

**SUPREME COURT OF NIGERIA**  
FRIDAY 5TH JULY, 2013. SC. 130/2004  
**CORAM:- M. MOHAMMED, M. S. MUNTAKA-  
COOMASSIE, N. S. NGWUTA, M. U. PETER-ODILI,  
O. ARIWOOLA, JJSC**

NIDOCCO LIMITED ..... APPELLANTS  
AND  
MRS. I. A. GBAJABIAMILA ..... RESPONDENTS

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APPEALS - Reply brief - Purpose - It is filed in answer to an issue of law or fact raised in respondent's brief - But it is not used to extend scope of arguments in appellant's brief (H1)

ORDERS OF COURT - Validity of - Order made by court of competent jurisdiction is valid - Until it is declared void by court of competent jurisdiction - And party whose interest is affected - Must seek for such declaration (H2)

SUPREME COURT - Fresh issue - Leave - Without leave being sought and obtained - The court is not competent to pronounce on issue - Not raised in Court of Appeal (H3)

PROPERTY LAW - Sale of property - Validity - As Exhibit D1-D5 was abandoned - And respondent having breached terms of the Sheraton Deed of Assignment - There is no valid sale of the property (H4)

APPEALS - Grounds 1 & 2 - Validity - The learned trial Judge's pronouncement on Exhibits D1-D5 and the sum of N150,000 - Constitutes a ratio decidendi - Upon which the grounds were framed (H5)

APPEALS - Issues - Clarity of - Issue is short question raised against ground(s) of appeal - Which is meant to be a guide to arguments - To be advanced in support of the ground(s) (H6)

ORDERS OF COURT - Sale of property - Specific performance - Cannot be made against appellant - In respect of property it did not

sell to cross appellant - Nor can order for joinder be made against PW2 (H7)

### ***FACTS***

Before the High Court of Lagos State Ikeja, plaintiff/appellant commenced this action, wherein it claimed against defendant/respondent a declaration of entitlement to the Certificate of Occupancy of the disputed property, damages for trespass and injunction restraining respondent from committing further acts of trespass on the property. Appellant is the owner of the property in dispute while respondent, PW2 (i.e. respondent's former husband) and one other person were the shareholders and Directors of appellant. PW2 was its Managing Director. Due to financial issues, the Board of Directors of appellant decided to sell the disputed property. PW2 and respondent offered to purchase same. A deed of assignment - Exhibits D1-D5 was thus executed by the parties in which the payment of the sum of N150,000 as consideration was acknowledged.

Meanwhile, respondent persuaded PW2 to transfer his share in the joint property to her. In order to cut cost in executing the transaction, the parties agreed to transfer the property direct from appellant to respondent, notwithstanding Exhibits D1-D5. Pursuant to the said agreement, the parties to Exhibit D1-D5 met at Sheraton Hotel where an entirely different deed of assignment was executed. By the terms of the latter deed, respondent was to make payment to PW2 before the transfer of his share in property to her. However, respondent failed to make the payment as required. Hence, PW2 retrieved the Sheraton Deed and subsequently destroyed same. At the trial, respondent counter-claimed against appellant, seeking for declaration that respondent is entitled to the grant of statutory right of occupancy of the disputed property and order compelling appellant to process the obtaining of Governor's consent in favour of respondent. At the end, the court entered judgment for appellant and dismissed respondent's counter-claim. Aggrieved, respondent appealed successfully to the Court of Appeal. Dissatisfied, appellant appealed to Supreme Court while respondent cross-appealed.

### ***ISSUES FOR DETERMINATION***

#### ***"ISSUE ONE***

*Whether the Court of Appeal is entitled to fashion out a new*

*contract for the parties to this action holding that the property subject matter of this action has been bought and sold on the basis of superseded, discredited and contradicted documentary evidence.*

### ISSUE TWO

*Whether Court of Appeal is possessed of the jurisdiction to entertain and determine the matter before it on the basis of incompetent ground of appeal and incompetent issues for determination.”*

**HELD** (Unanimously allowing the main appeal and dismissing cross appeal per **NGWUTA JSC**)

*APPEALS - Reply brief - Purpose*

**1. A reply brief is filed in answer to an issue of law or fact or argument raised in the respondent’s brief calling for a reply. It should not be used to extend the scope of the arguments in the appellant’s brief.** (p. 3495 C)

*ORDERS OF COURT - Validity of*

**2. An order made by a Court of competent jurisdiction is valid until it is declared void by a Court of competent jurisdiction. The validity vel non of the order of 23/9/2003 is not before this Court and the Court has no jurisdiction to pronounce one way or the other on a matter not before it. Without a declaration that the order is void, the Court cannot nullify processes filed pursuant to it.**

**The Court cannot nullify an order of a Court of competent jurisdiction on the ipse dixit, without more, of learned Counsel for either of the parties. Learned Counsel for the respondent relied on *Macfoy v. UAC* (1962) ACP 152 in his argument that nothing can be put on nothing. That may be so, but a party who perceives that an order of Court by which he is bound or which affects his interest, is null and void, ought to seek a Court declaration to that effect. If he ignores the Court or proceeds to rely on his own personal perception that the order is a nullity, he does so at his own risk.** (p. 3495 H)

*SUPREME COURT - Fresh issue - Leave*

**3. On the second ground of preliminary objection, learned Counsel argued that the appeal is incompetent in that the suit and the appeal were filed without authority in contravention of Section 63 (i) (3) of the Companies and Allied Matters Act Cap C LFN 2005. This is a fresh issue. It was not raised in the trial Court or in the lower Court and it is raised in this Court without leave of Court first sought and had, especially as it would require adducing further evidence. Without leave, this Court is not competent to pronounce on an issue not raised in the Court below. The preliminary objection has no substance and is hereby dismissed. (p. 3496 D)**

*PROPERTY LAW - Sale of property - Validity*

**4. There was a subsequent deed, i.e. the Sheraton Deed of Assignment by which Mr. Gbajabiamila purported to convey his interest in the property he jointly purchased from the appellant to the joint owner - the respondent. Did the Sheraton Deed of Assignment supersede, discredit and/or contradict Exhibit D1-D5 by which the appellant conveyed the property to the respondent and her husband, PW2?**

**The answer is in the negative for the simple reason that the Sheraton Deed of Assignment by which the PW2 conveyed his interest in the property to the respondent no longer existed. There is uncontradicted evidence from PW2 that the respondent failed to pay the purchase price of his share of the property and he retrieved and destroyed the Deed of Assignment. I agree with the Court below that evidence relating to the non-existent document was admitted by the trial Court in error.**

**In my humble view, the Sheraton Deed of Assignment, if it had been in existence at the material time, would have conveyed the property direct from the appellant to the respondent, as the Deed Exhibit D1-D5 was completely abandoned and discarded when the parties agreed to execute the Sheraton Deed the terms of which were breached by the respondent.**

**The Sheraton Deed of Assignment was aborted as the respondent breached its term by failure to pay the agreed sum.**

***Exhibit D1-D5 having been abandoned had no binding effect on the parties.***

***The Deed, Exhibit D1-D5, having been abandoned and the Sheraton Deed, having been breached and destroyed by PW2, the parties returned to the status quo before the execution of Exhibit D1-D5. In effect, there was no sale of the plaintiff company's property. Issue one is resolved in favour of the appellant.*** (p. 3497 E) B

*APPEALS - Grounds 1 & 2 - Validity*

***5. The reference to Exhibit D1-D5 and the sum of N150,000.00 allegedly acknowledged therein, cannot be said to have been plucked from a summation in the judgment. The Exhibit forms the basis of the dispute between the parties. Learned Counsel for the appellant cannot be right in his assertion that the two grounds of appeal cannot be fixed and circumscribed within a particular issue in controversy in the judgment.*** C  
D

***With reference to the Deed of Assignment D1-D5 pleaded in paragraph 5 of the Statement of Defence, the learned trial Judge, in his judgment at page 27 of the record said:*** E

***"I have in fact gone into detailed analysis of this document stated to be Deed of Assignment but which the defendant who tendered the document testified that the document is in fact the document by which PW1, Mrs. Ebie, received N150,000.00 and thereby divested her interest in the company. Of course there is nothing like that at all in the document."*** F

***Above is a definite determination of the main issue in contention, whether the finding is wrong or right is a different matter. It is a pronouncement on Exhibit D1-D5 and the sum of N150, 000.00 which the respondent claims was acknowledged therein. It is a ratio decidendi based on which grounds 1 and 2 were framed. I resolve issue two against the appellant.*** (p. 3499 G) G  
H

*APPEALS - Issues - Clarity of*

***6. Issue three is:***

*“Whether the Court below can make its determination per incuriam with respect to the admission/non admission, reliance and use of Exhibit D1-D5 by ignoring statutory provisions, ignoring decisions of this Honourable Court applicable to the matter and which are binding on it as well ignoring principles of law and those of equity as they apply to the facts of the matter before it, the circumstances of the matter and the evidence led thereon.”*

Above is clumsily unwieldy and inelegantly crafted. It hardly qualifies for an issue for determination in appeal which is a short question raised against one or more grounds of appeal and is meant to be a guide to the arguments and submissions to be advanced in support of the grounds of appeal. In *Chief Imankhe & Anor v. A.G. Bendel State & Ors. (1992)* 6 NWLR (Pt.248) 396 at 407, this Court held that an issue for purposes of appeal is a substantial question of law or fact or both arising from the grounds of appeal filed in the appeal which when resolved one way or the other will affect the result of the appeal. (p. 3500 D)

ORDERS OF COURT - Sale of property - Specific performance  
7. From the determination in the main appeal, appellant has not sold the property in dispute as Exhibit D1-D5 was abandoned by the parties thereto. The Court cannot make an order for specific performance against the appellant in respect of the property it did not sell to the cross-appellant, nor can an order for joinder be made against the PW2.

