

**SUPREME COURT OF NIGERIA**  
17TH FEBRUARY, 2012. SC. 207/2004  
CORAM:- **A. M. MUKHTAR, I. T. MUHAMMAD, S.**  
**GALADIMA, S. N. NGWUTA, O. ARIWOOLA, JJSC**

MRS. VIDAH C. OHOCHUKWU ..... APPELLANT  
AND

1. ATTORNEY-GENERAL  
OF RIVERS STATE

2. RIVERS STATE HOUSING ..... RESPONDENTS  
AND PROPERTY DEVELOPMENT  
AUTHORITY

3. MR. G. T. A. CHUKWUIBI

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PROPERTY LAW - Deed of Assignment - Validity - Since plaintiff failed to show - That the military governor approved the assignment - The same cannot be valid (H1)

PROPERTY LAW - Surrender - Effect - By agreeing to assign to someone else - Plaintiff has surrendered the property to Rivers State government (H2)

APPEALS - Issues - Not raised in trial court - Fate - Such issues cannot be raised in appellate court - Save with leave of either of the courts (H3)

COURTS - Pleadings - Binding nature of - Courts are bound by pleadings before them - And should confine themselves - To the case presented by parties (H4)

PLEADINGS - Content - Basis - Pleadings are required to contain facts - That assist court in just determination of a case (H5)

EVIDENCE - Proof - Onus - Evidence Act s. 135 - Plaintiff must prove his case - After which burden shifts to defendant (H6)

LAND LAW - Title - Proof - Party needs to succeed on strength of his case - And not depend on weakness of opponent (H7)

ACTIONS - Parties - Pleadings - Binding nature of - Party must state his complaints and remedy in statement of claim - Because any matter outside same - Goes to no issue (H8)

ACTIONS - Proof - Standard of - Actions are proved on preponderance of evidence - And balance of probabilities (H9)

### ***FACTS***

1<sup>st</sup> plaintiff applied for allocation of the plot of land in controversy from the Rivers State Government, and the same was allocated to him. After complying with the conditions of allocation i.e. payment, he was issued with a Certificate of Occupancy. He erected a building on the plot and has since been paying ground rents in respect of the said property. A commission named the Sanomi's commission was set up by the Rivers State Government to look into sales of landed properties in the State. In its report, the property in dispute was listed among plots that had reverted to the Government of Rivers State, and it was agreed that the land in controversy be assigned to 1<sup>st</sup> plaintiff's common law wife i.e. 2<sup>nd</sup> plaintiff/appellant. A deed of assignment was prepared and executed, and forwarded to the Secretary to the State Government requesting for consent of the then Military Governor. Upon noticing that the property was included in the list of properties seized, 1<sup>st</sup> plaintiff lodged a protest and when he applied for assignment, the Commissioner of lands replied that the property had reverted to the Rivers State Government. Hence the application for assignment could not be processed.

The action of the Commissioner led to the institution of this action by 1<sup>st</sup> plaintiff and appellant at the High Court of Rivers State, Port Harcourt. They claimed inter alia, that the Certificate of Occupancy in respect of Plot A27 G.R.A. Phase I, Port Harcourt is valid and subsisting and that the purported sale to 3<sup>rd</sup> defendant/respondent is null and void. They pleaded that the State government is estopped from revoking the Right of Occupancy after they had expended so much money on erecting a building on the land, and that any such revocation is ultra vires null and void. Defendants stated that the revocation was justified as 1<sup>st</sup> plaintiff was in breach of the covenant contained in the certificate of occupancy for non-payment

of ground rent. 1st defendant/respondent denied that the proposed deed of assignment between 1<sup>st</sup> plaintiff and appellant sent to the Secretary to the State government was approved. 3rd respondent in his statement of defence contended that he is a bona fide purchaser for value without notice of the property in dispute. Hence there is no cause of action against him. During the trial, the name of appellant was struck out. However on the demise of 1st plaintiff, appellant substituted 1<sup>st</sup> plaintiff. At the end of trial, the learned trial judge gave judgment in favour of appellant and granted the reliefs sought. Being dissatisfied, 3<sup>rd</sup> respondent filed an appeal at the Court of Appeal, Port Harcourt Division. The court allowed the appeal. Aggrieved, appellant appealed to Supreme Court.

### **ISSUES FOR DETERMINATION**

*“1. Whether the decision of the court of Appeal that the trial court did not appreciate and consider the issues raised in the suit is right and supported by the evidence on Record.*

*2. Whether the Court of Appeal was right in dismissing the suit of the Plaintiff/Appellant.*

*3. Whether the Court of Appeal was right when it dismissed the Plaintiff ‘s claim instead of ordering a retrial.”*

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

### **PROPERTY LAW - Deed of Assignment - Validity**

1. With due respect; I have looked at the bottom of the two letters, and I fail to see where the Military Governor gave directive/authority to assign the said property. All I can see thereon is the stamp of the principal Secretary to the Military Governor and his office written in ink. Then at the top of Exhibit 12A are the words “*SMG P1 process this appeal to me along with the attached one*”. Have the letters added value to the case of the plaintiff? I think not, for it does not say much about the Governor’s reaction/response or action authorized or directed to be taken by the Military Governor.

Secondly, Exhibit ‘13’ dated September 16, 1985, forwarding the deed of assignment was written and sent in spite of no response or permission to do so by, the Military Governor. Nevertheless Exhibit ‘14’ emanated from the Military Governor’s office demanding the payment of some amount before action can be taken. I believe this letter is what the plaintiff is strongly holding on to, but the fact

remains that the plaintiff was aware that his right to the property had been extinguished by the Government vide the report of the Sanomi Commission, which he admitted affected his property, since he owned two properties, and had agreed to hold on to the property he was earlier allocated and in which he resides. His attempt to establish that the property was financed by the appellant failed because the relevant documents related to the property bear the name of the plaintiff. Of particular importance is the Certificate of Occupancy Exhibit 4 which bears the name of the plaintiff. If, (and I emphasise the word if) the plaintiff had been able to show the court the directive of the then Military Governor to assign to the appellant, perhaps, the case of the plaintiff would have taken another dimension, but there is nothing to prove and establish that fact. (p. 903 B)

**D *PROPERTY LAW - Surrender - Effect***

2. The fact that the plaintiff attempts to assign the property is an admission of the fact that he was not entitled to the plot and an acceptance of the Sanomi report that it be relinquished and the certificate of occupancy be revoked. Having been revoked the Rivers State Government was at liberty to dispose of the property, as vested in it by the Land Use Act Cap 202 Laws of the Federation of Nigeria 1990.

A careful reading of paragraphs (12), (13) and (14) of the final amended Statement of claim that infers that the appellant surrendered the property in controversy, for by agreement to assign the residue of the lease to someone else, he has technically done so. In addition there was evidence in support of this, and the pieces of evidence have already been reproduced in this judgment. If there was no surrender why would the 1st appellant seek to assign the property to someone else (the fact that he attempted to assign the property to someone else, his common law wife notwithstanding).

The above juxtaposed against the facts, position and circumstance of the present case has convinced me that surrender took place i.e. the plaintiff surrendered the property in dispute to the Government of River State. Consequently, the said Government was right to have allocated the property to the 3rd respondent, having taken into account the provision of Section 27 of the Land Use Act supra. (pp. 904 A/907 C/908 F)

***APPEALS - Issues - Not raised in trial court - Fate***

3. On the issue of not serving the plaintiff a notice under subsection (6) of section 28 of the Land Use Act *supra*, before the certificate of occupancy was revoked, it is a fact that the plaintiff did not make an issue of it, in his final pleadings. The 1st defendant however pleaded in its statement of defence the fact that the revocation of the certificate of occupancy was done in exercise of the power conferred on the Military Governor under subsection (5) of Section 28 of the Land Use Act above. The fact, however, that the 1st defendant pleaded the revocation of the land in dispute by the Government under the Land Use Act *supra*, vide paragraph (11) of its amended statement of defence does not translate to evidence. No evidence was adduced on service of notice required before revocation of Certificate of Occupancy pursuant to the provision of Section 28 of the Land Use Act *supra*. As a matter of fact the plaintiff did not raise that point either in his pleadings or evidence. Hence it was neither made an issue in the trial court, nor did he seek and obtain leave to raise it as fresh issue in the court below. The law is trite that a point that is not made an issue in the course of trial cannot be so raised in an appellate court unless with the leave of the trial court or the appellate court. (p. 904 B)

***Pleadings - Binding nature of***

4. In this event, the lower court was right when it found *inter alia* in the excerpt of its judgment that the learned trial judge dabbled into extraneous matters that were not before him. Perhaps I should at this juncture reiterate the elementary principle of law that courts are bound by pleadings before them and should confine themselves to the case presented by parties. They are not allowed to go on a wild goose chase.

