing and Development Matters, Lagos State.....*

*2. An order of Mandatory Injunction is hereby made that the said defendants shall forthwith allocate 549 (five hundred and forty nine) plots to the plaintiff in the said Shangisha village scheme in the Shangisha village aforesaid.*

*3. I award the plaintiffs five thousand (N5, 000) Costs as costs of this action."*

The Court of Appeal Coram Oguntade, Galadima, Aderemi JCAS' (as they then were) had no difficulty confirming the decision. This is a case of concurrent findings of fact.

In *Shipcare Nig Ltd v. The owners of the M/V Fortumato & anor* 2011 2-3 SC pt.11 p.1, I said that findings of fact made by the trial court and confirmed by the Court of Appeal are very rarely disturbed or interfered with, but this court would quickly interfere and State the correct position if satisfied that there has been exceptional circumstances such as:

(a) the findings cannot be supported by evidence or are perverse; or

(b) that there was miscarriage of justice; or

(c) the court overlooked some principle of law or procedure.

See also *Cameroun Airline v. Otutuizu* 2011 1-2 SC Pt.111 p.200.

Concurrent findings of fact are that the defendants/appellants (the Lagos State Government) committed itself to allocate plots to the Plaintiffs/respondents Landlords Association. This is so obvious from the unchallenged testimony of PW1 (the Sole witness in the entire case) and several of the exhibits tendered. These finding by the two courts below are correct and so rather than interfere with them this court has no hesitation affirming them. Concurrent findings of the two courts below are hereby affirmed.

*Audi Alteram Patem* means please hear the other side. A judge should allow both parties to be heard and should listen to the point of view or case of each side before giving a decision. This is what fair hearing entails. See *Unongo v. Aku* 1983 2 SCNLR p. 332, *Isiyaku Mohammed v. Kano N.A.* 1968 1 ALL NLR p.42. The defendants/respondents complain that they were denied fair hearing. On 20/12/93 the matter came up for continuation of trial. Mrs. C.M Onyeabo informed the court that Mrs. O. Adeyemi, counsel handling the case was sick. The case was adjourned to the 22nd, 23rd and 24th of December 1993 for continuation. The learned trial Judge made it

clear to counsel that he was adjourning the case to those dates to enable His Lordship complete the case before 31st December 1993 before he proceeds on retirement on the 1st of January 1994. On 22nd December 1993, Mrs. Dupe Gbamgbose, a legal officer grade 1 appeared for the defendants/appellants. She asked for an adjournment. Her reason was that Mrs. O. Adeyemi was still sick and that she would resume the day. The learned trial Judge adjourned the case to the next day, i.e. 23/12/93. In the absence of defence counsel on subsequent day's trial proceeded to conclusion.

The learned trial Judge gave the defendants/appellants an opportunity to be heard, but they failed or neglected to avail themselves of the opportunity for no reason at all. In the circumstances the defendants/appellants cannot be heard to complain that they were denied fair hearing. It is clear that they denied themselves a hearing by failing to avail themselves of the opportunity of being heard.

Once again, I agree that there is no merit in this appeal.

### **PETER-ODILI JSC**

This is an appeal against the judgment of the Court of Appeal, Lagos Division delivered on 25th September, 2011. At the trial High Court of Lagos State, Balogun J, presided and in the suit the 1st to 7th respondents being plaintiff claimed against the appellants as defendants and sought a declaratory order that members of the Shangisha Landlords' Association whose land and/or buildings at Shangisha Village were allegedly demolished by the Lagos State Government during the period of June 1984 and May 1995 are entitled to *"First choice preferential treatment and in the allocation and/or as soon as possible Re-allocation of their particular respective plots as agreed in the meeting held on the 16th of October, 1984 with Ministry (sic) of Lands, Housing and Development Matters."*

On the 31st December, 1993 the trial Judge gave judgment in favour of the respondents in terms of the prayer sought and in addition, an order of mandatory injunction that *"the said defendants shall forth with allocate 549 (five hundred and forty naira) plots to the plaintiffs in the said Shangisha village scheme in the Shangisha Village aforesaid."*

