

SUPREME COURT OF NIGERIA
FRIDAY 31ST JANUARY, 2014. SC. 179/2007
CORAM:- M. MOHAMMED, C. M. CHUKWUMA-ENEH,
C. B. OGUNBIYI, K. B. AKA'AH,
K. M. O. KEKERE-EKUN, JJSC

AKUNNE BOSA MBANEFO APPELLANT
AND
1. MOFUNANYA AGBU
2. FIDELIS NNAEMEKA RESPONDENTS

LAND LAW - Customary sale - Evidence of - Exhibit A is memorandum of customary sale of the land - Which transferred to appellant - All 2nd respondent's customary interests (H1)

LAND LAW - Appeals - Fresh issue - Raised without leave - Appellant not having sought and obtained leave - Cannot be allowed to raise in SC issue of absence of witnesses - Since the same was not raised in the lower courts (H2)

LAND LAW - Customary transfer - Incidence of - Appellant cannot be heard to challenge his being put in possession - As this is evident by the slaughtering of goat on the land - Which symbolizes transfer of possession in customary law (H3)

LAND LAW - Possession - Proof - Exhibit A as document is the best evidence of its contents - And provides criterion for assessing any oral evidence - With regard to evidence of having put appellant in possession (H4)

LAND LAW - Customary sale - Governor's consent - 2nd respondent's customary interest does not conflict with L.U.A. s. 22 - And Exhibit A having transferred the interest to appellant - Does not require Governor's consent for its execution (H5)

LAND LAW - Customary title - Certificate of Occupancy - It is for holder of such title to land in urban area to apply to the Governor under L.U.A. ss. 5(1) & 9(1) - To have issued to him a C of O of the

LAND LAW - Title - Assignment - L.U.A. s. 22 - Application of - Governor's consent is required under the section - When C of O has been granted and the holder desires to transfer the land - That is subject of the certificate (H7)

LAND LAW - Trespass - Right of action - Appellant being in exclusive possession can maintain action in trespass - Against any trespasser who cannot claim possession by mere entry (H8)

LAND LAW - Legal practitioner - Duty - Proof - Appellant failed to discharge the onus of showing - That 1st respondent has not acted as solicitor to 2nd respondent in the land deal (H9)

FACTS

Plaintiff/appellant commenced this action at the High Court of Anambra State Onitsha against defendants/respondents, seeking for the refund of purchase price and the award of general damages for breach of contract of sale of a plot of land situate in an urban area of Onitsha. Appellant's contention is that after having made payments to respondents for the said plot of land and also for the Governor's consent in 1995, respondents resold the land to some trespassers he (appellant) noticed on the land in 1997. Appellant contended that from the receipt issued to him for the transaction, he noticed that 1st respondent acted in the transaction for 2nd respondent as his solicitor, which state of affairs were unknown to him from the start of their negotiation. Appellant therefore claimed for the refund of the purchase price of the land and for damages.

In their defence, respondents denied reselling the land. They argued that following the sale of the land, appellant was put in possession thereof in accordance with the custom. Respondents maintained that appellant failed to develop the land for two years after the sale which resulted in trespass on the land. In its judgment, the court ruled in favour of appellant and against 2nd respondent (as the owner/vendor of the land). The case against 1st respondent was dismissed as he acted solely as solicitor for 2nd respondent and therefore not liable. Dissatisfied, 2nd respondent appealed to the Court of Appeal Enugu

Division, while appellant cross-appealed. The court allowed the main appeal and dismissed appellant's claim in its entirety including his cross-appeal. Aggrieved, appellant appealed to Supreme Court.

ISSUES FOR DETERMINATION

"1. Were the learned Justices of the Court of Appeal not grossly in error when they held that in the circumstances of this case it was the duty of the purchaser of land to obtain the consent of the Governor.

2. Were the learned Justices of the Court of Appeal not grossly in error when they held that the appellant was put in possession of the land and therefore had taken title to the land?