That is not the proper order in the circumstance. Rather, if the proper parties in the counter-claim were not before the Court and so the case was not properly constituted and, ipso facto, the trial Court had no competence to entertain the counter-claim, the proper order is one for striking out the counter-claim, not joinder of a third party. But the issue is that the cross-appellant did not prove that the appellant sold the property to her. The property in dispute remains the property of the appellant, as the parties agreed to and did abandon Exhibit D1-D5. (p. 3502 C)

**CASES REFERRED TO**

- Lannie v. DPMS Ltd. (2005) 18 NWLR (pt. 958) 438  
Badaru v. SCB (Nig) Ltd. (2003) 10 NWLR (pt. 827) 91  
Nwokedi v. Okugo (2002) 16 NWLR (Pt. 294) 441  
Lawal v. Dawodu (1972) NSCC 515  
Agbaje v. Ajibola (2002) 2 NWLR (pt. 750) 127 B  
Yaya v. Mogoga (1947) 12 WACA 132  
Alase v. Olori-Ilu (1965) NWLR 66  
DPCC Ltd. v. BPC Ltd (2008) 4 NWLR 326  
Anwasi v. Chababasuva (2000) 6 NWLR (pt. 661) 408 C  
Macfoy v. UAC (1962) ACP 152  
Okonji v. Njokanma (1999) 14 NWLR (pt. 368) 250  
Madukolu v. Nkemdilim (1962) 1 All NLR 587  
Odofoin v. Agu (1992) 3 NWLR (pt. 229) 350  
Coker v. Oganye (1939) 15 NLR 57 D  
Ishola Williams v. Hammond (1988) 1 NWLR (pt. 71) 481

**STATUTES & RULES REFERRED TO**

- Land Instrument Registration Law of Lagos State, s. 15  
Land Use Act, s. 26 E  
Evidence Act, s. 132  
CAMA Cap C20 LFN 2004, s. 63(1)(3)  
Supreme Court Rules, O. 8 r. 8(i), O. 2 & 7 rr. 3(1), 5(1)

**REPRESENTATION**

- Dr. M. Laden, for Appellant  
Andrew Igboekwe Esq., for Respondent

**LEAD JUDGMENT BY NGWUTA JSC**

At all times material to the proceedings from which this appeal arose, the appellant company was the registered owner of the property known as, and situate at, 26 Sobo Arobiodu Street, G.R.A. Ikeja, Lagos State. The appellant company and the property at No. 26, Sobo Arobiodu Street, Ikeja, Lagos shall hereinafter be referred to as the appellant and the disputed property respectively. H

The Respondent herein, her former husband who testified at the trial Court as PW2 and a Mrs. Ebie who testified as PW1 constituted the entire shareholders and Directors of the appellant with the

PW2 as its Managing Director at the institution of the suit in the High Court of Lagos State, Ikeja Judicial Division. The parties herein are in agreement on the facts stated above.

As a result of issues bordering on the finances of the appellant, its Board of Directors passed a resolution to sell the disputed property. Mr. N. K. Gbajabiamila, who testified as PW2 and his then wife, the respondent herein, both Directors of the appellant, offered to purchase the property. Pursuant to the acceptance of the offer, the parties, that is, the Respondent and the PW2 as the purchasers and the company as the vendor, executed a deed of assignment dated 21/6/1983 in which the payment of the sum of N150, 000 as consideration was acknowledged. The deed of assignment was admitted in evidence at the trial and marked Exhibits D1-D5.

The parties did not seek to obtain the Governor's consent to the deed of assignment as it was considered a waste of their financial resources. Meanwhile, the respondent persuaded the PW2, then her husband, to transfer his share in the joint property to her. To evade costs of obtaining the Governor's consent, first, to the transfer of the property by the appellant to PW2 and Respondent and, second, from the PW2 to the respondent, the parties agreed to transfer the property direct from the appellant to the respondent, notwithstanding Exhibits D1-D5 between the appellant and PW2 and the Respondent as joint purchaser/owners.

Pursuant to the said agreement, the parties to Exhibits D1-D5 and their respective witnesses met at Sheraton Hotel where an entirely different deed of assignment was executed. This latter deed of assignment could not be tendered at the trial because it was no longer in existence. There is evidence that the PW2 who said he did not receive any consideration for the transfer of his share in the property to the Respondent after waiting for some for two years, retrieved the documents and destroyed them.

Above summary of fact was the state of affairs when the appellant commenced Suit No.ID/290/91 in the High Court of Lagos State holden at Ikeja, wherein it claimed against the Respondent as defendant as follows:

*“(1) A declaration that Nidocco Limited is entitled to be granted certificate of occupancy in respect of the leasehold of all that piece of parcel of land situate, lying and being at No.26, Sobo Arobiodun*



*Street, GRA Ikeja, Lagos State by virtue of a Deed of Assignment dated the 19th day of August, 1966 and registered as No.18 at page 18 in Volume 888 of the Lands Registry at Ibadan now in Lagos.*

*(2) Damages for trespass in respect of the said piece or parcel of land with all the appurtenances thereto.*

*(3) An order of injunction restraining the defendant, her servants, agents and privies from any further acts of trespass on the said land or dealing with the said piece or parcel of land in any manner whatsoever.”*

The statement of claim was filed along with the Writ of Summons on 8/2/91. In her statement of defence filed on 2/3/92, the defendant denied the material averments in the statement of claim and counter-claimed against the plaintiff as follows:

*“1. A declaration that the defendant is entitled to the grant of the Statutory Right of Occupancy in respect of the property situate, D lying and being at No. 26, Sobo Arobiodun Street, GRA, Ikeja, Lagos, and*

*2. An order compelling the plaintiff to process the obtaining of the Governor’s consent, stamping and registration by the plaintiff in favour of the defendant, given to Messrs. Burke & Co., Solicitors, to E process.”*

At the trial before His Lordship, Holloway, J. the plaintiff called three witnesses and rested its case. The defendant testified but called no other witness. In its judgment delivered on 19/5/95, the trial Court entered judgment for the plaintiff and dismissed the defendant’s F counter claim.

Dissatisfied with the said judgment, the defendant (now appellant) appealed to the Lagos Division of the Court of Appeal. In its exhaustive judgment delivered on 27th June, 2002 the Court below G concluded as follows:

*“In the final result this appeal succeeds. The judgment of the lower court given on 19/5/95 is set aside. In its place I make the following orders:*

*(1) That the plaintiff’s case be dismissed.*

*(2) That the counter-claim by the defendant be heard de novo.*

*(3) That the PW2, Mr. N. K. Gbajabiamila be joined as a defendant in the counter-claim to enable him defence (sic) the claim in his personal capacity.*

(4) *I award to the defendant against the plaintiff/company costs assessed and fixed at N7,500.00.*” (See pages 189-190 of the record).

Appellant expressed its grievance at the judgment by filing a notice of appeal containing seven (7) grounds of appeal on 20th September, 2002. Respondent filed a notice of cross-appeal containing two (2) grounds on 28/10/2002. The notice was deemed properly filed and served, on the application of the Respondent, on 24/5/2006.

In compliance with the rules and practice of the Court, learned Counsel for the parties filed and exchanged briefs of argument in the main appeal and the cross-appeal. In his further amended brief, learned Counsel for the appellant presented the following three issues for determination:

*“ISSUE ONE (Grounds 2, 3 and 6):*

*Whether the Court of Appeal is entitled to fashion out a new contract for the parties to this action holding that the property subject matter of this action has been bought and sold on the basis of superseded, discredited and contradicted documentary evidence.*

*ISSUE TWO (Grounds 5, 6):*

*Whether Court of Appeal is possessed of the jurisdiction to entertain and determine the matter before it on the basis of incompetent ground of appeal and incompetent issues for determination.*

*ISSUE THREE (Grounds 1, 4, 7 and 9):*

*Whether the Court below can make its determination per incurium with respect to the admission/non admission, reliance and use of Exhibits D-D5 by ignoring statutory provisions, ignoring decisions of this Honourable Court applicable to the matter and which one binding on it as well ignoring principles of law and those of equity as they apply to the facts of the matter before it, the circumstances of the matter and the evidence led thereon.”*

In his own brief, learned Counsel for the Respondent adopted the appellant’s three issues. In the preliminary objection which he argued in the brief he raised the following issue for determination:

*“Whether or not there is a competent appeal herein.”*

Learned Counsel for the appellant filed a reply to the preliminary objection and a reply to the Respondent’s brief. In the Cross-appellant’s brief, a sole issue for determination was presented:

*“Whether or not in all circumstances of this matter, it was open*

*to the learned Justices of Appeal to have invoked Section 76 of the Court of Appeal Act rather than sending the matter to the High Court as they did?”*

The Cross-Respondent filed a brief in which the sole issue in the cross-appellant’s brief was adopted.

In issue one on whether a Court is entitled to form a new contract for the parties, reliance was placed on Dabo v. Abdullahi (2005) 7 NWLR 923, 181, 124 para. J to the effect that where parties are ad idem on the terms of a contract, the function of the Court is to give effect to the terms of the contract.

It was submitted that where there is a dispute between the parties on their written contract, the contract itself is the only reliable evidence and legal source of information to resolve the dispute. Reliance was placed on Lannie v. DPMS Ltd. (2005) 18 NWLR (pt. 958) 438; Badaru v. SCB (Nig) Ltd. (2003) 10 NWLR (pt. 827), 91; D.C. (Nig) Ltd. v. Emehuru (2007) 5 NWLR (pt. 1027) 342, 351.

With reference to Exhibits D1-D5, it was argued for the appellant that this earlier deed was superseded by a later deed dated 5/12/88 made between the appellant and the respondent. Learned Counsel argued that the defendant at the trial Court did not rely on Exhibits D1-D5 generally or in proof of payment of the purchase price of the property.

Learned Counsel argued further that the failure to consider the new contract created by the parties deprived the parties of their right under the terms of the contract. He referred to, and relied on, the ruling of the trial Court that the defendant could, and did, lead oral evidence of the contents of second deed of assignment upon the evidence of the PW2 that he destroyed the said deed.