I cannot fathom how the learned trial judge arrived at the above, when in fact the plaintiff neither pleaded this failure to be served with notice of revocation nor did he give evidence of such failure in his evidence. With due respect, it was as though the learned trial judge was eager to make a case for the plaintiff, so to speak. When a party does not-make-an issue of a fact, it is not for a judge to go out of his case to do so. (pp. 904 H/911 E)

***PLEADINGS - Content - Basic***

5. It seems the learned counsel is saying because there was a blanket averment of revocation under the Land Use Act *supra*, so the issue of notice automatically arises, without a specific averment of failure to give it in satisfaction of subsection (6) of Section 28 of the Land Use Act. At any rate, the plaintiff did not make it part of his case, and even if the 1st defendant made an issue of it which it did not; the evidence on notice to revoke arose in the course of cross examination D.W. 2.
- C Although pleadings are not supposed to include evidence, they are expected and required to contain facts that will assist the court in arriving at a just determination of a case. (p. 905 C)

***EVIDENCE - Proof - Onus***

- D 6. On the appellant's contention that the defendant failed to prove the legality of the revocation, and his reliance on the case of *Elias v. Omobare* 1982 5 SC 25, I find no place for that in this exposition because the plaintiff has not proved his case for the burden shifts only after the party asserting has proved his assertion.
- E Now, I will go back to the position of the law as regards proof in a litigation. By virtue of Section 135 of the Evidence Act Cap 112 Laws of the Federation of Nigeria 1990, he who asserts must prove. See *Imana v. Robinson* 1979 3 - 4 SC. 1. It is after a plaintiff has proved his case that the burden of proof shift to the defendant. The
- F question now is, did the plaintiff prove his case to the extent that the burden shifted? By virtue of paragraphs (19) and (20) of the plaintiffs' pleading they asserted that the revocation of the certificate of occupancy in respect of the property in dispute was unconstitutional,
- G but they have not succeeded in establishing that fact by evidence. They may have proved that they expended money in erecting building on it, but then at the end of the day, they, did not claim the amount as per the reliefs they were claiming, in paragraph (24) of the plaintiffs second further amended statement of claim. The pivot
- H of the plaintiff 's case is that the revocation and seizure of the property was unconstitutional, but I do not see in his evidence that he proved the unconstitutionality of the revocation, especially on the face of paragraphs (12), (13), (14) (15) and (16) of his pleadings, (14) of which particularly was not successfully proved, as found in

the earlier part of this judgment. In view of the above facts, I am not satisfied that the plaintiff discharged the burden placed on him by Section 135 of the Evidence Act *supra*. The 1st defendant may have raised various defences to cover their action *vide* paragraphs (9), (10) and (11) of the final statement of defence of the 1st defendant, and averments of the 2nd and 3rd defendants. (pp. 905 F/912 D) B

### ***Title - Proof***

7. A plethora of authorities abound that a party in a suit for declaration of title to land cannot depend on the weakness of an opponent's case to succeed. C

I cannot see that the failure to prove some of the facts are of any negative significance, considering the settled position of the law that a party will not be allowed to rely on the weakness of the case of the opponent. (pp. 905 G/913 A) D

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

8. I will expound on the above argument what I consider to be a sacrosanct requirement of the law when a party institutes an action against an opponent. A litigant who seeks to succeed in his action must state all his complaints and the remedy he is seeking in his statement of claim. What it means is that his cause of action and his grievances must be contained in statement of claim, with which he is bound, for any matter outside the periphery of the statement of claim *i.e.* pleadings *vide* evidence goes to no issue and are bound to be ignored. (p. 910 G) F

### ***ACTIONS - Proof - Standard of***

9. Another important aspect of an action is proof of the content of the pleading. In this respect, the law is trite that actions are proved on preponderance of evidence and balance of probabilities. (p. 911 A) G

### **REPRESENTATION**

Mr. M. O. Onyeka, with J. A. N Okoli, for the Appellant  
I. R. Minakiri [Mrs.] (Director, Legal Drafting, Ministry of Justice, Rivers State) for the 1st respondent.  
Mr. Wilcox Abereton for the 2nd respondent. H

Mr. C. E. Onyebukwa for the 3rd respondent.

**CASES REFERRED TO**

- Oshatoba v. Olujitan (2000) 5 NWLR (pt. 655) 159  
 Obioha v. Duru (1994) 8 NWLR (pt. 365) 631  
 B Akpene v. Barclays Bank of Nigeria Ltd (1977) 1 SC 47  
 Continental Seaways v. N.D.R.G (1977) 5 SC 235  
 Orizu v. Anyaegbunam (1978) 5 SC 21  
 Akinfosile v. Ijose 1966 5 FSC 192  
 C Elias v. Omobare (1982) 5 SC 25  
 Imana v. Robinson (1979) 3 - SC 1  
 Osawaru v. Ezeiruka (1978) 6 - 7 SC 135  
 Kodilinye v. Odu (1935) 2 WACA 336  
 Akinola v. Olowu (1962) 1 SCNLR 352  
 D Ibeziako v. Nwagbogu (1970) 1 NMLR 113  
 Okonji v. Njokanma (1991) 7 NWLR (pt. 202) 131  
 Weli v. Okechukwu (1985) 2 NWLR (pt. 5) 3  
 Ike v. State (2001) 7 NSCQR 277

E **STATUTES REFERRED TO**

Land Use Act Cap 202 LFN 1990, s. 28(5)(6)

**BOOK REFERRED TO**

- F Halsbury's Laws of England 4th Edition Reissue, p. 496 para. 524

**LEAD JUDGMENT BY MUKHTAR JSC**

The appellant in this appeal was initially one of two plaintiffs in the High Court of Rivers State who sought the following reliefs against the defendants/respondents:-

- G *"1. A declaration that the certificate of Occupancy registered as No. 76 at page 76 in volume 93 in the Lands office Port Harcourt in respect of Plot A27 G.R.A. Phase I Port Harcourt property of the Plaintiff is correct, valid and subsisting.*
- H *2. A declaration that the purported sale of the said property to the 3rd defendant by the 1st and 2nd defendants is unconstitutional null and void and of no legal effect.*
- 3. N50,000.00 special and general damages for unlawfully purporting to sell the said 1st plaintiff's property.*

*4. A perpetual injunction restraining the defendants by themselves, their servants, agents or privies from further unconstitutionally interfering with the 1st plaintiff's ownership or possession of the said property situate lying and being at Plot A27 G.R.A. Phase 1, Port Harcourt."*

The history of the property is that the plaintiff applied for allocation of the plot in controversy from the Rivers State Government, and he was allocated the plot vide letters, and after complying with the conditions of allocation i.e. payment, the plaintiff was issued with a Certificate of Occupancy. The plaintiff erected a building on the plot, and he has since been paying ground rents in respect of the said property. A commission named the Sanomi's commission was set up by the Rivers State Government to look into sales of landed properties in the state. In its report the property was listed among plots that had reverted to the Government of Rivers State, and it was agreed that the land in controversy be assigned to his common law wife (the appellant) to enable him raise money to defray the bank loan used in erecting the building on it, and a deed of assignment was prepared and executed, and forwarded to the Secretary to the Government requesting for consent of the Military Governor. When the property was included in the list of properties seized, the plaintiff lodged a protest and when the plaintiff applied for assignment, the Commissioner of land, replied that the property had reverted to the Rivers State Government, hence the application for assignment could not be processed. The plaintiff pleaded that the Rivers State Government is estopped from revoking the Right of Occupancy after they had expended so much money on erecting a building on it, and any such revocation is ultra vires null and void.

The defendants in their various statements of defence denied most of the allegations in the plaintiffs' statement of claim, stating that the revocation was justified as the plaintiff was in breach of the covenant contained in the certificate of occupancy for non-payment of ground rent.

The 1st defendant denied that the proposed deed of assignment between the plaintiff and the appellant sent to the Secretary to the Government was not approved. The 3rd defendant in his statement of defence contended that he is a bona fide purchaser for value without notice of the property in dispute, and that the plaintiffs have

no cause of action against the 3rd defendant. The action is frivolous, speculative, incompetent and must be dismissed. The name of the 2nd plaintiff was struck out, but on the demise of the 1st plaintiff, the 2nd plaintiff was substituted as an appellant.

At the close of pleadings parties adduced evidence which was appraised by the learned trial judge, who at the end of the proceedings gave judgment in favour of the plaintiff and granted all the reliefs sought. Dissatisfied with the judgment, the defendants appealed to the court of Appeal, Port Harcourt Division. The Court of Appeal, allowed the appeal, concluding thus:-

*"In the result I am of the view that this appeal succeeds and it is allowed. The judgment of H. George J, given on 7th January 1994 is hereby set aside. The claim of the respondent in suit No. PHC/557/86 in the lower court fails. It is accordingly dismissed with costs assessed at N3,000.00 in favour of the appellants and N5,000.00 costs in this appeal also in favour of the appellants."*

The appellant after substitution appealed to this court. In compliance with the rules of this court, the parties exchanged briefs of argument, two briefs of argument were filed by the learned counsel for the appellant, but at the hearing of the appeal he adopted the brief filed on 13/3/2009. A brief prepared by the Director of Civil Litigation department, Rivers State, Mrs. Minakiri, had as its heading 1st and 2nd Respondent's brief of argument, but at the hearing of the appeal, Mrs. Minakiri informed the court that the brief was in respect of the 1st respondent only, and she accordingly adopted it.