3. Were the learned Justices of the Court of Appeal not grossly in error when they held that the 1st respondent only acted as a legal practitioner in the sale of land transaction in this case."

HELD (Unanimously dismissing the appeal per

CHUKWUMA-ENEH JSC)

LAND LAW - Customary sale - Evidence of

1. It seems to me that the appellant has misconceived the import of Exhibit A tendered by him as a document evidencing the sale of the land to him by the 2nd respondent. It is clearly a memorandum of customary sale of land. Exhibit A has transferred to the appellant all the 2nd respondent's customary interests, be it equitable in the land and in my view capable of defeating any subsequent purchaser and even then any adverse dealing by the 2nd respondent's family. I agree with the respondents that the instant sale has been done under the custom; the wordings of Exhibit A makes this point self evident particularly as regard its habendum. (p. 339 F)

Appeals - Fresh issue - Raised without leave

2. The allegation by the appellant of the absence of witnesses to the act of putting him in actual possession of the land thus removing the transaction from a customary sale lacks merit. I agree with respondents that being a fresh issue and not having been raised as an issue at the two lower courts as well as

not having sought and obtained leave of court to raise the issue here that it is too late in the day to take the point and so also the situation of the land whether in the urban or non-urban area of Onitsha. The parties' cases here on the facts show that both parties have fought this case in the two lower courts as founded under custom and so cannot now resile from their relative positions in this court. (p. 340 C)

LAND LAW - Customary transfer - Incidence of

3. On the other aspect of the appellant's case of not having been put in possession; in that regard it is submitted he cannot be heard to challenge the fact of having been put in possession of the land by the 2nd respondent as this is evident by the slaughtering of a goat on the land as borne out by Exhibit A and I agree. The act is very symbolic of changing of possession under customary law. I have read the cases Aboyade Cole (supra), Lydia Erinoshio (supra) and Murana Ajada (supra) stipulating the necessity of sales of land as in this instance being concluded in the presence of witnesses. It is beyond argument that the instant transaction is one performed under customary law. Exhibit A is a classic evidence of handing over possession of land as here to the appellant in this case upon slaughtering of a goat on the instant land as it is an incidence of customary transfer of absolute interest in land matters. (p. 340 F)

LAND LAW - Possession - Proof

4. In the circumstances of this case Exhibit A as documentary evidence is the best evidence of its contents and also provides the criterion by which any oral evidence if at all given by any witnesses with regard to the evidence of having put the appellant in possession of the said land has to be received and assessed, and in this vein any evidence falling out of line with it has to be rejected although this issue on the face of Exhibit A is rebuttable, the appellant has not so rebutted it here and so it does not behoove him to challenge the consideration and evaluation of Exhibit A by the court - a document duly tendered by him.

In my view Exhibit A has clearly evidenced the transaction, it has thereby established the customary sale to the appellant beyond any reproach and the lower court rightly has relied on it as having established the transfer of the land under the customary Law to the appellant. (p. 341 A)

B

LAND LAW - Customary sale - Governor's consent

5. Having come this far, I agree with the respondent that the 2nd respondent's customary interest in the land is not at conflict with the provisions of section 22 (supra) as is being urged by the appellant. I shall expatiate anon on this question and even then the instant sale of the land to the appellant as per Exhibit A has been made subject to the Land Use Act.

C

Sequel to the above reasoning it is apparent that the appellant has misconceived the import of the provisions of Section 22 (supra) and so in an obvious attempt to jump the gun has opined that it is for the 2nd respondent to seek and obtain the Governor's consent for transferring his customary interests in the land as per Exhibit A to him. This cannot be so on the facts and the law on this matter. It is clear that the appellant has floundered in his case and it must therefore fail.