Learned Counsel relied on the evidence of the PW2 that the purchase price was not paid in respect of the second deed of assignment and argued that the second contract had been discharged by breach in the failure to pay the purchase price. He urged the Court to restore the decision of the trial Court.

Dealing with issue two on alleged incompetent ground of appeal and incompetent issues for determination, learned Counsel said that the Court below based its decision on incompetent first and second grounds of appeal which he said were plucked from the summation of the trial Court and not from the ratio decidendi of the judg-

ment.

He referred to ground one and contended that though reference was made to Exhibits D1-D5, there was no reference to any part of the ratio of the judgment of the trial Court. He made the same submission on the second ground of appeal. He contended that the Exhibits D1-D5 which formed the basis of the judgment that the appellant had divested itself of its interest in the subject of litigation was not admitted at trial as acknowledgment of the payment of purchase price by the respondent or even as a current binding agreement between the parties.

He impugned the decision of the Court below which he said was based wholly and completely on the issues derived from the two incompetent grounds of appeal. He relied on *Lawal v. Dawodu & Anor. (1972) NSCC 515* in his contention that the Court below had no valid reason to interfere with the findings of the trial Court, and on *Agbaje v. Ajibola (2002) 2 NWLR (pt.750) 127* in his argument that an appellate Court should confine itself to the decision of whether or not the trial Court was right and not whether the reasons for the decision were right.

Issue three is on the lower Court's reliance on Exhibits D1-D5 ignoring, according to learned Counsel, statutory provisions, decisions of this Court and binding principles of law and equity. Counsel contended that Exhibits D1-D5 on which the lower Court predicated its judgment had been superseded and rendered inadmissible and unreliable and ought to have been expunged. He relied on *Yaya v. Mogoga (1947) 12 WACA 132*; *Alase v. Olori-Ilu (1965) NWLR 66*, among others.

Learned Counsel contended that Exhibits D1-D5 on which he said that the Court below based its judgment was a registrable instrument under Section 15 of the Land Registration Law of Lagos State but was not registered. He said that the said document was inchoate and incapable of transferring property or interest therein as the Governor's consent was not obtained. He relied on *CCCTCS Ltd. v. Ekpo (2008) 6 NWLR (Pt. 1083) 362* and Section 22 (1) of the Land Use Act, 1978.

He argued that the transaction in Exhibits D1-D5 was not in accordance with Section 26 of the Land Use Act (*supra*) and is, therefore, null and void. For failure to obtain the Governors consent, he

argued, the transaction evidenced in Exhibits D1-D5 is rendered unlawful, null and void. He argued that the lower Court was in error when it held that the trial Court was wrong to have admitted evidence of non-payment of the purchase price of the property because Section 132 of the Evidence Act upon which the Court below relied is not absolute but subject to several exceptions. B

Counsel argued that it is contrary to the principle of equity and an unjust enrichment to allow the respondent to own the property without proof of payment of the purchase price. He relied on DPCC Ltd. v. BPC Ltd (2008) 4 NWLR page 326. He argued that failure to pay the purchase price of the property was a fundamental breach of the contract of sale. He cited Anwasi v. Chababasuva (2000) 6 NWLR (pt. 661) 408 at 416 para C. C

He impugned the decision of the Court below based on Section 132 of the Evidence Act for its failure to advert to subsection (1) D (a) thereof which allows oral evidence to show fraud, intimidation, illegality, want of due execution, the fact that the document is wrongly dated, and want or failure of consideration. Learned Counsel relied on Dantsoho v. Mohammed (2003) 6 NWLR (pt. 817) 457 at 475 in his argument that the Court below erred in ordering the joinder of E the PW2, adding the order for joinder is outside the pleadings in the Court of trial.

He said that the joinder and order for retrial were raised suo motu by the Court below, but that the Court below failed to give the parties opportunity to be heard on the issues which failure, he said, F occasioned a miscarriage of justice. He relied on Okonji v. Njokanma (1999) 14 NWLR (pt. 368) 250. He said that the decision of the Court below setting aside the judgment of the trial Court ignored statutory provisions of law, and principles of equity applicable to the G fact established in the case and is, therefore, perverse. Counsel urged the Court to allow the appeal.

In his amended brief of argument, learned Counsel for the Respondent argued his preliminary objection. He said a certificate of Non-compliance was issued pursuant to order 8 Rule 13 of the Supreme Court Rules, now Order 8 Rule 8 (i) and time to appeal can be enlarged only by the Supreme Court Orders 2 and 7 Rules 3 (1) H and 5 (1), respectively.

He argued that there being no application for enlargement of

time before this Court, the notice of appeal is incompetent. He relied on *Madukolu v. Nkemdilim* (1962) 1 All NLR 587; *Odojin v. Agu* (1992) 3 NWLR (pt. 229) 350 at 368. Learned Counsel argued that this appeal is incompetent as there was no compliance with the conditions of appeal.

B In his second ground of preliminary objection, he argued that the action from which this appeal arose could not have been commenced without authority of the appellant. He relied on *Odutola Holdings Ltd v. Lufadeju* (2006) 19 NWLR (pt. 994) at 360 wherein the Court interpreted Section 63 (1) (3) of the Company and Allied  
C Matters Act Cap C 20 LFN 2004 to the effect that:

*“...an action of this nature cannot be commenced in the name of a company without its authority. That is the position of the law.”*

D He relied on various decided cases and urged the Court to strike out the action.

In his reply to appellant’s argument in issue one, learned Counsel for the Respondent referred to page 35 of the record and submitted that the execution of the second deed of assignment meant that parties no longer relied on the earlier deed evidenced on Exhibit D1-  
E D5. He stated that though oral evidence of the contents of the Sheraton Deed which was destroyed by PW2 was given as to its execution, no particulars of its contents were given.

F He submitted that on the facts, the deed Exhibit D1-D5 and the Sheraton Deed was material especially as D1-D5 bear receipt of the consideration. He argued that no oral evidence can be admitted to deny the contents of Exhibit D1-D5. He argued further that the evidence of the PW2 that no consideration was paid for the Sheraton Deed after he waited for two years for payment went to no issue as it  
G was not pleaded by the appellant.

H Learned Counsel relied on Section 167 (d) of the Evidence Act, 2011 in his contention that the Sheraton Deed of Assignment would have been fatal to the appellant’s case if it had been produced. He further argued that Exhibit D1-D5 showed that the purchase price of N150, 000 was collected by the appellant as consideration for the assignment of the disputed property. He relied on *Ishola Williams v. Hammond* (1988) 1 NWLR (pt. 71) 481 at 498 where the Court held that:

*“Once documents are tendered and admitted in evidence with-*

*out objection, they can be used for all legitimate purposes.”*

He referred to the Sheraton Deed of Assignment and said that the deed was executed by the appellant in favour of the Respondent for a consideration of N750,000 acknowledged therein. He said that learned Counsel for the appellant conceded that the Sheraton Deed of Assignment was executed by the appellant in favour of the Respondent. B

Learned Counsel argued that Exhibit D1-D5 and the Sheraton Deed which PW2, in his evidence-in-chief, said bear receipt clause constitute contrary evidence to the oral testimony of the PW2 that no money was paid. He urged the Court to hold that by the Sheraton Deed of Assignment, the appellant assigned the property in dispute to the Respondent, subject to the Governor’s consent. C

Learned Counsel said that Exhibit D1-D5 was made between the appellant, on one hand, and the PW2 and the respondent, on the other hand, while the Sheraton Deed was between the appellant and the respondent with Exhibit N explaining the exclusion of PW2 from the Sheraton Deed. He urged the Court to resolve issue one against the appellant. D

In issue 2, Counsel referred to paragraph 5 of the Statement of Defence wherein the respondent pleaded, and relied on, Exhibit D1-D5 for payment to the appellant of the purchase price by PW2 and herself. He referred to page 11 of the record and said that the appellant did not deny or admit the specific plea of payment of the sum of N150, 000 as the purchase price of the property. E F

He relied on *Obinechie & Ors v. Akusobi & 6 Ors* (2010) 4-7 SC (pt. 11) 178 at 215 in urging the Court to hold that the plea of the appellant is, in the circumstances, an admission of the fact pleaded by the respondent. Learned Counsel referred to Exhibit DD which he said showed that the respondent paid the PW2 for the PW2’s interest in the property. He urged the Court to resolve the issue against the appellant, adding that issue two issues not relate to any ground of appeal before the Court. G

In issue 3, learned Counsel said the parties intended to comply with the requirements of the Land Use Act, 1978. He argued that since the appellant, through PW2, collected and destroyed the Sheraton Deed of Assignment; it cannot rely on Section 22 (1) of the Land Use Act as it was the appellant who made it impossible to ob- H

tain the Governor's consent.

He relied on *Ohuka v. The State* (1988) 1 NWLR (Pt. 65) 539 at 557, where Oputa, JSC, said:

*"The mere fact that a thing cannot be done excuses the doing of it."*

B He urged the Court not to allow appellant benefit from the act of destroying the Sheraton Deed of Assignment. Counsel referred to some authorities and urged the Court to hold that both Exhibit D1-D5 and the Sheraton Deed are admissible in evidence as between C the appellant and the respondent to enforce the equitable contract against the appellant, notwithstanding Section 15 of the Land Instrument Registration Law of Lagos State.

He said that Exhibit D1-D5, by the intention of the parties, had become an appendage to the Sheraton Deed and is therefore D not within the ambit of Section 15 of the Land Instrument Registration Law for which he relied on *Coker v. Oganye* (1939) 15 NLR 57 wherein the Court held that an unregistered registrable document can be relied upon to support a claim for specific performance. He urged the Court to resolve issue three against the appellant. In conclusion, he urged the court to dismiss the appeal. E

In his reply to the preliminary objection which he incorporated in his reply brief, learned Counsel for the Appellant contended that there was no appeal against the order for extension of time. He relied on *Nwokedi v. Okugo* (2002) 16 NWLR (Pt. 294) 441 at 449 F paras. B - A and argued that the order of the Court not appealed against or set aside is valid.