The 2nd and 3rd respondents briefs of argument were also adopted at the hearing of the appeal, Three issues for determination were raised in the appellant's brief of argument, which read as follows:-

*"1. Whether the decision of the court of Appeal that the trial court did not appreciate and consider the issues raised in the suit is right and supported by the evidence on Record.*  
*2. Whether the Court of Appeal was right in dismissing the suit of the Plaintiff/Appellant.*

*3. Whether the Court of Appeal was right when it dismissed the Plaintiff's claim instead of ordering a retrial."*

The learned counsel for the 1st respondent is of the view that a lone issue which reads as follows will suffice for the determination

of the appeal.

The issue is:-

*“Whether in the light of the pleadings and evidence on record, the court of Appeal was right in dismissing the suit rather than remitting same to the trial court for retrial upon holding that the trial court did not appreciate the issues raised in the suit.”* B

The learned counsel for the 2nd respondent also formulated a single issue for determination which reads thus:-

*“Having regard to the evidence led in this case and the judgment of the learned trial judge, did the court below err in evaluating evidence and consequently dismissing plaintiff’s, claims, rather than ordering a retrial of the same?”* C

In his own brief of argument, the 3rd respondent also raised a lone issue for determination which reads as follows:-

*‘Whether the Court of Appeal rightly dismissed the Appellant’s case having regard to its findings that the trial court did not appreciate and consider the issues raised in this suit instead of ordering a retrial.’* D

I will adopt the issues formulated in the appellant’s brief of argument, starting with issues (1) and (2) supra. The finding of the lower court attacked by the appellant under this issue read as follows:- E

*“All these issues were not considered by the court thereby creating a lacuna, a solution to which this court has to find. In short, the plaintiff/Respondent having already surrendered the plot in dispute he no longer has any right in the said plot of land though he will be in order to claim for improvements made on the land by him. The Rivers State Government therefore had the right to accept the surrendered plot and deal in same as deemed appropriate under the provisions of the Land Use Act Cap 202 Laws of the Federation of Nigeria 1990. Issue No. 3 is therefore answered in the negative since the trial court failed to ascribe proper probative value to the evidence in that regard... Going by my findings above and it is that the Plaintiff/Respondent could not in any way have been given judgment on his claims even on his own showing....* F G H

*The judgment given in this suit was altogether inappropriate, the judge having failed to hit the nail on the head thereby making him miss the crucial point at stake.”*

The learned counsel for the appellant has submitted that the learned trial judge duly considered the crucial issues which arose for determination on the pleadings and evidence before him. The learned counsel for the respondent has submitted that the lower court is quite justified in taking the position it took in evaluating the evidence as it did based on the record, there being no issue touching on the credibility of witnesses or their demeanour.

The learned counsel for the 2nd respondent has submitted that the court below did not err when it evaluated the evidence and consequently dismissed the plaintiffs' claims at the High Court, rather than ordering a retrial of the same, in view of the pleaded facts and led evidence. The learned counsel for the 3rd respondent argued that the Court of Appeal was right in its conclusion that the trial court did not appreciate the issues raised in the suit. Now, what did the parties plead? I will reproduce the salient averments hereunder:-

In the plaintiffs second further amended statement of claim, the plaintiffs pleaded thus inter alia:-

*"6. Consequent on the plaintiff complying with the said payments a Certificate of Occupancy in respect of the said PLOT 427 Diobu G.R.A. PHASE 1, Port Harcourt was issued to the plaintiff. The said Certificate of Occupancy was registered as No. 76 at page 76 in volume 93 in the Lands Registry. The 99 years took effect from 1st January 1981 but the Certificate of Occupancy was signed on the 1st day of November, 1981.*

*7. Thereafter the plaintiff applied for the approval of his Building Plan. By a letter a Ref. CO/2638/2/82: RSL 8321/80 dated 22nd November 1982 from the City Engineer, the Plaintiff was required to make some payments being approval fees.*

*8. In response to the above the plaintiff made the following payments...*

*9. By a letter Ref. CC/2638/2/82 dated 23rd November 1982 from Port Harcourt Local Government area two (2) sets of the above approved plans were returned to the plaintiff.*

*11. The plaintiff has been paying property and Ground Rates (sic) in respect of the said property.*

*12. In 1984 the Rivers State Government set up a commission otherwise known as the SANOMI's COMMISSION to look into sales of landed properties in Rivers State. Property Owners were required*

*to submit the document showing their title to the respective property for verification. The plaintiff, who owned another property apart from the one in dispute submitted his documents. The plaintiff was there and then informed by commission that one of his properties will have to be surrendered to the River State Government. The plaintiff protested against this decision before the Commission.* B

13. The plaintiff soon after and prior to the publication of the Commission's report made a representation to the then Military Governor...

14. At the meeting with the Military Governor, the plaintiff submitted to the former, a letter appealing for the review of the decision of the Sanomi's commission. Consequent upon this representation, it was agreed that the plaintiff should assign the residue of the lease in respect of Plot A27 to Mrs. VIDAH OHOCHUKWU. The Military Governor there and then minuted on the said decision to the then Secretary to the Military Government, Mr. SOMIWA DAGOGO-JACK for necessary action. C

a) On 20th September 1985 the plaintiff had an appointment with the chief Lands officer and he was told what payment would be required before the assignment is made. The plaintiff who in three days was due to leave Nigeria for an appointment abroad, by a letter dated 20th September 1985, protested against the increase of the ground rent payable ... E

15. In response to the above letter Ref. RSL/8341/36 dated 25th September 1985 (sic) was written from the office of the Chief Lands officer demanding the payment of certain fees which must be paid before any further action was taken in this matter. F

These sums included...

16. On 2nd April 1986 the plaintiff caused to be paid into the G account of the Rivers State Government the sum of N859.10 covering the registration and consent fees as well as part of the Ground Rents owed. No receipt could be issued by the Ministry of Lands because the file for this property was reported missing.

a) The plaintiff contends that no ground rent was owed for the year 1983. The payment of 1984 ground rent was withheld pending approval of the assignment. The plaintiff will further contend at the trial that if ground rents were in arrears in respect 1983, 1984 and 1985 under the covenant in the Certificate of Occupancy in respect H

of the property in dispute.

18. By a letter Ref. RSL/8341/46 dated 16th July 1986 from the Chief Lands Officer the solicitors to the plaintiffs were informed that the application could not be processed because the property had reverted to the Rivers State official Gazette No. 9, Volume 18 of  
B 27th March 1996.

19. The plaintiff plead that the Rivers State Government is estopped from revoking the Rights of Occupancy after it has caused the plaintiff to expend money in erecting the building thereon and after causing its agents to demand from the plaintiff the necessary  
C fees in furtherance of the plaintiff's intention to assign the property to MRS. VIDAHOCHUKWU."

In its amended statement of defence, the 1st defendant gave a genesis of what led to the present controversy, as follows:-

D "3. The 1st Defendant does not admit paragraph 3, 4 and 5 of the plaintiff's statement of claim and will at the trial contend that the true position is as follows:-

(a) That by a personal letter dated 5th February 1981, the plaintiff applied to the Civilian Governor of Rivers State, Chief Melford  
E Okilo to buy No. 10 ALAGBO - OPIA CLOSE, PORT-HARCOURT.

(b) That the said No. 10 ALAGBO - OPIA CLOSE was a Rivers State Government residential property which the plaintiff was occupying as his official residential accommodation by virtue of his position as a High Court Judge in Rivers State.  
F

(c) That the then Governor minuted on the plaintiff's letter referred to above directing the Chairman of the Task Force on Government properties to find an alternative plot in Diobu G.R.A. Phases 1 and 2 for the plaintiff.

G (d) That based on the Governor's directive referred to above, the plaintiff was offered the property in plot 39 G.R.A. Phase I Diobu at the price of N60,704.95 which he accepted with the payment of 20% of the purchase price.

(e) That in evidence of the above transaction, a certificate of  
H Purchase was issued by the Secretary, Committee in Government Properties, Governor's office Port Harcourt on 30th June, 1981 under their letter reference No. GD/OGP/104/81.

The 1st Defendant thereby pleaded all the letters, minutes and documents herein before pleaded.