Being dissatisfied with the judgment of the trial court, the ap-

pellants appealed to the Court of Appeal and sought for the following reliefs, that the appeal be allowed, the judgment and proceedings of the lower court be set aside and the case of the plaintiffs dismissed on the grounds that-

(i) the trial Judge erred in law in assuming jurisdiction during the Christmas vacation; B

(ii) the trial Judge denied the appellants fair hearing;

(iii) the trial court erred in granting allocation rights in respect of 549 plots to the plaintiff when the first plaintiff was the only one to have given evidence. C

On the 25th day of September, 2001, the Court of Appeal dismissed the appeal of the appellants on the grounds that:-

(i) the Judge was right to proceed with the case during the Christmas vacation period because of the compelling urgency to hear the case before his retirement (even though no application by way of summons for urgent hearing was before the court) and because the defendants did not avail themselves of the opportunity to appear and defend the suit. D

(ii) That Exhibit p.25 would appear to have confirmed the oral evidence of PW1 that the defendants had agreed to give the plaintiffs alternative plots of land; E

(iii) That the plaintiff proved their case by unchallenged evidence;

(iv) The plaintiffs were shown to be in possession of their individual portions of land and were ejected by the defendants. F

Being aggrieved with the judgment of the Court of Appeal, the appellants have now appealed to this court by a Notice of appeal dated the 30th day of July 2003 containing 4 grounds of appeal:

On the 15th November, 2011, date of hearing, Mr. Lawal Pedro G SAN, Solicitor General, Lagos State on behalf of the appellants adopted their brief filed on 13/7/05 and a reply brief filed on 2/6/09 and deemed filed on 14/12/09. In the appellant's brief of argument, were couched six issues for determination and on the application of counsel Issues 5 and 6 being withdrawn were struck out. H

The issues for determination framed by the appellant are as follows:

1. Whether the court below was right when it held that it was not necessary for any of the parties to bring an application by way of

summons for urgent hearing of the case during the court's Christmas vacation and particularly for the proceedings dated 29th and 31st of December 1993.

2. Whether there was any oral application made by Chief A. O. Adefola of counsel to the plaintiffs/respondents that the case be  
B heard urgently and during the courts' Christmas vacation.

3. Whether the court below was right in confirming the decision of the trial court that the defendants had agreed to allocate to the plaintiffs alternative plots of land and that Exhibit p.25 "*would appear to evidence of PW1 to that effect.*"  
C

4. Whether the court below properly evaluated the evidence of the plaintiff before affirming the declaratory judgment of the trial court and granting mandatory injunction compelling the defendants to allocate 549 plots of land to the plaintiff.  
D

For the respondents, Mr. Olumide Sofowora, learned counsel their behalf adopted their brief of argument filed on 19/3/07 and deemed filed on 4/06/08. Respondents formulated five issues for determination which are as follows:

1. Whether the Court of Appeal was right in holding that the  
E appellants were not denied their constitutional right of fair hearing at the trial court, but rather that the appellants were given the opportunity to appear and defend the suit, but they failed to avail themselves of the opportunity afforded them.

2. Whether the Court of Appeal was right in affirming the decision of the trial court that there was an urgency by the fact the learned trial Judge was retiring with effect from 1st January 1994, which fact the trial court brought to the knowledge of all the parties and their counsel and that all the parties and their counsel consented  
F  
G to the further hearing of the case being held during the 1993 Christmas vacation, so that the learned trial Judge may complete the case before proceeding on his retirement with effect from 1st January, 1994.

3. Whether the Court of Appeal had jurisdiction and competence to hear and determine the application of the respondents dated 12th January 2000 (hereinafter in this brief referred to as "*the second Application.*") on the accuracy of the record be amended as sought thereby so as to make it a complete and accurate record in the terms thereby sought, notwithstanding that the same court had  
H

heard a similar application of the respondents on the same matter on 28th June 1999 and gave its ruling thereon on that date refusing the same; and whether the Court of Appeal in those circumstances had purported to sit as an appellate court over its aforesaid earlier decision refusing the first application on the same issue.