He argued that this Court cannot sit on appeal or pronounce on the nullity of an order made by a Court of competent jurisdiction G when there is no appeal against the order. He relied on *Ezeokafor v. Ezeilo* (1999) 9 NWLR (Pt.619) 513, 530-531 para G in his contention that unless the issue is raised on appeal, the Court cannot pronounce on the order even if it is readily perceived to be a nullity.

H He argued further that a breach of a rule of practice can only render a proceeding irregular and will not nullify it. He relied on *Elabanjo v. Dawodu* (2006) 15 NWLR (Pt. 1001) 76; *Bajoga v. Govt. FRN* (2008) 1 NWLR (Pt. 1067) 85, 114 para C.

On want of authority to sue, Counsel said that the Respondent is a minority shareholder and that the control and management of



the appellant are vested in the majority shareholders and that it is only the majority that can question the authority to institute an action in the name of the company. He relied on *Ivory Merchant Bank v. Makhum Co. Ltd.* (2002) 1 NWLR (Pt.747) 74 and argued that the respondent has no locus to complain. He said that the respondent did not raise the issues in the preliminary objection timeously and is deemed to have waived them. B

In what is supposed to be a reply on point of law as indicated on page 1 of the process, the appellant started at page 5 with the heading: “*Arguments on the Three Issues Combined.*” As the title indicates, what should have been a reply brief was presented as an improved version of the argument in the appellant’s brief. C

***A reply brief is filed in answer to an issue of law or fact or argument raised in the respondent’s brief calling for a reply. It should not be used to extend the scope of the arguments in the appellant’s brief.*** See *Okonjo v. Njokanma* (1999) 125 SCNJ 259 at 277. I will not consider the said “*arguments on the Three Issues Combined*” filed in place of a reply brief. D

A preliminary objection is a pre-emptive strike at the hearing of the appeal. When it is raised, the Court will deal with it as a threshold issue in the appeal. E

In ground 1 of his preliminary objection, the respondent relied on Order 8 Rule 11 of the Supreme Court Rules in his contention that the appeal is incompetent. Order 8 Rule 11 provides: F

*“Ord. 8 r.11: After an appeal has been entered and until it has been finally disposed of the Court shall be seised of the whole of the proceedings as between the parties thereto, and except as may be otherwise provided in this Order, every application therein shall be made to Court and not to the Court below, but any application may be filed in the Court below for transmission to the Court.”* G

The rule reproduced above vests in the Supreme Court exclusive control of proceedings during the pendency of appeal. The respondent has argued that the appeal contemplated in the rule is a competent appeal and not an incompetent one. Respondent’s case rests on the contention that the order made by the court below on 25/9/2003 was made without jurisdiction and is therefore a nullity and the processes filed pursuant to same are incompetent. H

***An order made by a Court of competent jurisdiction is***

***valid until it is declared void by a Court of competent jurisdiction. The validity vel non of the order of 23/9/2003 is not before this Court and the Court has no jurisdiction to pronounce one way or the other on a matter not before it. Without a declaration that the order is void, the Court cannot nullify processes filed pursuant to it.***

***The Court cannot nullify an order of a Court of competent jurisdiction on the ipse dixit, without more, of learned Counsel for either of the parties. Learned Counsel for the respondent relied on Macfoy v. UAC (1962) ACP 152 in his argument that nothing can be put on nothing. That may be so, but a party who perceives that an order of Court by which he is bound or which affects his interest, is null and void, ought to seek a Court declaration to that effect. If he ignores the Court or proceeds to rely on his own personal perception that the order is a nullity, he does so at his own risk.***

***On the second ground of preliminary objection, learned Counsel argued that the appeal is incompetent in that the suit and the appeal were filed without authority in contravention of Section 63 (i) (3) of the Companies and Allied Matters Act Cap C LFN 2005. This is a fresh issue. It was not raised in the trial Court or in the lower Court and it is raised in this Court without leave of Court first sought and had, especially as it would require adducing further evidence. See Hindi v. State (1974) 5 SC 39; Sken Consult v. Ukey (1981) 1 SC 6. Without leave, this Court is not competent to pronounce on an issue not raised in the Court below. The preliminary objection has no substance and is hereby dismissed.***

***I will now determine the appeal on the three issues formulated by the appellant and adopted by the Respondent.***

***Issue 1 question:***

***“Whether the Court of Appeal is entitled to fashion out a new contract for the parties to this action holding that the property subject matter of this action has been bought and sold on the basis of superseded discredited and contradicted documentary evidence.”***

After a copious argument on the sanctity of contract and related matter, learned Counsel for the appellant finally came down to the crux of Issue 1. He said:

*“...There was a second deed of assignment dated 5/12/88 by the plaintiff company to the defendant (page 35, 101 - 102 of the records) showing clearly that Exhibit D1-D5 generally or on the clause of the said Exhibit D1-D5 referencing the purchase price of the property in particular...”*

The bundle of documents admitted by the trial Court and marked Exhibit D1-D5 is the documentary evidence described by learned Counsel for the appellant as *“superseded, discredited and contradicted documentary evidence”*. B

Learned Counsel for the respondent, in his marathon submission on issue 1 appeared to have avoided the real issue with respect to Exhibit D1-D5 which appear to me to be *“what superseded, discredited and contradicted documentary evidence D1-D5?”* The answer to the poser above lies with the Sheraton Deed of Assignment made subsequent to the execution of Exhibit D1-D5. C

At all material times, the plaintiff company (the appellant therein) was constituted of three members: N. K. Gbajabiamila, who was the Managing Director and his then wife (the respondent) and one Ms. Elizabeth Oyetutu Ebia, as Director and shareholder, respectively. It is in this setting that the property in dispute was sold by the appellant to Mr. Gbajabiamila and the respondent who was then his wife. See Exhibit D1-D5. All that was left to perfect the deed was the Governor’s consent. D

***There was a subsequent deed, i.e. the Sheraton Deed of Assignment by which Mr. Gbajabiamila purported to convey his interest in the property he jointly purchased from the appellant to the joint owner - the respondent. Did the Sheraton Deed of Assignment supersede, discredit and/or contradict Exhibit D1-D5 by which the appellant conveyed the property to the respondent and her husband, PW2?*** E F

***The answer is in the negative for the simple reason that the Sheraton Deed of Assignment by which the PW2 conveyed his interest in the property to the respondent no longer existed. There is uncontradicted evidence from PW2 that the respondent failed to pay the purchase price of his share of the property and he retrieved and destroyed the Deed of Assignment. I agree with the Court below that evidence relating to the non-existent document was admitted by the trial Court in*** H

error.

***In my humble view, the Sheraton Deed of Assignment, if it had been in existence at the material time, would have conveyed the property direct from the appellant to the respondent, as the Deed Exhibit D1-D5 was completely abandoned and discarded when the parties agreed to execute the Sheraton Deed the terms of which were breached by the respondent.***

***The Sheraton Deed of Assignment was aborted as the respondent breached its term by failure to pay the agreed sum. Exhibit D1-D5 having been abandoned had no binding effect on the parties.***

***The Deed, Exhibit D1-D5, having been abandoned and the Sheraton Deed, having been breached and destroyed by PW2, the parties returned to the status quo before the execution of Exhibit D1-D5. In effect, there was no sale of the plaintiff company's property. Issue one is resolved in favour of the appellant.***

In issue 2, learned Counsel for the appellant queries:

***"Whether Court of Appeal is possessed of the jurisdiction to entertain and determine the matter before it on the basis of incompetent ground of appeal and incompetent issues for determination?"***

Grounds 1 and 2 in the lower Court described as incompetent by learned Counsel for the appellant are reproduced hereunder for ease of reference:

***"1. The learned Trial Judge misdirected himself in law when he refused to give Exhibit D1-D5 its full weight and effect.***

***2. The learned Trial Judge having held at page 43 lines 1 to 4 and pages 24 to 26 of the record thus: 'I must however say that PW2's claim that no money was paid to the plaintiff cannot hold for right on the Deed, the plaintiff or Assignor did acknowledge the receipt of N150, 000...' ought to have dismissed the Respondent's claim and also given judgment for the appellant on both the main suit and the counter-claim." See pages 24075 of the record.***

In his brief, learned Counsel for the appellant submitted, inter alia, that the two grounds were plucked from the summation of the Court rather than from the ratio decidendi of the judgment of the trial Court. Appellant's claim before the trial Court was reproduced earlier in this judgment. The first claim is a declaration of title to the

property in dispute.

In paragraphs 8, 9 and 10 of the Statement of Claim, it was averred:

*“8. By a building Agreement made between the plaintiff and a building company the property was to be developed at a specified cost and the development is still going on. The plaintiff will rely on the said building Agreement at the trial of the action.* B

*9. The plaintiff has since been in full and effective possession of the said land until recently when the defendant entered into the land without any right or authority from the plaintiff.* C

*10. The plaintiff avers that the defendant is in wrongful possession of the said land as she has no right or authority to do so without the consent and...”*

The Respondent (as defendant) joined issue with the plaintiff on ownership of the land. In paragraphs 4 and 5 of the Statement of Defence, it was averred as follows: D

*“4. With reference to paragraph 8 of the Statement of Claim, the defendant states that the building agreement was entered into between the defendant and her former husband Mr. N. K. Gbajabiamila on one hand and Abbun Construction Limited, on the other hand.* E

*5. With further reference to paragraph 8 of the Statement of Claim, the defendant states that the plaintiff intended to divest and divested itself of any interest in the property when it executed a Deed of Assignment dated 21st June, 1983 to her and her former husband Mr. N. K. Gbajabiamila after the payment of the sum of N150,000.00 as consideration. The defendant will at the trial rely on the deed of assignment executed between the plaintiff company and the Assignee with Mrs. E. O. Ebie singing as Secretary of the plaintiff company which is duly stamped but for which the Governor’s consent was not obtained.”* F G