(f) *That unknown to the Governor at the time a photocopy of the plaintiff's letter, with the Governor's office, 'minutes thereon had also been sent to the lands Division of the Governor's office which then offered a vacant plot No. A27 Diobu G.R.A. Phase 1 to the plaintiff by its letters Nos of 14th August 1981 an RSL/8341/12 of 3rd December 1981, subject to the terms and conditions contained in those letters, which said letters are hereby pleaded.* B

(g) *That the said offer of Plot A.27 Diobu G.R.A. phase 1 was pleaded above, both referred to the plaintiff's letter of 5th February 1981 which had been satisfied with the sale of Plot 39 G.R.A. Phase 31 to the plaintiff earlier on in the year.* C

(h) *The 1st Defendant shall contend at the trial that the alleged payment of N550.00 by Barclays Bank certified cheque referred to by the plaintiff could not have been in response to RSL/8341/7 of 14/8/81 and letters Nos. RSL/8341/12 of 03/02/81 in respect of the transaction involving the plot in dispute.* D

4. *with regard to paragraphs 6, 7, 8 and 9 of the plaintiff's statement of claim the 1st Defendant admit that a certificate of occupancy was issued to the plaintiff but denies that the plaintiff complied with the payments required of him.* E

5. *In further answer to paragraphs 6 and 7 of the plaintiff's statement of claim the 1st Defendant shall at the trial contend as follows:-*

(a) *That by the terms of the Certificate of Occupancy issued to him the plaintiff covenant among other things:-* F

(i) *to pay the required rent of N391.00 per annum.*

(ii) *to erect buildings to the value of not less than N20,000.00 within*

(b) *That the plaintiff breached the above terms and conditions in that:-* G

(i) *the plaintiff failed or neglected to pay the required rents for the years 1983, 1984 and 1985;*

(ii) *the plaintiff did not erect building of not less than N20,000.00 in accordance with plans approved by the Chief lands officer.* H

6. *The 1st Defendant does not admit paragraph 10 of the plaintiff's statement of claim and will contend at the trial that the building erected on the property in dispute was not in accordance with plans approved by the Chief Lands Officer, neither was the value up to*

*N20,000.00 as required by the Certificate of Occupancy. What the plaintiff erected was only the boys quarters which was less than N20,000.00 at the time it was erected.*

8. *The 1st Defendant does not admit paragraphs 10, 13, 14 and 15 of the plaintiff's statement of claim and will at the trial contend as follows:-*

(a) *That after the publication of the 'SANOMI PANEL REPORT, the plaintiff in two separate letters dated 8/8/85 appealed to the then Military Governor, Mr. Fidelis Oyakhilome for consent to assign the property in dispute to Mrs. Vidah Ohochukwu, the plaintiff's "common law wife".*

(b) *That the Military Governor refused the plaintiff's request and informed him that it was government policy that no individual should own more than one plot in G.R.A. Phase 1 and 2. The Plaintiff elected to keep Plot 39 G.R.A. Phase 1.*

(c) *That following the publication of the SANOMI PANEL'S REPORT and the acceptance of the said Panel's recommendation as it affects the plot in dispute, the then Military Governor of Rivers State acting under powers granted him by the Land Use Decree 1978 revoked the plaintiff's rights of occupancy over the said plot and cancelled the certificate of Defendant shall at the trial rely on the Rivers State official Gazette No. 9, Volume 18 of 27th March 1986 in proof of this fact.*

(d) *That at no time did the then Military Governor, Mr. Fidelis Oyakhilome or any other person authorized by him agree that the plaintiff should assign the property in dispute to his common law wife.*

(e) *That the proposed Deed of Assignment made by the plaintiff in favour of his common law wife was not approved by the Military Governor or any person duly authorized by him.*

9. *The 1st Defendant does not admit paragraph 16 of the plaintiff's statement of claim and will at the trial contend that the payment of ground rent, if made at all, was without any demand from the Rivers State Government and was also made by the plaintiff after he had known of the revocation of his rights of occupancy and the cancellation of his Certificate of Occupancy in respect of the property in dispute.*

10. *The 1st defendant admits paragraphs 17 and 18 of the*

*plaintiff's statement of claim, but say that with the, enactment of the REVOCATION OF RIGHTS AND CERTIFICATE OF OCCUPANCY ORDER OF 1986, the plaintiff's interest in the property in dispute became extinguished with effect from the date of the said order.*

11. *The 1st Defendant does not admit paragraphs 19 and 20 of the plaintiff's statement of claim and will at the trial contend follows:-* B

(a) *That the revocation of the plaintiffs rights of occupancy and the cancellation of his certificate of occupancy were acts done in the exercise of powers vested in the Military Governor by the provisions of the Land Use Decree, 1970 and therefore ultra vires.* C

(b) *That the plaintiff is estopped from contesting the revocation of his rights of occupancy and the cancellation of his certificate of occupancy in that he had agreed with the then Military Governor to forego his interest in that plot.* D

(c) *That this Honourable Court has no jurisdiction to entertain the plaintiffs claim in this suit by virtue of the provision of Decree No. 13 of 1984."*

The 2nd defendant's salient averments read as follows:-

"3. *2nd Defendant in answer to paragraph 12 of the Statement of Claim aver that the 1st Defendant refused to pay Ground rents and Penalty for 1983, 1984 totaling N2,146,10k demanded per letter RSL 8341, dated 25/9/85 contending in his letter dated 20/9/85 to the Chief Lands Officer that there was no legal right to revise the amount of Ground Rent.*" F

6. *It was a term of the offer and grant of the Certificate of Occupancy in letter referred to in paragraph 6 of the Statement of Claim which was accepted by the 1st plaintiff in his letter of 5/10/81 to erect residential building to the value of N20,000.00. It is quiet usual to demand statutory fees for normal assignment.* G

*However, as earlier averred herein, officials of the Lands Department unaware at the time that the Sanomi Report Affected this property which, it recommended should revert to the State Government on the ground that is (sic) allocation to the 1st plaintiff was in violation of government policy not to allocate more than one property in same government GRA for purchase to an individual. The 1st plaintiff had already been allocated and granted a lease of plot 39 Diobu G.R.A., where the property in dispute is also located, by the* H

*1st Defendant.*

8. *2nd Defendant would also contend at the hearing that the said revocation was justified as the 1st Plaintiff was in breach of covenant contained in the Certificate of Occupancy for non-payment of ground rent at least for 1984 and 1985 as earlier averred. 2nd Defendant does not admit that 1st plaintiff was ever informed that the file was missing and so could not pay due fees as even if so those fees were payable into Government account with the Pan African Bank within the knowledge of the 1st Plaintiff when he paid the 1983 ground rent and penalty to that Bank on 2/4/86...*"

The plaintiff gave evidence on the procedure that led to his grant of a Certificate of Occupancy No.76/76/93, Exhibit 4, and how he sought for and received permission to build a house on the plot in dispute. He testified inter alia thus:-

*"In 1984 I was summoned before the Sanomi Committee set up by the former Military Government. I appeared before them. They informed me that from the records before them that I had two properties in the GRA Phase 1. That I should choose which of the two properties that I would like to take. I decided to retain No. 39 Birabi Street, where I now reside. The Committee said the Government would take over the other property. That was the property in dispute, plot A27. When I left the Committee I made a written protest to the Government about what the Committee said to me. I had an evidence (sic) with the Military Governor..."*

The 2nd plaintiff also wrote a letter to the Military Governor in respect of the same property.

The letter written by the plaintiff and addressed to the Military Governor of Rivers State has as part of its content, the following:-

*"The fact that the purchase was financed by Mrs. V. C. Ohochukwu was never disclosed in the Certificate of Occupancy. At the time of purchase the present policy that 'wives can as of right purchase property in their names was not a recognized policy.*

*Now that this right is recognized by your Government, I am humbly appealing to you to exercise your discretion in favour of Mrs. V. C. Ohochukwu and a (sic) her to retain the plot in question .....I here once more humbly ask for your permission to assign the property to her for the following reasons".*

Then exhibit '12' also dated 8th August and addressed to the

Military Governor by the plaintiff has inter alia the follow:-

*“At that time married women could not own properties in their own name hence the Certificate of Occupancy bore his name. I raised most of the money used in developing the property and can substantiate these fact...*

*In view of the fact that you and your Government, sir, recognizes the right of married women to own property in their own right, I humbly ask that I be allowed to retain the above plot by Deed of Assignment from my husband”.*

**With due respect; I have looked at the bottom of the two letters, and I fail to see where the Military Governor gave directive/authority to assign the said property. All I can see thereon is the stamp of the principal Secretary to the Military Governor and his office written in ink. Then at the top of Exhibit 12A are the words “SMG P1 process this appeal to me along with the attached one”. Have the letters added value to the case of the plaintiff? I think not, for it does not say much about the Governor’s reaction/response or action authorized or directed to be taken by the Military Governor.**

**Secondly, Exhibit ‘13’ dated September 16, 1985, forwarding the deed of assignment was written and sent in spite of no response or permission to do so by, the Military Governor. Nevertheless Exhibit ‘14’ emanated from the Military Governor’s office demanding the payment of some amount before action can be taken. I believe this letter is what the plaintiff is strongly holding on to, but the fact remains that the plaintiff was aware that his right to the property had been extinguished by the Government vide the report of the Sanomi Commission, which he admitted affected his property, since he owned two properties, and had agreed to hold on to the property he was earlier allocated and in which he resides. His attempt to establish that the property was financed by the appellant failed because the relevant documents related to the property bear the name of the plaintiff. Of particular importance is the Certificate of Occupancy Exhibit 4 which bears the name of the plaintiff. If, (and I emphasise the word if) the plaintiff had been able to show the court the directive of the then Military Governor to assign to the appellant, perhaps,**

*the case of the plaintiff would have taken another dimension, but there is nothing to prove and establish that fact. The fact that the plaintiff attempts to assign the property is an admission of the fact that he was not entitled to the plot and an acceptance of the Sanomi report that it be relinquished and*  
 B *the certificate of occupancy be revoked. Having been revoked the Rivers State Government was at liberty to dispose of the property, as vested in it by the Land Use Act Cap 202 Laws of the Federation of Nigeria 1990.*