4. Whether the Court of Appeal was right in affirming the finding of the trial court that the 1st - 4th defendants agreed to allocate alternative plots of land to each of the 549 plaintiffs, having regard to the manner in which the plaintiffs were evicted and their structures demolished by the defendants, but the defendants breached the said agreement; and in holding that Exhibit P25 confirmed the oral evidence of PW1 to that effect. B  
C

5. Whether where as in this present case there are concurrent findings of fact in the decision of both the trial High court and the Court of Appeal, and where those findings are reasonable, justified and supported by evidence (including in this case, Exhibit P257 and the appellants have not shown any special circumstances why the Supreme Court should interfere, the Supreme Court would affirm those findings of fact and would not interfere therewith but it would dismiss the appeal brought to it by the appellants against those findings of fact of the two lower courts as lacking in substance. D  
E

Learned senior Advocate Mr. Pedro submitted for the appellant that the rules of court covering the nature of proceedings during vacation period are of a special nature, designed primarily to give the parties protection from “ambush” or “surprise” proceedings whose outcome as in this case, would be against their interest. That there is no contemplation, as erroneously held by the court below, that the trial Judge would suo motu, and because of its own peculiar circumstance, in this case, the fact of the judges impending retirement, contrive an urgency, and go ahead to hear the case without consent of the other party and, more importantly, in the absence of an application which this other party would be given an opportunity to react to. F  
G

That Order 48 Rules 4, 5 and 7 of the High Court of Lagos State Civil Procedure Rules 1972 which has similar provision as Order 50 Rules 4 and 5 of the High court of Lagos State Civil Procedure Rules 1994 are unambiguous as to their purport and application. That Rule 4(c) provides that no cause or matter wit be heard during the period beginning on Christmas eve and ending on the H

2nd January next following save where such a matter or at the request of the parties concerned. That the proceedings of 29th and 31st of December, 1993 were conducted during the Christmas vacation. It is submitted that the consent of all the parties to the suit was sine qua non for the proceedings to be valid. He cited *Itaye v. Ekaidere* B (1978) ALL NLR 247.

Mr. Pedro SAN for the appellants said the type of urgency anticipated by the rules is a situation that would have the effect of affecting the subject matter of the suit such as perishable goods, or a right that might be extinguished by some extraneous act such as destruction of the res or an irreversible event that would have permanently prejudiced the rights of the parties. That the subject matter of this suit was the allocation of land. That the non-hearing of the suit during the period of vacation could not have so prejudiced the rights D of any of the parties to the extent of rendering any further judicial action nugatory. That the land was there, the allocating authority being the Lagos State Government was in place. He said at worst, the retirement of the judge would have compelled the hearing of the case before another judge with the rights of the parties intact. He E stated on that the urgency envisaged in the rules of the court is in the cause or matter and not an urgency arising from the disposition, transfer or retirement of the trial Judge. Learned senior counsel submitted for the appellants that the hearing of the case during the vacation F when the other party was entitled to believe that no steps would be taken against its interest during that period. That the defendants had not waived their rights under the rules. That the question before this court is not whether the defendants were given full opportunity generally to defend the suit and failed to do so, but whether in the particular circumstances of hearing during vacation the defendants were G not enabled to exercise the rights that accrued to them by law during such a period. That the appellants' right to fair hearing guaranteed by section 36 of the constitution of Nigeria that was breached by the trial court. He said the trial court did not only close the appellant's H right to cross examine the plaintiff's sole witness on the same 29th of December, 1993, it also closed the appellants' right of defence when the case was not adjourned for the defence. That those proceedings of 29th and 31st of December, 1993 were therefore a nullity, and so a miscarriage of justice had occurred.