E

It follows also that the appellant has gotten his case all wrong as it concerns this question by suggesting that the 2nd respondent has firstly to seek and obtain the Governor's consent for the transaction, so as to perfect the appellant's title to the land. I hold that the execution of Exhibit A as encompassing the transaction between the appellant and the 2nd respondent vis-à-vis the 2nd respondent's customary interests in the said land, does not therefore require any Governor's consent and being otherwise valid and subsisting as between the appellant and the 2nd respondent it has transferred to the appellant all the 2nd respondent's interests thereof and so the appellant can exercise his rights of ownership under Exhibit A and besides he is also lawfully in exclusive possession of the land; these rights extend to protecting his land from trespassers. (pp. 341 D/G/343 F)

F

G

H

LAND LAW - Customary title - Certificate of Occupancy

6. And so a holder of customary title to land situate in urban area as the appellant in this matter has to apply to the Governor under sections 5(1) and 9(1) of the Land Use Act to have issued to him a Certificate of Occupancy of the land. It is the only way to obtain a certificate of occupancy. (p. 341 F)

LAND LAW - Title - Assignment

7. Without going further into the dialectics of the construction of the foregoing provision let me come down to how its application i.e. of Section 22 (supra) is relevant to the instant case if at all. Flowing from reading the provision it is clear that it is only whenever Certificate of Occupancy has been granted or is deemed granted and a holder of such certificate is desirous to transfer, assign, mortgage, lease and sublease of the land that is subject of such certificate that the Governor's consent is required under the said section. Meaning that Exhibit A is not a document to which the Governor has to give his consent under the section as it is neither a granted certificate of occupancy nor a deemed one. (p. 343 D)

LAND LAW - Trespass - Right of action

8. It is settled law that trespass is an infraction of the right of exclusive possession to land and as the appellant here has been put in exclusive possession of the aforesaid land, an action in trespass is certainly maintainable by him by virtue of his rights against any trespasser who in law cannot claim to be in possession by mere entry which is complained of by the appellant. It is therefore deprecated that the appellant instead of initiating an action to eject the trespasser(s) from his land has rather resorted to an action to rescind the contract of sale without any justification. And he must fail. (p. 344 A)

Legal practitioner - Duty - Proof

9. On issue 3: on this issue the appellant has failed to discharge the onus of showing that the 1st respondent has not otherwise acted as solicitor for the 2nd respondent in this

land deal. His attitude on this issue has attracted severe condemnation from the lower court and I am at one with that court. I reject the appellant's case insinuating that the 1st respondent never acted as solicitor to the 2nd respondent. I find his case in this regard most distasteful and baseless. (p. 344 D)

B

CASES REFERRED TO

Intn'l. Textile Ind. Nig. Ltd. v. Aderemi (1999) 8 NWLR (pt. 614) 268

Awojugbagbe Light Ind. Ltd. v. Chinukwe (1995) 4 SCNJ 162

Savannah Bank Ltd. v. Ajilo (1989) 1 NWLR (pt. 97) 305

C

Solanke v. Abed (1962) NMLR 92

Cole v. Folami (1956) 5 CNLR 180

Irinoshio v. Owokoniran (1965) NMLR 479

Ajada v. Olakewaju (1969) ANLR 374

Ogida v. Oliha (1986) 2 SC 406

D

NSP Ltd. v. Ogun (1980) NCLR 233

Obijuru v. Ozims (1989) 2 NWLR (pt. 6) 167

Adeniji v. Onagoruwa (2000) 1 NWLR (pt. 639) 1

WAEC v. Akinkunmi (2002) 7 NWLR (pt. 766) 327

Okenwa v. Military Gov. Imo State (1996) 6 NWLR (pt. 455) 394

E

Browne v. Dawson (1840) 113 ER 95

Philips v. Ogundipe (1967) 1 ANLR 258

STATUTE REFERRED TO

Land Use Act 1978, ss. 1, 5(1), 9(1), 22, 26, 34(7)

F

REPRESENTATION

Onyechi Araka with B. I. Oluwade (Mrs.) and Rita Ilukwe (Mrs.), for the Appellant

G

Chidi Obieze with Udoka Ekwealo (Mrs.), Kingsley Nnajoka and S. O. Kopodudu, for the Respondents