C *On the issue of not serving the plaintiff a notice under subsection (6) of section 28 of the Land Use Act supra, before the certificate of occupancy was revoked, it is a fact that the plaintiff did not make an issue of it, in his final pleadings. The 1st defendant however pleaded in its statement of defence*  
 D *the fact that the revocation of the certificate of occupancy was done in exercise of the power conferred on the Military Governor under subsection (5) of Section 28 of the Land Use Act above. The fact, however, that the 1st defendant pleaded the revocation of the land in dispute by the Government under*  
 E *the Land Use Act supra, vide paragraph (11) of its amended statement of defence does not translate to evidence. No evidence was adduced on service of notice required before revocation of Certificate of Occupancy pursuant to the provision of Section 28 of the Land Use Act supra. As a matter of fact*  
 F *the plaintiff did not raise that point either in his pleadings or evidence. Hence it was neither made an issue in the trial court, nor did he seek and obtain leave to raise it as fresh issue in the court below. The law is trite that a point that is not made an*  
 G *issue in the course of trial cannot be so raised in an appellate court unless with the leave of the trial court or the appellate court. See Oshatoba v. Olujitan 2000 5 NWLR part 655 page 159, Obioha v. Duru 1994 8 NWLR part 365 page 631, and Akpene v. Barclays Bank of Nigeria Ltd 1977 1 SC 47.*

H *In this event, the lower court was right when it found inter alia in the excerpt of its judgment that the learned trial judge dabbled into extraneous matters that were not before him. Perhaps I should at this juncture reiterate the elementary principle of law that courts are bound by pleadings be-*

**for them and should confine themselves to the case presented by parties. They are not allowed to go on a wild goose chase.**

See *Continental Seaways v. N.D.R.G.*, 1977 5 SC 235 and *Orizu v. Anyaegbunam* 1978 5 SC. 21. In this wise, the court below was right when it held as follows:-

*“Strangely however, the court did not make any pronouncement on the issue of surrender whether or not proper and effective. It merely busied itself with lack of atonement, which was never made an issue, and which the counsel for the Plaintiff/Respondent conceded was uncalled for. It also held that no notice was served on the Plaintiff/Respondent before the Certificate of Occupancy was revoked. The point was never made an issue at the trial and did not in fact arise going by the facts of the case”.*

***It seems the learned counsel is saying because there was a blanket averment of revocation under the Land Use Act supra, so the issue of notice automatically arises, without a specific averment of failure to give it in satisfaction of subsection (6) of Section 28 of the Land Use Act. At any rate, the plaintiff did not make it part of his case, and even if the 1st defendant made an issue of it which it did not; the evidence on notice to revoke arose in the course of cross examination D.W. 2. See Akinfosile v. Ijose 1966 5 FSC 192. Although pleadings are not supposed to include evidence, they are expected and required to contain facts that will assist the court in arriving at a just determination of a case.***

***On the appellant’s contention that the defendant failed to prove the legality of the revocation, and his reliance on the cases of Elias v. Omobare 1982 5 SC 25, Imana v. Robinson 1979 3 - SC 1 and Osawaru v. Ezeiruka 1978 6 - 7 SC 135, I find no place for that in this exposition because the plaintiff has not proved his case for the burden shifts only after the party asserting has proved his assertion. A plethora of authorities abound that a party in a suit for declaration of title to land cannot depend on the weakness of an opponent’s case to succeed. See Kodilinye v. Odu 1935 2 WACA 336, Akinola v. Olowu 1962 1 SCNLR 352, and Ibeziako v. Nwegbogu 1970 1 NMLR 113.***

I will repeat here again, that the plaintiff did not complain of lack of notice in compliance with the provision of Section 28 of the

Land Use Act, in making his case in the court of first instance, and so he couldn't have been allowed to do so on appeal, for it was like attempting to improve his case at a higher level, which is unfair on his opponents. The plaintiff understood very well the reason for the revocation of the certificate of occupancy, for by the singular act of opting  
 B to assign the property covered by the certificate of occupancy, he admitted he had no right to it, in view of the policy of the Rivers State Government at that time. It is in this light that I subscribe to the observation of the court below which reads:-

C *"This is a situation in which the Plaintiff/Respondent surrendered the plot. The Government accepted the surrender and went on to reallocate the property. Going by all the above one could see that the issues were patent and cogent enough to warrant pronouncement on that aspect of the case but strangely enough the lower court*  
 D *simply glossed over them".*

The submission of the learned counsel for the appellant under this issue is that the defendants did not base their defence on any alleged surrender of his statutory Right of Occupancy over the plot by the plaintiff to the Government. It was submitted that the evidence of the plaintiff reproduced in the judgment at page 204 of the  
 E Record of proceedings did not on the pleading amount to a surrender of the Right of Occupancy over the property by the plaintiff to the Government. It was a decision taken by the Government on the basis of an alleged one man one plot policy. Accordingly the 1st plaintiff  
 F did not surrender his Right of Occupancy over the plot in dispute to the Rivers State Government. The Right of Occupancy needed to be revoked according to law for the property to legitimately revert to the Government. It is further submitted that in the circumstance, since  
 G by their own admission, the military Governor revoked the plaintiff's Right of Occupancy by virtue of Section 28 (5) of the Land Use Act, the overriding issue for determination therefore becomes whether the revocation was in compliance with the provision of the Land Use Act, and a pronouncement on whether or not there was a surrender  
 H of plot in the circumstance was no longer pivotal to the determination of the claims of the plaintiff.

In her brief of argument, Mrs. Minakiri, of learned counsel for the 1st respondent did argue that the appellant though evasively pleaded the surrender of the property in dispute in paragraph 12 of

his amended statement of claim, he actually admitted same in both his evidence in chief and cross examination.

The 2nd respondent has in its brief of argument submitted that the trial court erred when it omitted to make a pronouncement on the issue of surrender of plot A27 which was the heart of the matter; and the said omission by the trial court did not prevent the Court of Appeal from looking into those issues. He placed reliance on the cases of Okonji v. Njokanma 1991 7 NWLR part 202 page 131, and Weli v. Okechukwu 1985 2 NWLR part 5 page 3.

The 3rd respondent's counsel has replied that the issue of surrender was pleaded by the parties and evidence was amply led on same by the plaintiff. I have already reproduced the relevant averment into the final amended statement of claim above.

***A careful reading of paragraphs (12), (13) and (14) of the final amended Statement of claim that infers that the appellant surrendered the property in controversy, for by agreement to assign the residue of the lease to someone else, he has technically done so. In addition there was evidence in support of this, and the pieces of evidence have already been reproduced in this judgment. If there was no surrender why would the 1st appellant seek to assign the property to someone else (the fact that he attempted to assign the property to someone else, his common law wife notwithstanding).***

A part of the plaintiff's evidence which is worthy of note reads:-

*"Minute on letter admitted as exhibit 12A. The Governor said that this property should be assigned to the 2nd Plaintiff. He minuted on the letter to the Secretary to the Military Government and called him and handed over the letter to him".*

With utmost respect, the minute merely reads:-

***"SMG***

***P1 process this appeal to me along with the attached one."***

Not that this inconsistency matters on the issue of surrender, but the evidence reproduced above reinforces the fact that the 1st plaintiff was agreeable to the surrender of the property. The appellant's stance that the position taken by the learned Court of Appeal that the learned trial judge did not consider crucial issues that arose and held that the plaintiff surrendered was no requirement for notice is not altogether correct. What led the court to this finding is the fact

that that fact was not pleaded as is demonstrated by the following excerpt of the judgment:-

B *"It also held that no notice was served on the plaintiff/respondent before the certificate of occupancy was revoked. That point was never made an issue at the trial and did not in fact arise going by the circumstances of the case."*

I am guided by the authors of Halsbury's Laws of England fourth Edition Reissue page 496 paragraph 524 in which the theory of surrender was propounded thus:-

C *"A surrender is a voluntary act of the parties whereby, with the landlord's consent, the tenant surrenders his lease to the landlord so that the lease merges with the reversion and is thus brought to an end. It is defined as being the yielding up of the term to the person who has the immediate estate in reversion in order that, by mutual D agreement, the term may merge in the reversion. The surrender may be either express, that is by an act of the parties having the expressed intention of effecting a surrender; or by operation of law, that is as an inference from the acts of the parties. The parties to the surrender must be the owner of the term and the owner of the immediate E reversion expectant on the term. Consequently an under-tenant cannot surrender his under-lease to the head landlord. A surrender must be of the entire term in the premises; hence a tenancy held jointly cannot be surrendered by one of two joint tenants. A part only of the demise premises may, however, be surrendered"*.