For the respondents, Mr. Sofowora contended that there was compelling urgency for the trial judge who was retiring on 1st January, 1994 to make sure that the matter which was already part heard was concluded within the 1993 Christmas vacation. That the appellants had specifically consented to attend trial on all the dates fixed for the hearing including those dates which fell within the Christmas Vacation. That the conditions provided for under order 48 Rules 4 and 5 of the High Court of Lagos State (Civil Procedure) Rules 1972 were met. That it is the role of the judge to determine whether the situation was urgent or not with or without the application of any of the parties. He referred to the case of *Military Administrator, Delta State v. Olu of Warri* (1997) 7 NWLR (Pt. 513) 430 per Akintan JCA (as he then was):

In reply on point of law, learned counsel for the appellants submitted that if the trial judge had wanted their attendance in court, hearing notice would have been served on the appellants since they were not in court when the 29th December date was fixed and on that 29th December the case of the defence was closed but they were not given an opportunity to address the court before the judgment was delivered on the 31st of December 1993. That the right to address the court before judgment is a constitutional right conferred by s.294 (1) of 1999 constitution. That the infraction was denial of their right of fair hearing. He cited *Obodo v. Olomu* (1987) 3 NWLR (pt.59) 111; *Adigun v. A. G. Oyo State* (1987) 1 NWLR (pt.53) 678.

From whatever side of the divide, it is easy to see how the position taken by the appellant came about and countered by the respondent from their submissions. The anchor of the arguments of the appellants is that the trial judge had heard and concluded the dispute during the Christmas vacation without any of the parties applying based on urgency. The respondent on the other hand came from another angle, which is that the appellant now crying that their right of fair hearing was infringed was well aware and consented to the trial judge's handling within the focus that there was urgency since he was retiring on 1/1/94.

For a clearer view, I would want to quote excerpts from the judgment of the court below per Oguntade JCA (as he then was) at pages 714 - 718 of the record thus:

The trial Judge proceeded to deliver his judgment on 31/12/

93 which was the final date he could sit before he proceeded on his retirement.

In the appellant's brief, it was argued in support of the first issue for determination that the court notes of the lower court did not show that the court sat on 23/12/93. According to counsel, the two parties had been present on 22/12/93 on which date the matter was adjourned to 23/12/93. The next time the court sat was 29/12/93. It was argued that as no hearing notices were issued to the parties against 29/12/93, the proceedings of 29/12/93 leading to the judgment given on 31/12/93 were nullity. It was further argued that the 29/12/93 being a day falling within the Christmas vacation the court could not validly sit without parties' consent. Counsel relied on: *Julius Berger Ltd. V. Ukey* (1981) 1 SC. 6 at 20, *Obimonure v. Erinoshio* (1966) 1 ALL NWLR 250, *Okafor v. A. G. of Anambra State* 6 NWLR (p.200) 659 at 662, *Itaiye & Ors v. Ekaidere* (1978) N.S.C.C 485 at 482.

The respondents' counsel in reply submitted that parties had agreed that the case be heard during the Christmas vacation and that in any case the relevant rules of court allow urgent cases to be hearing during Christmas vacation counsel relied on: *Veritas Insurance Co. Ltd. V. Trust investment Ltd.* (1993) 3 NWLR (Pt.281) 349, *Anre v. Uzorka* (1993) 8 NWLR (pt. 309) 1, *Kaduna Textiles Ltd. V. Umar* (1994) 1 NWLR (Pt.143) at 159; *Obimiami Brick and Store Nig. V. A.C.B. Ltd.* (1992) 3 NWLR (Pt.229) 260; *Attorney General of Anambra State v. Nwobodo* (1992) 7 NWLR (Pt.256) 711 and *Ibekendu v. Ike* (1993) 6 NWLR (pt. 299) 28.