LEAD JUDGMENT BY CHUKWUMA-ENEH JSC

This appeal is against the decision of the Court of Appeal Enugu Judicial Division allowing the appeal against the judgment of the High Court sitting at Onitsha Anambra State for ordering in favour of the plaintiff the refund to him of the purchase price and the award of general damages for breach of contract of sale of a plot of land

H

situate at Akwuefe Layout Umutasia of Ogbeodogwu at “3-3” in Onitsha Urban of Anambra State with costs assessed and fixed at N3,000.00. The matter has now come to this court on appeal lodged by the plaintiff.

Evidently from the pleadings filed and exchanged by the parties as well as from their respective viva voce testimonies in the case at the trial court the facts of this case are not complicated. They run as follows: In this court the plaintiff is the appellant and the 1st defendant (a legal practitioner) and the 2nd defendant (at all material times the vendor in this matter) are the 1st and 2nd respondents respectively in this appeal. It is the appellant’s case that about March 1995 that the 1st respondent came to his place with the 2nd respondent and offered to sell to him the aforesaid plot of land at the agreed sum of N180,000.00 (One Hundred and Eighty Thousand Naira only) and he paid the same. From the receipt issued to him for the said sum he noticed that the 1st respondent acted in the transaction for the 2nd respondent as his solicitor which state of affairs were unknown to him from the start of their negotiation.

In addition to paying the premium the appellant claimed to have paid N10,000.00 for the survey plan of the said plot of land and a further sum of N17,000.00 for the preparation of a memorandum of customary grant of the land to him and for the Governor’s consent as required under section 22 of the Land use Act. The appellant complained that the respondents failed to obtain the Governor’s consent to the transaction as agreed. About 1997 the appellant noticed the presence of trespassers on the land and confronted the 1st respondent on the said question to no avail as they resold the land to the trespasser. The respondents in their defence filed at the trial court denied ever reselling the land to another person. It is to be noted that the appellant’s case rested on the fact that the respondents fraudulently resold the land to someone else. In the circumstances the appellant prayed as per his claim. It is the respondents’ case that they sold the plot of land to the appellant and put him in possession thereof in accordance with the custom. For two years he failed to develop the land and no wonder trespassers entered the land and took over the land. The appellant stood by and did nothing.

The trial court at the conclusion of the case before it gave judgment for the appellant against the 2nd respondent as the owner

of the land in question; it however, dismissed the claim against the 1st respondent who as found by the trial court acted solely as solicitor for the 2nd respondent in the transaction and therefore not liable.

The 2nd respondent has appealed the trial court's decision while the appellant has also cross-appealed to the court below. The court below in its judgment has allowed the appeal of the 2nd respondent and has dismissed the plaintiff's claim in its entirety and it has also dismissed the cross-appeal. Hence the appellant has filed a notice of appeal on 24/5/2007 containing four grounds. In the appellant's brief of argument filed on 23/7/2007 in this appeal three issues for determination have been distilled and they are:

"1. Were the learned Justices of the Court of Appeal not grossly in error when they held that in the circumstances of this case it was the duty of the purchaser of land to obtain the consent of the Governor."

2. Were the learned Justices of the Court of Appeal not grossly in error when they held that the appellant was put in possession of the land and therefore had taken title to the land?"

3. Were the learned Justices of the Court of Appeal not grossly in error when they held that the 1st respondent only acted as a legal practitioner in the sale of land transaction in this case."

The respondents have also filed their respondents' Brief of Argument on 13/9/2007 and they have raised three issues and they are:

"Were the learned Justices of the Court of Appeal not correct, when they held that, by the nature of the transaction in this suit and based on the pleadings, that what the 2nd respondent held was an equitable title, based on customary law, which he transferred to the appellant and which transfer was complete upon payment of the purchase price and being put into possession in 1995 and therefore it was the duty of the appellant to apply for the consent of the Governor to convert such a title to a certificate of occupancy and to chase away trespassers to the land and not the duty of the 2nd respondent to do so?"