F **The above juxtaposed against the facts, position and circumstance of the present case has convinced me that surrender took place i.e. the plaintiff surrendered the property in dispute to the Government of River State. Consequently, the said Government was right to have allocated the property to the 3rd respondent, having taken into account the provision of Section 27 of the Land Use Act supra.**

H In the light of the above discussion I resolve issues (1) and (2) in favour of the respondents, and dismiss grounds (1) and (3) of appeal to which they are married. In canvassing argument to cover issue (2) formulated in the appellant's brief of argument, learned counsel submitted that the Court of Appeal was wrong in the circumstance to assume the responsibility of evaluating the evidence led at the trial court ascribing probative value to same. According to learned

counsel the evaluation of evidence and the ascription of probative value to such evidence are the primary function of the trial court which saw, heard and assessed the witnesses as they testified in the witness box. He placed reliance on the case of *Ike v. State* (2001) 7 NSCQR 277. The learned counsel further submitted that the situation was not such where the Court of Appeal was in a good a position as the trial court to evaluate the evidence of the witnesses at the trial court before it decided the issues, and even after it assumed that function, the Court of Appeal failed in the end to evaluate the evidence of the witnesses. It is further submitted that the Court of Appeal had no competence to assume jurisdiction on an issue that the trial court did not consider. See *Jinadu v. Esurombiaro* 2005 14 NWLR part 944 page 142. The correct thing to do was for the Court of Appeal to order a retrial, and not to dismiss the appellant's suit, he added. Learned counsel referred to the cases of *Udenewu v. Uzuegbu & Ors* 2003 15 NSCQR 262, and *Nnorodim & Anor v. Ezeani & Ors* 2011 5 NSCQR 510.

In her reply the learned counsel for the 1st respondent argued that an order for retrial is not appropriate when the plaintiff's case has failed in toto. See *Abibu v. Bintu* 1988 1 NWLR part 68 page 57. It was argued that in the face of the strong evidence of surrender, which ever way one looks at it, the plaintiffs case failed in toto and there was no interest vested in him that required a revocation notice before the assignment to the 3rd defendant contrary to the trial judges demand when he allowed his reasoning to be beclouded by extraneous issues by stating as follows:-

*"Assuming Government made a mistake what atonement has Government made for its mistake. It wants the plaintiff loose the property and also throw away the fees and the money he has spent in developing the property. With respect I agree with the Plaintiff that the 1st Defendant has not complied with the law and procedure laid down by the Land Use Act in purporting to revoke the plaintiffs Right of Occupancy and Certificate of Occupancy (C of O)."* Again, *Musa Iyafi v. Sule Eyigebe* 1987 7 SCNJ was referred to on the impropriety of an order of retrial.

The learned counsel for the 2nd respondent aligned himself with the above submissions arguing that the learned trial judge raised the issues suo motu, as they were not part of the pleadings and evi-

dence, but part of the appellant's counsel's final address, which the learned trial judge wrongly treated as if it constituted evidence on record. See *Shagi v. Smith* 2009 18 NWLR part 1173 page 330. The learned counsel has accordingly submitted that where a trial court as in the instant case draws wrong inferences from prima facts, the ap-  
 B pellate court would be right to interfere and to reject the inference and make what it considers to be the right inference supported by evidence. He relied upon the cases of *Lagga v. Sarhuma* 2008 16 NWLR part 725, and *Finnih v. Imade* 1992 1 NWLR part 219 page  
 C 511. ON AN order of retrial, learned counsel argued that it is when a trial court fails in its primary duty of making findings of facts on issues joined on the pleadings and on the evidence in such a way that an appellate court cannot make its findings and come to a decision on all the relevant issues that an order of retrial is a proper order an  
 D appellate court should make. See *Edjekpo v. Osia* 2007 8 NWLR part 1037 page 63 5. This is not the case in the instant case and these are the contentions of the learned counsel, who in addition argued that Section 15 of the Court of Appeal Act gives the Court of Appeal authority to evaluate evidence and not send the case for rehearing. It  
 E was further submitted that a retrial was not a reasonable and legitimate order to make in the circumstances of this case, Reliance was placed on the cases of *Ugwu v. Ogbuzuru* 1974 10 SC 133, *Olatunji v. Adisa* 1995 2 NWLR part 376 page 167 and *Oro v. Falade* 1995 5 NWLR part 396 page 385.  
 F

In his reply the learned counsel for the 3rd respondent has submitted that having regards to the finding of the Court of Appeal that the plaintiff failed totally to prove his case at the trial, a retrial is not an appropriate order to make in the circumstance. Reliance was  
 G placed on the cases of *Godwin Ogolo & Ors v. Chief Joseph Ogolo* 2003 18 NWLR part 852 page 494, and *Abilawon Ayisa v. Olaoye Akanji & Ors* 1995 7 NWLR part 456 page 129.

***I will expound on the above argument what I consider to be a sacrosanct requirement of the law when a party institutes an action against an opponent. A litigant who seeks to succeed in his action must state all his complaints and the remedy he is seeking in his statement of claim. What it means is that his cause of action and his grievances must be contained in statement of claim, with which he is bound, for any***  
 H

**matter outside the periphery of the statement of claim i.e. pleadings vide evidence goes to no issue and are bound to be ignored.** See *Emegokwe v. Okadigbo* 1973 4 SC. 113, *Shell P. B. v. Abedi* 1974 1 SC 23, and *Umuofia v. Ndem* 1973 2 SC 69. **Another important aspect of an action is proof of the content of the pleading. In this respect, the law is trite that actions are proved on preponderance of evidence and balance of probabilities.** See *Elias v. Omo-Bare* 1982 5 SC. 25, *Woluchem v. Gudi* 1981 5 SC. 291, and *Akinlemibola v. C.O.P.* 1976 6 SC. 205. In the case at hand, the pertinent question I will ask here is, did the plaintiff/appellant plead and prove his case according to the above principles of law? Before I attempt to answer this question, I will like to reproduce a very salient excerpt of the judgment of the learned trial judge, which in fact to my mind constitutes the reason for the success of the litigation in that court. It reads:-

*“With respect, I agree with the Plaintiff that the 1st Defendant has not complied with the law and procedure laid down by the Land Use Act in purporting to revoke the plaintiff’s right of Occupancy and certificate of occupancy. For example no notice to revoke the certificate of occupancy was served on the plaintiff as required by law. Notice means written notice. See Section 44 of the Land Use Act”.*

**I cannot fathom how the learned trial judge arrived at the above, when in fact the plaintiff neither pleaded this failure to be served with notice of revocation nor did he give evidence of such failure in his evidence. With due respect, it was as though the learned trial judge was eager to make a case for the plaintiff, so to speak. When a party does not-make-an issue of a fact, it is not for a judge to go out of his case to do so.** I believe the learned trial judge predicated his judgment on this failure of notice, and in fact did not give the issue of surrender of the property the attention it deserved, in spite of the overwhelming evidence before him on what led to the revocation, other than the following:-

*“The policy of one man one plot in a GRA on which Government relies does not appear to have been well-known to its functionaries from the number of revocation of allocations of plots arising from the Sanomi Report. It seems from the evidence that Sanomi*

*introduced it, not highlighted it. The policy therefore unfortunately has a retrospective effect which is repugnant.”*

The above view may not be incorrect but I will not overlook the plaintiff s testimony that he appeared before the Sanomi Commission, and he was told that he would have to forfeit one of the two properties he owned in the GRA concerned, and he agreed. I will also not overlook the fact that the plaintiff admitted that he applied for two government plots on the same date in his name and he was granted allocations to the two properties around the same time. By virtue of the content of Exhibit “26”, the Rivers State of Nigeria official Gazette No. 3 of 1986, the property in controversy had its right and certificate of occupancy revoked. The court below as was empowered by Section 15 of the Court of Appeal Act evaluated the evidence in the record of proceedings.

**Now, I will go back to the position of the law as regards proof in a litigation. By virtue of Section 135 of the Evidence Act Cap. 112 Laws of the Federation of Nigeria 1990, he who asserts must prove.** See *Imana v. Robinson* 1979 3 - 4 SC. 1. **It is after a plaintiff has proved his case that the burden of proof shift to the defendant. The question now is, did the plaintiff prove his case to the extent that the burden shifted? By virtue of paragraphs (19) and (20) of the plaintiffs’ pleading they asserted that the revocation of the certificate of occupancy in respect of the property in dispute was unconstitutional, but they have not succeeded in establishing that fact by evidence. They may have proved that they expended money in erecting building on it, but then at the end of the day, they, did not claim the amount as per the reliefs they were claiming, in paragraph (24) of the plaintiffs second further amended statement of claim. The pivot of the plaintiff ‘s case is that the revocation and seizure of the property was unconstitutional, but I do not see in his evidence that he proved the unconstitutionality of the revocation, especially on the face of paragraphs (12), (13), (14) (15) and (16) of his pleadings, (14) of which particularly was not successfully proved, as found in the earlier part of this judgment. In view of the above facts, I am not satisfied that the plaintiff discharged the burden placed on him by Section 135 of the Evidence Act supra. The 1st defendant may**

**have raised various defences to cover their action vide paragraphs (9), (10) and (11) of the final statement of defence of the 1st defendant, and averments of the 2nd and 3rd defendants. I cannot see that the failure to prove some of the facts are of any negative significance, considering the settled position of the law that a party will not be allowed to rely on the weakness of the case of the opponent.** See the cases of Kodilinye v. Odu, Akindola v. Oluwo and Ibeziako v. Nwagbadu supra.