In the course of hearing this appeal, the respondents who insisted that the lower court sat on 23/12/93 and that the matter was later adjourned to 29/12/93 brought an application for leave to call further evidence in order to show that the lower sat on 29/12/93. In a ruling delivered by this court on 1/3/2001, leave was granted that an affidavit deposed to by the trial Judge, Balogun J on 4/11/99 be made a part of the record of appeal. In paragraphs 10, 11, 12, 13, 14, 15, 16, 17, of the affidavit Balogun J. deposed thus:

"(10) *That the oral objection so referred to in that Statement of Fact which I have set out above, was heard by me on the 23rd day of December, 1993, and accordingly the record of proceedings in the case is incomplete in so far as it fails to contain the proceedings of 23rd day of December, 1993.*

(11). *That the record of proceedings of 20th December, 1993 contained at pages 396 - 398 of the records of proceedings herein show clearly that on Wednesday, 22nd December, 1993 at the instance of Miss Dupe Gbangbose, learned counsel for 1st to 4th defendants (and not withstanding the opposition of Chief Adefola, learned counsel for plaintiffs) further hearing of the case was adjourned to 23rd December, 1993.* B

(12) *That if the correct position has been that the court presided over by me did not sit on 23rd December 1993 in this case, then by the practice followed in the High Court of Lagos State, there would still be a record on a page in the record of proceedings specifically dealing with that circumstance, and stating the reason (if known) why the court did not sit on that date, and also stating the new date to which the case is adjourned or when it would be fixed.* C

(13). *That if refer by way of illustration of the point dealt with by me in the preceding paragraph to pages 153 and 154 of the record of Proceedings herein, relating to Monday, 22nd day of March, 1993 where the following endorsement appears on the records of proceedings herein:*"

*"PUBLIC HOLIDAY. Adjourned to 29th March, 1993"* E

(14). *That it was at the end of the proceedings in the case on 23rd December, 1993, that further hearing of the case was adjourned by me to 29th December, 1993, and I did so bearing in mind:*

(a) *Friday 24th December, 1993 was a day before Christmas;* F

(b) *Saturday 25th December, 1993 was Christmas day;*

(c) *Sunday 26th December, 1993 was Boxing day;*

(d) *Monday 27th December, 1993 was a public holiday for Christmas of that year;*

(e) *Tuesday 28th December, 1993 was also a public holiday for Christmas of that year.*

(15). *That the first working day after 23rd December, 1993 was 29th December, 1993 and this explains in this case why I adjourned the case after the proceedings of 23rd December, 1993 to 29th December, 1993.* H

(16). *That if I did not sit and hold proceedings in the case on 23rd December, 1993 the position in this case will be that there will be nothing in the record of proceedings to show or explain how it came about that the case was adjourned by me to 29th December.*

(17). *That all the documents I have referred to in this affidavit are already before the Court of Appeal, except the proceedings of 23rd December, 1993 in question.*”

It is necessary here to say that the trial judge had on 20/12/93 indicated to both parties that he was proceeding on retirement on 1/1/94. This was the reason why the suit was adjourned to 22/12/93, 23/12/93, and 24/12/93. It must appear strange that the same court which had demonstrated an earnestness to hear the case before the retirement of judge on 1/1/94 and which had adjourned the matter to 22/12/93, 23/12/93 and 24/12/93 would without any reason whatsoever suddenly skip sitting on 23/12/93. It is therefore easy to accept the explanation of Balogun J. that the court sat on 23/12/93 and adjourned on that date to 29/12/93. Further, it must also appear dubious that defendant’s counsel did not go to court on 23/12/93 or 24/12/93 to which dates the case was adjourned on 20/12/93. If she did she would have discovered that the matter was to come up next on 29/12/93. This is in view of the fact that all the parties knew that the case was to be disposed of before 1/1/94. I think that the disappearance from the record of proceedings of the court notes for 23/12/93 was the result of mischief-making or negligence on somebody’s part. I hold that the lower court sat on 23/12/93 and that the case was adjourned to 29/12/93 for continuation.