***The reference to Exhibit D1-D5 and the sum of N150,000.00 allegedly acknowledged therein, cannot be said to have been plucked from a summation in the judgment. The Exhibit forms the basis of the dispute between the parties. Learned Counsel for the appellant cannot be right in his assertion that the two grounds of appeal cannot be fixed and circumscribed within a particular issue in controversy in the judgment.*** H

**With reference to the Deed of Assignment D1-D5 pleaded in paragraph 5 of the Statement of Defence, the learned trial Judge, in his judgment at page 27 of the record said:**

**B “I have in fact gone into detailed analysis of this document stated to be Deed of Assignment but which the defendant who tendered the document testified that the document is in fact the document by which PW1, Mrs. Ebie, received N150,000.00 and thereby divested her interest in the company. Of course there is nothing like that at all in the document.”**

**D Above is a definite determination of the main issue in contention, whether the finding is wrong or right is a different matter. It is a pronouncement on Exhibit D1-D5 and the sum of N150, 000.00 which the respondent claims was acknowledged therein. It is a ratio decidendi based on which grounds 1 and 2 were framed. I resolve issue two against the appellant.**

**Issue three is:**

**E “Whether the Court below can make its determination per incuriam with respect to the admission/non admission, reliance and use of Exhibit D1-D5 by ignoring statutory provisions, ignoring decisions of this Honourable Court applicable to the matter and which are binding on it as well ignoring principles of law and those of equity as they apply to the facts of the matter before it, the circumstances of the matter and the evidence led thereon.”**

**G Above is clumsily unwieldy and inelegantly crafted. It hardly qualifies for an issue for determination in appeal which is a short question raised against one or more grounds of appeal and is meant to be a guide to the arguments and submissions to be advanced in support of the grounds of appeal. See Angyu & Anor v. Alhaji Malami & Anor. (1992) 9 NWLR (Pt. 264) 242. In Chief Imankhe & Anor v. A.G. Bendel State & Ors. (1992) 6 NWLR (Pt.248) 396 at 407, this Court held that an issue for purposes of appeal is a substantial question of law or fact or both arising from the grounds of appeal filed in the appeal which when resolved one way or the other will affect**

***the result of the appeal.***

In the issue reproduced above, learned Counsel for the appellant assumed as established facts issues on which he was to address and persuade the Court. For instance, it is yet to be established by learned Counsel that the Court below made its determination per incuriam. B

Above all, at page 4 of his brief, learned Counsel for the appellant stated thus:

*“Issue (Three Grounds 1, 4, 7 and 9).”*

The only grounds of appeal are at pages 239 to 240 of the record. They are numbered from (i), (ii), (iii), (iv), (v), (vi) and (vii). C They are seven grounds of appeal. Issue 3 was formulated from grounds 1, 4, 7 as well as from a non-existent 9. The issue is therefore incompetent and liable to be struck out. It is hereby struck out.

Of the two surviving issues, Issue 2 resolved against the appellant is peripheral. Issue 1 resolved in favour of the appellant is the deciding factor in the appeal. The appeal is allowed on the said issue one. D

I have considered the grounds of cross-appeal, the issue formulated for determination and the submissions of learned Counsel E for the parties. It is not necessary to reproduce them. At the trial Court, the cross-appellant counter-claimed thus:

*“(a) A declaration that the defendant is entitled to the grant of statutory right of occupancy in respect of the property situate at, lying and being at No.26, Sobo Arobiodu Street, GRA, Ikeja, Lagos State.” F*

*“(b) An order compelling the plaintiff to process the obtaining of the Governor’s consent, stamping and registration of the Deed of Assignment executed by the plaintiff in favour of the defendant given G to Messrs. Burke & Co. Solicitors to process.”*

In its judgment, the trial Court dismissed the counter-claim in the following terms:

*“It is also ordered that all the reliefs for which the defendant applied in her counter-claim is (sic) refused and the counter-claim is H dismissed.”*

See page 46 of the record.

On further appeal to the Court of Appeal, the issue relating to the counter-claim was:

*“Whether or not the defendant is entitled to judgment on the counter-claim.”*

See page 187 of the record.

In its judgment, the lower Court ordered inter alia, as follows:

*“(2) That the counter-claim by the defendant be heard de novo.*

B *(3) That the PW2 Mr. N. K. Gbajabiamila be joined as a defendant in the counter-claim to enable him defence (sic) the claim in his personal capacity.”* See page 110 of the records.

C I have determined that the Deed evidence in Exhibit D1-D5 was abandoned. I have also determined that the attempt to replace the Deed Exhibit D1-D5 with the Sheraton Deed failed, leaving the parties in the position they were before the execution of Exhibit D1-D5, which was later abandoned.

***From the determination in the main appeal, appellant D has not sold the property in dispute as Exhibit D1-D5 was abandoned by the parties thereto. The Court cannot make an order for specific performance against the appellant in respect of the property it did not sell to the cross-appellant, nor can an order for joinder be made against the PW2.***

E ***That is not the proper order in the circumstance. Rather, if the proper parties in the counter-claim were not before the Court and so the case was not properly constituted and, ipso facto, the trial Court had no competence to entertain the counter-claim, the proper order is one for striking out the counter-claim, not joinder of a third party. But the issue is that the cross-appellant did not prove that the appellant sold the property to her. The property in dispute remains the property of the appellant, as the parties agreed to and did abandon***  
F ***Exhibit D1-D5.***  
G

In the final conclusion, the appeal is allowed; cross-appeal is dismissed. Parties to bear their respective costs. Appeal allowed. Cross-appeal dismissed.

H

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### MOHAMMED JSC

My learned brother Ngwuta JSC had permitted me to read his judgment which has just be delivered in this appeal. I am completely with my learned brother in the manner he considered and resolved



the three (3) issues arising for determination in the appeal before arriving at the conclusion that the appeal ought to succeed and allowed while the Cross-appeal should be dismissed.

The dispute between the parties in this appeal is over ownership of property situate at No. 26 Sabo Arobiodu Street, G.R.A. Ikeja, Lagos over which the Appellant company went to the trial Court claiming for title on the basis of a Deed of lease executed on 19/8/1966, registered as No. 18, page 18 and volume 88 of the Land Registry, Ibadan and later in Lagos. The Respondent on the other hand counter-claimed for the same property on the basis that the same property has been sold to her by the Appellant, following two separate Deeds of Assignment executed between the parties on 21/6/1983 and 5/12/1988 respectively. While the trial Court in its Judgment found title in the property in dispute in favor of the Appellant, the same Court dismissed the Defendant's/Respondent's counter-claim for title in respect of that same property. However, the Defendant/Respondent who lost at the trial High Court, appealed to the Court of Appeal, Lagos Division which after hearing the parties on the appeal, allowed it, set aside the Judgment of the trial Court, dismissed the case of the Plaintiff/Appellant and remitted the Defendant's/Respondent's counter-claim to the trial Court for hearing de-novo with P.W.2 who testified at the trial Court for the Plaintiff/Appellant, joined in the case as the 2nd Defendant.

It is apparent that both parties were not happy with the Judgment of the Court of Appeal and this situation was what gave rise to the present appeal by the Appellant and the Cross-appeal by the Respondent. While the Appellant had identified three (3) issues for determination of the appeal from the seven 7 grounds of appeal filed by it in the Notice of Appeal, the Respondent agreed with the three (3) issues in the Appellant's brief but formulated only one issue for the resolution other Cross-appeal.

As far as I am concerned, the resolution of the first issue for determination in the Appellant's brief of argument will dispose of this appeal as well as take care of the Cross-appeal. This is because the evidence on record as adduced by the parties both oral and documentary is quite plain. The 1st Deed of Assignment executed by the parties in Exhibits D1 - D5 selling the property in dispute to the Respondent and her former husband P.W.2 who is also the Managing

Director of the Appellant was executed on 21/6/1983 with a consideration of N150, 000.00 only. No consent of the Lagos State Governor was sought and obtained for this transaction by the parties before the parties decided to enter into another new agreement by executing the 2nd Deed of Assignment in respect of the same property. This time the transaction was between the Appellant and the Respondent assigning the property directly from the Appellant to the Respondent thereby keeping out P.W.2 who was said to have conceded his interest in the property to the Respondent on the consideration of the sum of N750,000.00. This 2nd Deed of Assignment was executed on 5/12/1988. However, this Deed of Assignment was not in evidence at the trial Court because it was retrieved from the Counsel who prepared it and destroyed by P.W.2 when according to him, he had waited for two (2) years for the payment of the amount due from the Respondent for foregoing his own interest in the property in dispute in favour of Respondent.

With this development, it is not difficult to see from the evidence that the 1st Deed of Assignment by the parties in Exhibits D1 - D5 executed on 21/6/1983 had been abandoned by the parties when they decided to execute the 2nd Deed of Assignment on 5/12/1988 which unfortunately could not come into force for failure of consideration and subsequent destruction of the same. The law is trite that failure to pay the purchase price under a contract for sale of land constitutes a fundamental breach which goes to the root of the contract and upon which the Court cannot decree specific performance. See *Nlewedim V. Uduma* (1995) 6 N.W.L.R. (Pt.402) 383 at 400-401. Thus, with the collapse of the two Deeds of Assignment for the sale of the property in dispute, the title to the property in dispute remained with the Appellant as found by the trial Court. Accordingly, the appeal is hereby allowed. The Judgment of the Court below is set aside and the Judgment of the trial Court is restored and affirmed. In the result, the Cross-appeal is dismissed. In the circumstances of this case, I am also not making any order on costs.

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**MUNTAKA-COOMASSIE JSC**

I have read in draft the lead judgment just delivered by my learned brother Sylvester Ngwuta, JSC. I completely agree with the

reasons and conclusion therein. Accordingly I too allow the appeal and dismiss the cross-appeal. No order as to costs.