As a matter of fact. I am intrigued by, the averment in paragraph (11)(b) of the 1st defendant's statement of defence, which also states that the plaintiff is estopped from contesting the revocation of his rights of occupancy and the cancellation of his certificate of occupancy in that he had agreed to forgo his interest in the plot. Again, this is the gravamen of this case, which seemingly the learned trial judge did not appreciate. So as much as the plaintiff has claimed that the 1st defendant is estopped from revoking the rights of occupancy, the 1st defendant has also claimed same against the plaintiff as regards the property he has already surrendered.

In the light of all the facts contained in the printed record of proceedings and the treatment of the issues above, I am not convinced that the plaintiff proved his case against any of the defendants, and in the words of the court below, *'the claim of the plaintiff/respondent in suit No.PHC/557/86 in the lower court fails'*. This is not a case that calls for retrial, and the Court of Appeal was right not to have ordered a retrial, and this court is also not inclined to do so. This is not a case where an order of retrial can be made. See Anyaoke v. Adi 1986 3 NWLR part 31 page 731, Elias v. Disu 1962 1 SCNLR 361, and Okeowo v. Migiliore 1979 11 SC. 138. Issue (3) in the appellant's brief of argument is hereby resolved in favour of the respondents, and ground (2) of appeal to which it is related fails, and it is hereby dismissed.

In the final analysis this appeal fails in its totality and it is hereby dismissed. Cost is ordered at N50,000.00 in favour of each respondent against the appellant.

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**MUHAMMAD JSC**

I have had the advantage of reading in draft the judgment of

my learned brother, Mukhtar, JSC. I am in agreement with the reasoning and conclusions of my lord that the appeal lacks merit and should be dismissed. I, too, dismiss the appeal and abide by the consequential orders made in the leading judgment.

B

### **GALADIMA JSC**

I have had the opportunity of reading in draft the lead judgment of my Learned Brother MUKHTAR JSC. I agree with his reasoning and conclusion leading to the dismissal of this appeal for lacking in merit.

The claim of the Appellant who was initially one of the plaintiffs at the trial High court of Rivers state was for a declaration that the certificate of occupancy Registered as No. 76 at page 76 in volume D 93 in the Lands office Port Harcourt in respect of plot A27 GRA, Phase 1, Port Harcourt property of the plaintiff is correct, valid and subsisting. It is also sought that the purported safe of the property to the 3rd Respondent by the 1st and 2nd Respondents herein is unconstitutional null and void, while N50,000 was claimed as special and general damages, the plaintiff also sought for a perpetual injunction to restrain the respondents.

The History of the property in dispute has been carefully given in detailed in the lead judgment. In short the plaintiff was unhappy with the recommendation of the SANOMI'S Commission set up by the Rivers State Government to look into sales of landed properties in the State, which (Commission) recommended the reversion of the property to the Government and this resulted in the refusal of Assignment of the said property to her.

The plaintiff claimed that the Rivers state Government was estopped from revoking the Right of Occupancy after she had expended so much money in erecting a building on it, and any such revocation was ultra vires and void. Denying most of the allegations, the Defendants put up their various statements of defence. They all stated that the revocation was justified because the plaintiff was in breach of the covenant contained in the certificate of occupancy for failure to pay ground rents. That the proposed Deed of Assignment between the plaintiff and the Appellant sent to the secretary to the State Government was not approved. The 3rd dependent contended

that he was the bona fide purchaser for value without notice and that the plaintiffs have no cause of action against him.

After the trial court had appraised the evidence adduced before it, it granted all the reliefs sought by the plaintiff. On appeal to the court of Appeal Port Harcourt Division, the court allowed the appeal and set aside the Judgment of the trial High court and dismissed the claim of the respondent with costs. B

It is to be noted that the name of the 2nd plaintiff was once struck out but after the death of the 1st plaintiff, the 2nd plaintiff was substituted as an appellant. C

She was dissatisfied with the judgment of the court below, hence she appealed to this court. She distilled 3 issues from her Grounds and Notice of Appeal as follows:

*"1. Whether the decision of the court of Appeal that the trial court did not appreciate and consider the issues raised in the suit is right and supported by the evidence on Record."* D

*2. whether the court of Appeal was right in dismissing the suit of the Plaintiff/Appellant."*

A sole issue was raised by the 1st Respondent as follows:

*"Whether in the light of the pleadings and evidence on record, the court of Appeal was right in dismissing the suit rather than remitting same to the trial court for retrial upon holding that the trial court did not appreciate the issues in suit."* E

The 2nd Respondent's lone issue raised for determination reads F as follows:

*"Having regard to the evidence led in this case and the judgment of the learned trial judge, did the court below err in evaluating evidence and consequently dismissing plaintiff's claims, rather than ordering a retrial of same?"* G

The 3rd Respondent also raised a lone issue for determination thus:

*"Whether the court of appeal rightly dismissed the Appellant's case having regard to its findings that trial court did not appreciate and consider the issues raised in this suit instead of ordering a retrial."* H

In the lead judgment, the three issues formulated by the Appellant have been adopted by my learned brother for the determination of this appeal. All these issues have been exhaustively dealt with. In my view the issue here is whether the court below was right

to have dismissed the plaintiff's claim instead of ordering a retrial.

I have noted keenly the plaintiff's evidence on the procedure that led to his grant of a Certificate of occupancy No . 76/76/93, Exhibit 4, and how he sought or and got permission to build on the plot now in dispute. He testified as follows:

B *"In 1984 I was summoned before the Sanomi Committee set up by the former Military Government. I appeared before them. They informed me that from the records before them that I had two properties in the G.R.A Phase 1. That I should choose which of the*  
 C *two properties that I would like to take. I decided to return No.39 Biraku street, where I now reside. The committee said the Govern-*  
 D *ment would take over the other property. That was the property in dispute, Plot A27. when I left the committee I made a written protest to the Government about what the Committee said to me. I had an*  
*evidence (sic) with the Military Governor ... the 2nd plaintiff also wrote a letter to the Military Governor in respect of the same prop-*  
*erty"*

I also note that part of the letter of the plaintiff contains the following request:

E *"The fact that the purchase was financed by Mrs. V.C. Ohochukwu was never disclosed in the Certificate of Occupancy. At the time of purchase the present policy that wives can as of right purchase property in their names was not a recognized policy. No*  
 F *that this right is recognized by your Government, I am humbly ap-*  
*pearing to you to exercise your discretion in favour of Mrs. V.C. Ohochukwu and (sic) her to retain the Plot in question".*

Exhibit 12, dated 8/8/86, further addressed to the Military Governor by the plaintiff makes more interesting reading. It says:

G *"At the time married women could not own properties in their own name, hence the certificate of occupancy bore his name. I raised most of the money used in developing the property and can sub-*  
 H *stantiate these facts ... In view of the fact that you and your Govern-*  
*ment, sir, recognizes the right of married women to own property in their own right. I humbly ask that I be allowed to retain the above plot by Deed of Assignment from my husband."*

I have given a dispassionate consideration of these two letters Exhibits 4 and 12, I cannot discern how the Military Governor has consented to assign the property in dispute to the plaintiff. I do not

think Exhibits 13 and 14 have helped the plaintiff's case, either. The Appellant was unable to show the court the directive of the Military Governor to assign the disputed property to her.

On the issue of not serving the Appellant a notice under subsection (6) of Section 28 of the Land Use Act, she did not make this an issue in her pleadings. It was neither made an issue at the trial court, nor was any leave sought to raise same as fresh issue in the court of Appeal. The issue not having been raised by the appellant in the Court below, it is plain that it cannot now be canvassed in this Court without leave, See *OSHATOBA v OLUJITAN* (2000) 5 NWLR (pt.655) 159 at 176. The plaintiff did not in anyway, complain of lack of service of notice of compliance with the provision of subsection 5 of section 28 of the Land Use Act (supra). She clearly understood the reason for the revocation of the Certificate of Occupancy. The Right of occupancy needed to be revoked so as to revert same to the Government.

For the above observations and the more detail reasons carefully set out in the lead judgment. I too, feel that the appeal is devoid of any merit, and should be dismissed, It is so ordered with costs of ₦50,000 in favour of each Respondents against the Appellant.

### **NGWUTA JSC**

I have had the privilege of reading in draft the lead judgment of my Lord, Mukhtar JSC. The salient facts of this case have been painstakingly set out in the lead judgment and the issues were adequately addressed and resolved. By way of contribution, I will comment on a portion of the pleading of the original plaintiff relating to Sanomi's Commission and the evidence he adduced on the point. The portion relevant to my comment is paragraph 12 of the Second Further Amended statement of claim, hereunder reproduced:

Paragraph 12: *"In 1984 the Rivers State Government set up a Commission otherwise known as the SANOMI'S COMMISSION to look into sales of landed properties in Rivers State. Property owners were required to submit the document showing their titles to the respective property for verification. The plaintiff, who owned another property apart from the one in dispute, submitted his documents. The plaintiff was there and then informed by the commission that*

*one of his properties will have to be surrendered to the Rivers state Government...*" See page 85 of the record.

The original plaintiff testified as PW1 and as the record shows, he was economical in his pleading on the issue of surrender of the property in dispute. The relevant portion of his sworn testimony in chief is hereunder reproduced:

*"In 1984 I was summoned before the Sanomi committee set up by the Military Government to enquire into sale of properties by the former civilian Government. I appeared before them. They informed me that from the records before them that I had two properties in the GRA Phase 1. That I should choose which of the two properties that I would like to take. I decided to retain No. 39 Birahi Street where I now reside. The Committee said the Government would take over the other property. That was the property in dispute, Plot A27..."* See page 53 of the record.