With respect to the argument that the lower court sat on 29/12/93, a date which fell within the Christmas vacation, it is expedient to examine the applicable rules of the lower court. Order 48 Rules 4, 5 and 7 of the High Court of Lagos State (civil procedure) Rules, 1972 provide:

“4. *Subject to the directions of the Chief justice, sittings of the High court for the dispatch of civil matters will be held on every week-day except:-*

- (a) *On any holidays;*
- (b) *During the week beginning with Easter Monday*
- (c) *During the period beginning on Christmas Eve and ending on the 2nd January next following;*

(d) *During the long vacation i.e., the period beginning on the first Monday in August and ending on a date not more than six weeks later as the Chief Justice may by notification in the Gazette appoint.*

5. (1) *Notwithstanding the provisions of Rule 4, and any cause*

*or matter may be heard by a judge in court during any of the periods mentioned in paragraphs (b), (c), or (d) of rule 4 (except on a Sunday or public holiday) where such cause or matter is urgent or a Judge at the request of all the parties concerned agrees to hear a cause or matter.*

*(2) An application for an urgent hearing shall be made by summons in chambers and the decision of the Judge on such an application shall be final.”* B

Under the above Rules it is clear that a court may not sit on any of the days or period referred to under order 48 Rule 4 (a) to (d) above. However under order 48 Rule 5 are two exceptions, namely: C

(1) Where a cause or matter is urgent

(2) Where the parties to the cause or matter consent.

Now under order 48 Rule 5(2) an application for an urgent hearing may be made by summons. It is however my view that in this case, it was not necessary for any of the parties to bring any application for urgent hearing since the trial Judge himself had on 20/12/93 said: D

*“I therefore exercise discretion to adjourn further hearing of this case to 22nd, 23rd and 24th December, 1993 in order to assure that I complete this case on or before 31/12/93 before I proceed on retirement on 1/1/94.”* E

It is manifest from what the trial judge said that he was under a compelling urgency to dispose of the case within 11 days from 20/12/93 before he proceeded on retirement on 1/1/94. There could not have been any doubt on the matter in view of the fact that the trial judge was reacting to an oral application by Chief A. O. Adefala that the case be heard urgently. F

It is my view that the lower court was right to have adjourned G the case to 29/12/93 in view of the obvious urgency involved which it made clear to the parties. The case itself had been in court since June 1988.

From that judgment of the court of Appeal which brought out the glaring factors at play, the urgency or emergency scenario was not hidden in that the other option would have been that the trial Judge having commenced the hearing would have let go, for a trial de-novo, a situation known to all parties. The conditions stipulated under order 48 Rules 4 and 5 of the Rules of the High Court of H

Lagos State which provisions are embedded in the extracts of the judgment of the court below quoted extensively above, those conditions were adequately met. Order 48 Rule 5 (1) gives the judge the power to determine an urgent situation. Rule 5(2) provides for when any of the parties so apply that there was urgency. The discretion exercised by the learned trial Judge cannot be faulted. The circumstances that brought about that exercise of the court's discretion was not lost on the appellants who chose unilaterally to keep away, only to turn around clutching at a weak rope to salvage what obviously is a lost cause. The diction of Akintan, JCA (as he then was) in the case of *Military Administrator, Delta State v. Olu of Warri* (1997) 7 NWLR (pt.513) 430 at 450 - 451 is apt and captures the present situation properly. It is as follows:

*"It is therefore quite clear that there is nothing preventing a court from sitting on Saturdays or during vacation or even on Sundays to hear and determine urgent matters. The determining factor, however, is that the matter to be given such preferential treatment must be acceptable to the court as being very urgent. In the result therefore it was not per se out of place for this court to sit during the court vacation, provided that the matter in respect of which it decided to sit is one which the court considers as very urgent."*

The painting by the appellants portraying an underhanded operation in the determination of the suit by the retiring trial judge is a kite that just will not fly. The proper picture is that the appellants made a choice in not taking seriously a clear emergency situation; they cannot therefore explain away their lapses and re-arrange things to suit only them. The opportunity was there and they opted to let it pass and so the court below was right in upholding what the trial Judge did.

From the foregoing and the more detailed and elaborate reasons in the lead judgment just delivered by O. O. Adekeye JSC including the fact that on the merit the concurrent findings of the two lower courts, the justice of the matter resided with the respondent, I dismiss this appeal. I abide by the consequential orders in the lead judgment.