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### **PETER-ODILI JSC**

I agree in totality with the judgment just delivered by my learned brother, N. S. Ngwuta, JSC and the reasoning therein. To establish my support, I shall make some remarks. B

The Appellant who was the plaintiff at the trial High court is the registered owner of the landed property subject matter of this action, known as and called NO. 26 Shobo Arobiodu Street, G.R.A. Ikeja, Lagos. N. K. Gbajabiamila who testified as pw2 and who happened to be the husband of the respondent, Mrs. I. A. Gbajabiamila, before the institution of this action together with one Ms. Ebie who testified as PW1 are the Shareholders and Directors of the Plaintiff/Appellant. C  
Mr. N. K. Gbajabiamila at all times material to this action was the Managing Director of plaintiff/appellant Company. The trial court gave judgment to the Appellant. D

Dissatisfied with this decision, the respondent appealed to the Court of Appeal, Lagos Division which, on the 27th June, 2002 reversed the decision of the High court and gave judgment to the respondent. The appellant dissatisfied has approached this court on appeal. E

#### **BACKGROUND FACTS:**

The appellant company was in serious debt and therefore in need of cash flow to pay its debt and so the appellant by a resolution of its Board of Directors decided to sell the property in dispute on the conditions clearly stated in the Resolution to that effect. That Resolution was tendered and admitted at the trial court as Exhibit P1. F  
G

Mr. N. K. Gbajabiamila and his wife both directors of the Appellant company offered to purchase the property, No. 26 Shobo Arobiodu Street, GRA, Ikeja, Lagos subject matter of this dispute and the appellant company agreed to sell. Although the consideration of the purchase price could not be proved to have been paid for the properties the parties executed a deed of assignment dated 21/6/1983 in which the payment of a consideration of N150,000.00 was acknowledged. This deed of assignment was tendered and admitted as Exhibits 'D1- D5'. H

No steps were taken to obtain the Governor's consent for this deed of assignment because it was found to be a financial waste to do so. The parties then decided to abandon Exhibits 'D1 - D5', in order to save the cost of having to obtain the consent of the Governor twice. To this end, the parties to Exhibits 'D1 - D5' as well as their witnesses  
 B met at the Sheraton Hotel and executed a different deed of assignment. This deed could not be tendered in court because PW2 after having waited for two years and receiving no payment as consideration for the execution had collected the documents and destroyed  
 C them. The trial court on the basis of a notice to produce, allowed the respondent to testify to the contents of the deed executed at Sheraton Hotel. That trial court entered judgment for the appellant and dismissed the respondent's counterclaim on the ground that the court was not satisfied on the basis of the evidence adduced that respondent  
 D had paid for the property.

The Respondent herein appealed to the Court of Appeal which allowed the appeal and set aside the judgment of the court. On the counter-claim, the Court below sent it back to the High Court for retrial, further ordering that Mr. N. I. Gbajabiamila be joined as a  
 E defendant to the counter-claim.

Dissatisfied with the decision of the Court of Appeal, the appellant has come to the Supreme Court.

On the 9th of April, 2013, date of hearing, Dr. Abdul Muyassir  
 F Ladan of counsel adopted the Appellant's Further Amended Brief of argument and deemed filed on the 12-11-2012. The Brief was settled by Dr. Ladan and in it he distilled three issues for determination stated as follows:-

1. Whether the Court of Appeal is entitled to fashion out a  
 G new contract for the parties to this action holding that the property subject - matter of this action has been bought and sold on the basis of superseded, discredited and contradicted documentary evidence.

2. Whether the Court of Appeal is possessed of the jurisdiction to entertain and determine the matter before it on the basis of incompetent  
 H ground of appeal and incompetent issues for determination.

3. Whether the Court below can make its determination per incuriam with respect to the admission/non admission, reliance and use of Exhibits 'D1-D5' by ignoring statutory provisions, ignoring

decision of this Honourable Court applicable to the matter and which are binding on it as well as ignoring principles of law and those of equity as they apply to the facts of the matter before it, the circumstances of the matter and the evidence led thereon.

The appellant also had adopted their Reply on points of law filed on 5th April, 2013. B

Mr. Andrew C. Igboekwe, learned counsel for the Respondent adopted their Amended Respondent's Brief settled by counsel and filed on the 13th March, 2013. He pointed out the matter of their Cross-Appeal and the Preliminary Objection the respondent raised against the main appeal which arguments are incorporated in this Amended Respondent's Brief. It needs no saying that the Preliminary Objection would be first tackled before anything else. C

#### PRELIMINARY OBJECTION:

The Preliminary Objection of the respondent is predicated on D whether or not there is a competent appeal herein and Mr. Igboekwe of counsel submitted that a Certificate of Non-Compliance was issued pursuant to Order 8, Rule 13 of the Supreme Court Rules then, now Order 8, Rule 8 (i). That the certificate is issued by the Supreme Court which Court is the only Court that by virtue of Orders 2 and 7, E Rules 3 (i) and 5 (i) respectively, can enlarge the time prescribed by the Rules of the Supreme Court and direct a departure from rules 2, 3 and 4 of Order 7. That the prescriptions do not include the Court of Appeal. F

Learned counsel for the respondent went on to state that the Supreme Court is empowered by virtue of Order 7, Rule 5 (The proviso thereto) to give further or other directions for the purpose of procuring a record of Proceedings not the Court of Appeal. He said the conditions of appeal were issued pursuant to the rules of this G Court and not those of the Court of Appeal. That those Rules of the Supreme Court cannot be employed in the Court of Appeal. He cited *Clement v. Iwuanyanwu* (1989) 3 NWLR (pt. 107) 39 at 51.

For the respondent/Objector was further submitted that the H appellant/respondent has not filed a counter-affidavit which has not controverted the fact that no application to enlarge the time to perfect the condition of appeal and indeed no application was so filed in this Court and until such is filed for enlargement and granted, there can be no competent Notice of Appeal as the condition precedent to

the validity thereof had not been complied with. He referred to *Madukolu v. Nkemdilim* (1962) 1 All NLR 587; *Odofoin v. Agu* (1992) 3 NWLR (Pt. 229) 350 at 368.

B Learned counsel went on to contend that the Rules of this Court empower the Registrar of the Court of Appeal to issue the conditions and that is what makes the Notice of Conditions of Appeal competent. That there is no corresponding empowerment by the Rules of the Supreme Court granting the Court of Appeal power to enlarge time along with this court. He said Order 8, Rule 11 contem-  
C plates a competent appeal and not an incompetent one.

On the second leg of the Objection, learned counsel said there was absence of authority through a Board Resolution to commence this action in keeping with Section 63 (1), (3) of the Companies and Allied Matters Act Cap. C20 LFN 2004: *Fakoya v. St. Paul's Church D Sagamu* (1966) 1 All NLR 74; *Okoye v. Dumez* (1985) 1 NWLR (pt.4) 783 at 802.

E Learned counsel for the Appellant/Respondent in answer flowing along the Reply Brief submitted that there was a subsisting enlargement of time by the Court of Appeal for the appellant to appeal and there was no appeal on it and so respondent cannot raise an objection in total disregard of that valid, subsisting order of a competent court with jurisdiction. That this objection cannot affect the jurisdiction of this court to hear the substantive appeal which was filed  
F within time because this objection is misplaced. He cited *Nwokafor v. Ezeilo* (1999) 9 NWLR (pt. 619) 513 at 530 - 531; *Elabanjo v. Dawodu* (2006) 15 NWLR (pt. 1001) 76; *Bajoga v Government of the Federation Republic of Nigeria* (2008) 1 NWLR (pt. 1067) 85 at 114.

G On the matter of the lack of authority of the company for the initiation of the Court process, Dr. Ladan of counsel said the law is well founded that it is only the company that can on the basis of its separate personality remedy any wrongful act against it not any member of the company and certainly not the minority shareholder.

H He cited *Labinjo v. Odotola Holdings* (2002) 3 NWLR (pt.753) 121 at 147; *Ivory Merchant Bank v. Makham Co. Ltd* (2002) 1 NWLR (pt. 747) 74; *Sotuminu v. Ocean Steamship Nig. Ltd.* (1987) 4 NWLR (pt. 66) 691.

On this matter as to the competence or lack of it in the suit ab

initio based on the Appellants lack of authority to institute this action. This is one of those instances where the lateness of the objection on competence shuts the objector for all time. The respondent failed to raise the issue at the Court of trial or the Court of Appeal and it is only now that he sees the light to so bring it up. It seems to me akin to what the Supreme Court no less saw in *Ezekude v. Odogwu* (2002) BFWLR (Pt. 121) 1927 at 1931. This court stated as follows:-

*“The issue whether there was really a case properly in court because representative capacity of respondent to sue was not proved. This is a surprise in this matter. All through the journey of the case from trial court to Court of Appeal, there was no challenge to the representative capacity. This is a matter that can only be argued as new issue by leave of court. This issue is irrelevant, incompetent and it is wrong to argue it at this stage ...”*

Taking a cue from the case of *Ezekude v. Odogwu* (supra) D above quoted, in the case at hand, the respondent had by his conduct of not raising the matter at either of the two Courts below, waived that right to challenge the competence of the suit as instituted by the Appellant. The Respondent is a party to this suit and also a director but participated in the case including giving evidence and did not see the need to complain that the company did not authorise the suit. E The cases of *Odutola Holdings Ltd. v. Ladejobi* (2006) 5 SC (pt. 1) 83; *Sotuminu v. Ocean Steamship Nig. Ltd* (1987) 4 NWLR (pt.66) 91 have been referred to out of context, the facts in those cases F being different from the circumstances of the present case. In those cases, the issue was fought all the way from the trial court up to the Supreme Court.