His evidence, contrary to his pleading, shows that the original plaintiff appeared before the Sanomi Committee and that the committee put him to his election in respect of the properties sold to him. He made a deliberate, knowing, understanding and intelligent choice between the two properties. There is no proof that he was allowed to assign the property he surrendered in preference to the one he chose to keep.

The surrender was effected when the commission as the agent of the Government of Rivers State invited the appellant, and he chose one of the two properties, thereby giving up or surrendering the other one. Surrender in this context is implied. It is surrender by operation of law. See Blacks Law Dictionary 7th Edition, page 1458, Advanced Law Lexicon vol. 4, p.4574. The trial Court, for reasons not apparent on the face of the record, abandoned the evidence led by the appellant consisting of admission against his interest and dwelt on issues not raised in the pleading or evidence before it. Judgment of a Court must be confined to the relief sought in the light of evidence adduced and the applicable law. See *Mogaji & Ors v. Odofin & Ors* (1978) 4 SC 91; *Ekpenyong & Ors v. Nyong & Ors.* (1975) 2 SC 71; *Aseimo v. Amos* (1975) 2 SC 57.

For the above and the detailed analysis in the lead judgment, I agree that the appeal is devoid of merit. Accordingly, I also dismiss it and abide by the order for costs.

### ARIWOOLA JSC

This appeal is against the decision of the Court of Appeal, Port Harcourt Division delivered on the 27th May, 2003 against the Appellant. By a Writ of Summons dated 22/12/1986, the Honourable Justice Vincent Oluoma Maxwell (now deceased) and Mrs. Vidah O. Ohochukwu had commenced an action before the High Court of Rivers State against the Defendants, now Respondents claiming as per paragraph 26 of their Amended Statement of Claim as follows:

*"1. A declaration that the certificate of occupancy registered as No. 76 at page 76 in volume 93 in the Lands office Port Harcourt in respect of plot A27 GRA Phase 1 Port Harcourt property of the 1st plaintiff is current, valid and subsisting.*

*2. A declaration that the purported sale of the said property to the 3rd defendant by the 1st and 2nd defendants is unconstitutional, null and void and of no legal effect.*

*3. N50,000 special and general damages for unlawfully purporting to sell the said 1st plaintiff's property.*

*4. A perpetual injunction restraining the defendants by themselves, their servants, agents or privies from further unconstitutionally interfering with the 1st plaintiff's ownership or possession of the said property situate, lying and being at plot A27 GRA phase 1, Port Harcourt."*

The name of the 2nd Plaintiff was at a stage in the proceedings struck out leaving only the 1st Plaintiff to prosecute the case but after his demise was substituted with the Appellant who he described as his "common Law" wife. The trial court gave judgment for the plaintiff as per claims. In an appeal to the court below prosecuted by the 3rd defendant, the lower court allowed the appeal leading to the instant appeal to this court by the Appellant.

Briefs of argument were filed and dully exchanged. In her brief of argument, the Appellant distilled three Issues for the determination of the appeal as follows:

*"1. Whether the decision of the court of Appeal that the trial court did not appreciate and consider the Issues raised in the suit is right and supported by the evidence on Record. (Ground 1 of the Grounds of Appeal)*

*2. Whether the court of Appeal was right in dismissing the suit*

of the Plaintiff/Appellant (Ground 3).

3. *Whether the Court of Appeal was right when it dismissed the plaintiffs claim instead of ordering a retrial (Ground 2). "*

In the Respondent's brief of argument filed by the 1st and 2nd Respondents, though at the hearing, learned counsel, Mrs. Minakiri, of the Ministry of Justice, Port Harcourt, told the court that she was for only the 1st Respondent and that the brief of argument would be for only the 1st Respondent. In the said brief, the sore issue formulated for determination of the appeal is as follows:

*"Whether in the light of the pleadings and evidence on record, the court of appeal was right in dismissing the suit rather than remitting same to the trial court for retrial upon holding that the trial court did not appreciate the Issues raised in the suit. "*

However, the 2nd Respondent later filed a separate brief of argument and formulated a sole issue for determination of the appeal as follows:

*"Having regard to the evidence led in this case and the judgment of the learned trial judge, did the court below err in evaluating evidence and consequently dismissing plaintiffs claim rather than ordering a retrial of the same. "*

In his own brief of argument, responding to the appellant's brief of argument, the 3rd Respondent formulated a lone issue from the three Grounds of Appeal filed with the Appellant's Notice of Appeal, as follows:

*"whether the court of appeal rightly dismissed the Appellant's case having regard to its findings that the trial court did not appreciate and consider the Issues raised in the suit instead of ordering a retrial. "*

I read in advance the lead judgment of my learned brother, Mukhtar, JSC. I agree entirely with the reasoning and conclusion arrived at. The court below was right to have held that the trial court in the light of the pleadings and evidence on record, did not appreciate and consider the Issues raised in the suit. One of the Issues is the fact that the Appellant had surrendered the plot of land in dispute, (Plot A.27, Diobu GRA, Phase 1, Port Harcourt), to the Government hence there was no need any longer for revocation of the Certificate of occupancy registered as No.76 at page 76 in volume 96 in the Lands office port Harcourt. As clearly shown on the printed record of

proceedings the plaintiff had testified on oath as PW1 as follows:

*"In 1984 I was summon (sic) before the Sanomi committee set up by the Military Government to enquire into sale of properties by the former civilian government. I appeared before them. They informed me that from the records before them that I had two properties in the GRA Phase 1. That I should choose which of the two properties that I would like to take. I decided to retain No. 39 Birabi Street, where I now reside. The committee said the Government would take over the other property. That was the property in dispute; Plot A27."* See; page 53 lines 4-16 of the Record. The Plaintiff then testified further that he protested the take-over of the said Plot A27 and applied to assign it to his wife, who was then the 2nd plaintiff but now the Appellant and that the Government agreed, though the Chief Lands Officer refused to let the assignment sail through. The court below found that though the plaintiff protested but the surrender he made had been accepted and acted upon with the reallocation of the property to the 3rd defendant. In its judgment the court below had found on this issue as follows:

*"This is a situation in which the plaintiff/Respondent surrendered the plot. The Government accepted the surrender and went to reallocate the property. Going by all the above one would see that the issues were patent and cogent enough to warrant pronouncement on that aspect of the case but strangely enough the lower court simply glossed over them. Once there is a surrender of a right the giving of notice by the authority accepting the surrender will be unnecessary, hence the issue of notice was very far-fetched. It did not relate to the salient point which was in fact the crux of the whole matter; that is, that the Plaintiff/Respondent had surrendered his Right of occupancy over the property in dispute, albeit reluctantly."*

The appellant had contended that the oral evidence of the plaintiff when he testified as quoted above did not amount to a surrender of his Right of Occupancy over the property in dispute. And that it was a decision taken by the Government on the basis of an alleged one man-one plot policy. It was therefore submitted that the Plaintiff did not surrender his Right of Occupancy over the land in dispute to the Rivers State Government. It is however noteworthy that the plaintiff clearly stated that after he chose Plot 39 where he was residing with his family he began the process of assigning the

residue in the other Plot A27 to his “common law” wife. It goes without saying that the process of assigning Plot A27 to his wife, for which he would require the consent of the Governor to do, the intention to surrender the said plot A27 to Government became manifested.

Generally, every express surrender is void unless it is made by deed or in writing. But *“the use of the word ‘surrender’ is not necessary. Any form of words which shows the intention of the parties to effect a surrender will be sufficient and the words will be construed so as to give effect to that intention.”* See; Halsbury’s Laws of England, 4th Edition page 499 paragraph 526. However, delivery of possession by the tenant to the landlord and acceptance of possession by landlord effect a surrender by operation of law. In this case, the law gives effect to the intention of the parties as appearing from their acts, and cures the informality of the surrender. It is said that where the elements of surrender are satisfied, the subsequent assertion by the tenant that he had no intention of leaving permanently is irrelevant. See; Halsbury’s Law (supra) at pages 500-501 paragraph 527. In the instant case, by the choice of Plot 39 where he lived out of two plots of Government land and the attempt to assign the residue interest in the second property’ (Plot A27) he had then surrendered his interest hence he needed the consent of the Military Governor to carry out an assignment of the said property to his “Common Law” wife, but which consent was not given to assign.

There is no doubt that no assignment can be concluded without the consent of the Governor. Hence, by seeking consent to assign the said property to someone else, the plaintiff had surrendered in law, the said property in dispute to the Government of Rivers State. Therefore, if the trial court had appreciated and considered these issues, it would have been discovered that the Plaintiff was not entitled to his claims as awarded by it. The court ought to have dismissed the claims for not being meritorious.

In view of the above and the detail reasons contained in the lead judgment, I also hold that the appeal lacks merit. It is liable to dismissal. Accordingly, it is hereby dismissed. I abide by the consequential orders in the lead judgment including order on costs.