Furthermore, the principles laid down by this Court is that where the authority of the company to commence legal proceedings G is challenged, the burden is on the respondent/objector to prove that there is a presumption of regularity and the onus is on the Objector to show that there is that lack of authority for the company to commence the suit. In the case of *Sotuminu v. Ocean Steamship Nig. Ltd* (supra). this Court laid down the rule when it held thus:- H

*“A solicitor to a company is competent to institute an action in the name of the company without first being formally authorised to do so by the company, if it appears to him that the company’s interest, property or rights are in immediate jeopardy. If the solicitor’s*

*authority is challenged, the action will not be struck out by the court if it appears to it that the grievance is one in respect of which the company is competent and would normally institute an action to protect its interest, property or rights. In such circumstance the court would take steps to ascertain the stand of the company in the matter.*

B *It is when it has become evident that the company has dissociated itself from the action of the solicitors that the suit will be struck out."*

In the case in hand the company's authority has not been challenged by those who ought to, in fact PW2, the erstwhile husband of the defendant/respondent went along with the protection of the rights of the Appellant in this suit and he is a major shareholder. It is in keeping with the circumstances that existed in *Haston (Nig.) Ltd. v. A. C. B. plc* (2002) FWLR (pt. 119) 1476 at 1492 where this court held that a Chairman who is also a director of the company has a duty to  
D act in the best interest of the company.

I am satisfied that the matter on this preliminary Objection has been effectively settled by the guidelines in such situations and the respondent should rest the issue as it cannot fly. The Objection lacks merit and is dismissed.

E **MAIN APPEAL:**

The Respondent adopted the appellant's issues as couched and I have no difficulty using them.

**ISSUE ONE:**

F Whether the Court of Appeal is entitled to fashion out a new contract for the parties to this action holding that the property subject matter of this action has been bought and sold on the basis of superseded, discredited and contradicted documentary evidence.

Dr. Ladan of counsel for the appellant submitted that the law  
G does not allow any court whether of trial or an appellate one to create a contract for parties to litigation before it which is what the Court of Appeal did. He cited *Dabo v. Abdullahi* (2005) 7 NWLR (pt. 923) 181 at 124; *UBN Ltd v. Umeh & Sons* (1996) 1 NWLR (pt.426) 565. He stated on that a written contract agreement entered into by  
H parties are binding on them and where there is any disagreement between the parties to such written agreement on any particular point, the only reliable evidence and legal source of information to resolve the claim is the written contract executed by the parties. He referred to *Lannie v. D. P. M. S. Ltd* (2005) 18 NWLR (Pt. 958) 438; *Badaru*



v. S. C. B. (Nig.) Ltd (2003) 10 NWLR (pt. 827) 91; D. C. (Nig.) Ltd. v. Emehuwu (2007) 5 NWLR (pt. 1027) 347 at 351.

For the appellant was submitted that the principle of sanctity of contract enjoins the courts to deal carefully with agreements as reached by the parties and the courts cannot make contracts for parties. He relied on Afribank (Nig.) Plc v A. I. Investment Ltd (2002) 7 NWLR B (Pt.765) 40.

That the presumption is that the parties have intended what they have in fact stated in their agreement and those words must be construed as they stand. He cited UBA v. Ozigi (1994) 3 NWLR (pt. 333) 385; Afrotec Tech. Services (Nig.) Ltd v. MIA & Sons Ltd (2000) 15 NWLR (Pt.692) 730 at 788; Misr (Nig.) Ltd v. Assad (1971) 1 All NLR 172 etc. C

It was contended for the appellant that the Court below had by its judgment occasioned a miscarriage of justice when it failed to take account of the fundamental nature of consideration in a contractual relationship generally and position of purchase price under a contract of sale of land in particular, when it was clear that there was no consideration perfecting the sale agreement in this instance.

Responding, learned counsel for the respondent said the appellant did not raise the matter of non-payment of consideration/purchase price in its pleading to warrant PW2 testifying that when he waited for about 2 years and respondent did not come forth with the purchase price, PW2 then collected the Sheraton Deed of assignment from F.O. Bakare and destroyed it. Also, that this piece of evidence is contrary to Exhibit 'N' which never made mention of any outstanding sum of money to be paid by the respondent to the appellant. That neither did the appellant apply to amend its pleadings in order to make use of this piece of evidence elicited under cross-examination. He cited Slee Transport Ltd v. Oladipo Oluwasegun & anor (1973) ECSLR (pt.II) 1176; Ajeiebe v. Odedina (1988) 1 NWLR (pt.72) 584 at 598. F

It was canvassed for the respondent that the law would not allow such turpitude because Section 167 (d) of the Evidence Act 2011 readily becomes applicable in that had the Sheraton Deed been produced it would have been against the Appellant. G

That the issue of the consideration not passing to the appellant was an issue of law which fell outside the pleadings hence the pervers-

sity which the Court of Appeal corrected based on Exhibits D1 - D5. That what matters is, if those Exhibits D1 - D5 were covered by the proceedings of the respondent and therefore relevant. He cited *Bookshop House v. Stanley* (1986) 3 NWLR (pt. 26) 87 at 92.

B Mr. Igboekwe of counsel stated that Exhibits D1 - D5 were useful for legitimate purposes including the fact that the purchase price of N150, 000.00 was collected by the appellant for the property in dispute. He referred to *Williams v. Hammond* (1988) 1 NWLR (pt. 71) 481 at 498; *G.A.S. v. Thahal* (2004) 4 SC (pt. 1) 109 at 120.

C He stated further that parties are bound by their pleadings and so the piece of evidence that no money was paid went to no issue. That relevancy is based on the state of the pleadings and not submissions of counsel. He cited Section 128 (i) of the Evidence Act; *Torti v. Ukpabi* (1984) NSCC Vol. 15, Page 141.

The Reply on Points of Law was more a rehash of the appellant's Brief of Argument that it would lead to confusion to utilize it as all that needed be said by the appellant was fully stated in the submissions of counsel following the Brief of argument.

E The evidence proffered by the parties is that the parties had abandoned the first contract, and in the matter of the second contract, there was evidence that though there was an agreement, when the PW2 awaited two years for the payment by Respondent of the purchase price and he decided to destroy all the copies of the Agreement. The effect of that is that the contract came to an end, as a contract without consideration cannot be taken as complete, nor can it be such as the court can decree specific performance of.

F Stated differently, failure to pay the purchase price under a sale of land is a fundamental breach which goes to the root of the contract of sale. See *Anwasi v. Chabasaya* (2000) 6 NWLR (pt. 661) 408 at 418; *Nlewedim v. Uduma* (1995) 6 NWLR (pt. 402) 383; *Manya v. Idris* (2001) 8 NWLR (pt. 716) 627; *Odusoga v. Ricketts* (1997) 7 NWLR (Pt. 511) 1.

H The above being the case, the Court below was clearly in error when it failed to take into account the fundamental nature of consideration in a contractual relationship especially when it has to do with the purchase price under a sale of land contract. The issue is resolved in favour of the Appellant.

ISSUE TWO:

Whether Court of Appeal is possessed of the jurisdiction to entertain and determine the matter before it on the basis of incompetent ground of appeal and incompetent issues for determination.

Dr. Abdul Ladan of counsel contended for the appellant that the issue herein is a matter of competence and jurisdiction of court and need not be first raised before the Lower court, did not need leave to argue them as new grounds. This is because the issue of jurisdiction can be raised at any time and at any stage whether at the trial court, Court of Appeal or the Supreme Court. That it cannot be foreclosed because no counsel brought it up earlier since mistake of counsel cannot be a bar to its being raised. He cited *SPDC Ltd v. Adamkwe* (2003) 11 NWLR (pt.832) 53; *Okoma v. Nwaegbu* (1992) 2 NWLR (Pt. 225) 622; *Ezomo v. Oyakhire* (1985) 1 NWLR (pt. 2) 105 etc.

It was submitted for the appellant that the issues tackled in the Court below did not flow from the grounds of appeal and so those issues were incompetent. He cited *Falola v Union Bank of Nigeria Plc* (2005) 7 NWLR (pt. 924) 405; *Yadis (Nig.) Ltd v. G. (Nig.) Ltd.* (2007) 14 NWLR (Pt. 1055) 584.

That the Court of Appeal misapplied the law on documentary evidence by imposing a piece of evidence that had been superceded and contradicted thereby going outside what was before it emanating from the trial court and not allowable. He cited *Lawal v. Dawodu & Anor* (1972) NSCC 515; *Agbaje v. Ajibola* (2002) 2 NWLR (Pt. 750) 127.

Mr. Igboekwe, learned counsel for the Respondent said that when the trial court misdirected itself, that gave rise to a competent ground of appeal and so the Court below was right to redress the anomaly. He cited *Nwadike v. Ibekwe* (1987) 4 NWLR (pt. 718) 744; *Obineche & Ors Akusobi & Ors* (2010) 4 - 7 SC (pt. II) 178 at 215; *Adone v. Ikebudu* (2001) 7 SC (pt. II) 22 at 31.

The question here raised on the competence of some of the grounds of appeal at the Lower court seems somewhat academic since the issues raised from the grounds of appeal at that court were outside the nagging questions agitating the minds of the parties from the very beginning. This is more like a fishing expedition and there is no difficulty in resolving it in favour of the Respondent and against

the Appellant.

ISSUE THREE:

Whether the Court below can make its determination per in curiam with respect to the admission/non admission, reliance and use of Exhibits D1 - D5 by ignoring statutory provisions, ignoring  
B decision of this Honourable Court applicable to the matter and which are binding on it as well ignoring principle of law and those of equity as they apply to the facts of the matter before it, the circumstances of the matter and the evidence led thereon.

C For the Appellant was submitted that Exhibits D1-D5 on which the Court below relied to set aside the decision of the trial court had been superceded. That the parties were ad idem in changing their positions in relation to the said exhibits. That the contract law of variation as well as the doctrine of privity of contract both allows the parties  
D to do as they had done.

Learned counsel for the Appellant further contended that the trial court made a specific finding which had not been appealed against and that is that the document did not contain the signature of the Governor of Lagos state signifying his consent to the transaction and  
E subject to which the Assignment was said to have been made contrary to Section 22 of the Land Use Act. This failure rendered the alienation of the right of occupancy a nullity. He cited Section 26 of the Land Use Act.

F Dr. Ladan of counsel went on to say that the only admissible evidence of a contract which had been reduced to the form of a document is the contract document itself. He referred to Section 132 (b) of the Evidence Act and that the exceptions provided in that law is not in existence in the case at hand.

G That the respondent as defendant failed to prove her counter claim and that is the end of the matter and so when the Court of Appeal ordered a retrial of the counter claim that was an unfair advantage given to the defendant/now respondent to have a second chance.

H Mr. Igboekwe, for the respondent said the facts and circumstances in this case show it was within the contemplation of the parties to comply with the requirement of the Land Use Act 1978, specifically Section 22. He cited *Awojugbagbe v. Chinukwe* (1995) 4 NWLR (Pt. 390) 379; *Onwuka v. The State* (1988) 1 NWLR (Pt. 65)

539 at 551. That paragraphs 6 to 18 of the statement of Defence and counter-claim left no one in doubt that the respondent relying on Exhibits D1 - D5 and the Sheraton Deed had established an equitable estate and the Court of Appeal merely corrected the error of the trial court in holding that Exhibits D1 - D5 were inadmissible. He cited *Oni v. Arimoro* (1973) 3 SC 163; *Bucknor Madean v. Inlaks* (1980) 8/11 SC 1; *Fakoya v. St. Paul's Church, Shagamu* (1966) 1 All NLR 74 at 80. B

That both Exhibits D1 - D5 and the Sheraton Deed are admissible in evidence as between Appellant and Respondent as pleaded to enforce the equitable contract against the appellant, Section 15 of the Lands Instruments Registration Law notwithstanding. He cited *Coker v. Ogunye* (1939) 15 NLR 57; *Okoye v. Dumez Nig. Ltd* (1985) 1 NWLR (pt.4) 783. C

This issue seems to have been answered by Issue I as there was no evidence of consideration, that ended the matter of whether or not there was an agreement completed by the parties for which specific performance can be ordered. D

There is also no basis for the ordering of the retrial ordered by the Court of Appeal as Respondent failed to prove the payment of the purchase price on the second deed of assignment and so no ground on which an equitable ownership can be founded. Her counter claim therefore fell off the handle. It will be a miscarriage of justice to allow the retrial as ordered by the Court below, which in effect would enable the respondent effect some repair jobs on her counter claim. E  
This is in line with the legal principle that where a plaintiff's case for that is what the Respondent as counter claimant became in respect of the counter claim, fails to prove her case and there is no evident irregularity of a substantial nature as is in this case in hand, then granting a retrial is to give an unfair advantage to such a party. That would be very wrong. See the case of *Nnadozie v. Mbagwu* (2008) NWLR (pt. 1074) 363 at 378. This third issue is resolved against the Respondent. F

From the above and the well considered reasoning in the lead judgment, I allow the appeal and set aside the judgment of the Court of Appeal, and have restored the decision in the trial court. I abide by the consequential orders made. H

**CROSS-APPEAL:**

A background of this cross-appeal may be briefly captured as follows:-

The Plaintiff in the main suit claimed against the defendant principally for a declaration that NIDOCCO Limited is entitled to the grant of a Certificate of Occupancy in respect of the leasehold of all that piece or parcel of land situate, lying and being at No. 26 Sobo Arobiodu Street, G.R.A., Ikeja, Lagos State by virtue of a Deed of assignment dated the 19th day of August, 1956 and duly registered in the Lands Registry at Ibadan.

The Cross-Appellant as defendant has counter-claimed as follows:-

*“WHEREOF the Defendant claims against the plaintiff;*

*(i) A declaration that the Defendant is entitled to the grant of the Statutory Right of Occupancy in respect of the property situate, lying and being at No. 26, Sobo Arobiodu Street, G.R.A. Ikeja, Lagos and,*

*(ii) An Order compelling the plaintiff to process the obtaining of the Governor’s consent, stamping and registration of the Deed of Assignment executed by the Plaintiff in favour of the Defendant, given to Messrs. Burke & Co., Solicitors to process.”*

The trial court entered judgment for the appellant and dismissed the respondent’s counter claim. The respondent appealed to the Court of Appeal which set aside the judgment of the High Court and dismissed the appellant’s claims and ordered that the respondent’s counter claim be sent back to the High Court for retrial. Also, the Court of Appeal in its judgment ordered the joinder of Mr. N. L. Gbajabiamila as a defendant to the counter-claim on the basis that there was confusion in the role the said Mr. N. I. Gbajabiamila played in the whole affair. In dissatisfaction, the cross-appellant has come before the Supreme Court.

The Cross-Appellant’s counsel adopted the Brief of Argument settled by C. O. I, Joseph SAN which was filed on 7/5/2008 and deemed filed on 8-2-10. He crafted a sole issue. viz:-

Whether or not in all circumstances of this matter, it was open to the learned Justices of the Court of Appeal to have invoked Section 16 of the Court of Appeal Act rather than sending the matter to the High Court as they did.

Dr. Abdul Ladan, learned counsel for the cross-respondent

adopted their Brief settled by himself, filed on 8th April, 2013 and deemed filed on 9th April, 2013. He adopted the single issue crafted by the cross-appellant which I am comfortable with in the determination of this cross-appeal.

For the cross-appellant was contended that the Court of Appeal rightly rejected the attempt by PW2 to vary or contradict Exhibits D1 - D5 based on Section 132 (i) of the Evidence Act, the same applying to the cross-appellant's Title Deed of Assignment destroyed by PW2. That even if Section 149 (d) of the Evidence Act does not apply here against both PW2 and the cross-respondent regarding the equitable claim to the property in dispute, the question still remains whether PW2 or the claimant ought to be allowed to benefit from the wrong doing perpetrated by PW2 who claimed to have done what he did as the chairman, alter ego of the claimant. B  
C

For the cross-appellant was again stated that the cross-respondent had assigned all its interests, rights and title to the cross-appellant by the duly executed Deed of Assignment with the active participation of PW2 and so an order of retrial and joining PW2 was uncalled for. D

That PW2 is bound by the outcome of this case and there is no need to remit the case to the High court because PW2 and the appellant are estopped in all circumstances from challenging the equitable interest by the cross-appellant. He referred to *Kamalu v. Umunna* (1997) 5 NWLR (pt. 505) 321 at 334 - 335. E

Responding, Dr. Ladan of counsel for cross-respondent correctly in my view stated that the Court of Appeal infringed on the fundamental rights of fair hearing of the cross-respondent when it made an order against a person not a party before it and no claim made against. He cited *Awoniyi v. Registered Trustees of Amorc* (2000) 10 NWLR (pt. 676) 522; *Eronini v. Iheuko* (1989) 2 NWLR (pt. 101) 46; *Liman v. Mohammed* (1999) 7 NWLR (pt. 617) 116 etc. F  
G

I would adopt the reasoning in the lead judgment on this cross-appeal which I see as lacking in merit. I have no difficulty also in dismissing it as my learned brother did in the judgment aforesaid. H

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### **ARIWOOLA JSC**

I had the opportunity of reading in draft the lead judgment

just delivered by my learned brother, Ngwuta, JSC. With the reasoning contained in the said lead judgment, there is no doubt that the title Deed - Exhibit D1-D5 which was made the basis of the transaction between the appellant and PW2 and the respondent was abandoned for the reasons best known to the parties, therefore it did not  
B pass any title to the proposed assignees.

Consequently, the subsequent transaction was not proved to have come into existence. The trial court was therefore right and properly held that the appellant did not pass title in the property in  
C dispute to PW2 and respondent. Hence, the respondent did not acquire any title in the property and therefore could not have been entitled to the grant of Statutory Right of Occupancy in respect of the property in dispute situate, lying and being at No. 26, Sobo Arobiodu Street, GRA Ikeja, Lagos. The property remains in the appellant as  
D agreed to by parties.

It is interesting to note that the court below made the following orders, inter alia,

*“2. That the counter claim by the defendant be heard de novo.*

*3. That the PW2 - Mr. N. K Gbajabiamila be joined as a defendant in the counter claim to enable him defence (sic) the claim in his personal capacity.”*  
E

None of these reliefs was sought by either party either before the trial court or on appeal. One wonders then how the court below went out of its way to become Father Christmas. The said reliefs could  
F not be covered by the pleadings of either party and the court did not and could not have said it did pursuant to the Rules of the court. That discretion could have been exercised as it should, judicially and judiciously.

In Peter Adeboye Odojin & Anor V. Chief Agu & Anor (1992) NWLR (pt 229) 350, on whether relief not sought by parties can be granted and the effect when court grants same, this court opined as follows:  
G

*“It has been said times without number that a court ought not to play the role of Father Christmas which can go around granting to parties relief they have not asked for; see; Nwanya V. Nwanya (1987) 3 NWLR (pt 62) 697.*  
H

*In our adversary system, a court makes orders on the lis or issues raised by the parties. Where a court grants to a party a relief*



*which it did not seek, it has made the order on a lis not raised by the party. This will be an order made without jurisdiction and therefore a nullity; see; Umenweluaku v. Ezeana (1972) 5 SC 343; Western Steel Works Limited Vs. Iron & Steel Workers Union (1986) 3 NWLR (pt 30) 617, 618" per Nnaemeka - Agu, JSC.*

Also in the case of Yusuf V. Oyetunde (1998) 10 SCNJ 1 at 20 B (1998) 12 NWLR (pt 579) 483 at 498 - 499, this court per Uwais, CJN opined as follows:

*"the court is not a father Christmas. It does not award what a party has not claimed."* See also; Union Bank of Nigeria Limited V. Ogboh (1995) 2 SCNJ 1 (1995) 2 NWLR (pt 380) 647, Olaopa V. Awolowo University, Ile Ife (1997) 6 SCNJ 46 (1997) 7 NWLR (pt 512) 204, Etajata & Ors. vs. Ologbo & Ors. (2007) 16 NWLR (pt 1061) 554; (2007) 12 SCM (pt 1) 97, (2007) 6 SC (pt. 1) 1. C

In the final analysis, I am in complete agreement with my D learned brother, Ngwuta, JSC and I adopt His Lordship's reasoning and conclusion in the lead judgment as mine. The appeal is meritorious and it is allowed while the cross appeal of the respondent is devoid of merit and liable to dismissal. Accordingly, it is dismissed.

I abide by the consequential order on costs. E

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