Were the learned Justices of the Court of Appeal not correct, when they held that the learned trial Judge was wrong in law, when he awarded to the plaintiff his claims, after having found that the respondents did not resell the land to anybody, which was the basis

of the claims before the court?

Were the learned Justices of the Court of Appeal not correct, when they held that the 1st respondent, from the records before the court, only acted as a legal practitioner to the 2nd respondent, and that it was therefore wrong and condemnable to have joined him in this suit?"

On the first issue, the central theme in the appellant's contention is that all State land is vested in the State Governor by section 1 of the Land Use Act 1990, and that the 2nd respondent as the vendor in the instant matter is by Section 22 of the Land Use Act required to obtain Governor's consent to alienate his interest in the aforesaid plot of land to him and that by virtue of section 26 of the said Act any transaction affecting land or instrument pertaining thereof as in this matter not in compliance with the said section 22 is null and void. He opines that the 2nd respondent has been allotted the instant plot of land by the family thus constituting him an absolute owner of the said plot of land and that as the land is situate in the Designated Urban Area of Onitsha, it is subject to the written consent of the Governor for any transfer whatever affecting the said plot of land. The appellant has thus submitted that the 2nd respondent's purported transfer of his interest in the said plot to him is to no avail and ineffective indeed void without the Governor's consent and so that unless and until the deal has complied with section 22 of the Land use Act no interest whatsoever in the land has been transferred to him. See: *International Textile Industries (Nig) Ltd. v. Dr. Ademola Oyekanmi Aderemi & ors.* (1999) 8 NWLR (Pt.614) 268 and *Awojugbagbe Light Industries Ltd. v. Chinukwe* (1995) 4 SCNJ 162 at 216-2D. He maintains that both he and the vendor (2nd respondent) have entered into Exhibit A albeit an inchoate agreement of the transaction that the 2nd respondent bears the duty to pass a proper title to the land to him by seeking and obtaining the written consent of the Governor. He has rested on the following authorities like *Savannah Bank Ltd. v. Ajilo* (1989) 1 NWLR (Pt 97) 305, *Solanke v. Abed* (1962) NMLR 92 and *Owoni-boys Tech-services Ltd. v. Union Bank of Nigeria* (2003) 15 NWLR (Pt.844) 545 at 583 to contend that it is an owner of a statutory right of occupancy of land as the 2nd respondent and not the purchaser as himself that is obliged under the Land Use Act to seek and obtain the consent of the Governor for

the instant transaction in the land particularly so as it is situate in an urban area of Onitsha and that the lower court has misconceived the said provision in rejecting his case on the point.

On issue two:

The appellant has contended that the ownership of the instant land has not by Exhibit A passed to him as it cannot be so without the consent of the Governor under section 22 of the Land Use Act. And that under the instant sale transaction that the title to the land is still with the 2nd respondent. He has castigated the lower court's view that the 2nd respondent having only a customary title to the land and which interest he has transferred to the appellant by Exhibit A that it is for the appellant to convert it to right of occupancy as the transaction is a Customary sale of land. He has further challenged the transaction for not having been predicated on any customary law nor has the allegation of having put the appellant in possession of the land been done in the presence of witness as required under customary Law and he relies on the decisions in *Aboyade Cole v. S.R. Folami* (1956) 5 CNLR 180 at 183; *Lydia Irinoshio v. Tunji Owokoniran & Anor.* (1965) NMLR 479 and *Murana Ajada v. Madam Dorcas Olakewaju* (1969) ANLR 374 per Fatai Williams JSC (as he then was) for so submitting. Finally, he submits that as title has not passed added to the fact of not having been put in possession of the land that it is for the 2nd respondent to ward off any trespassers.

On issue three:

The appellant has contended that throughout the transaction the 1st respondent has not disclosed the identity of the 2nd respondent as the vendor and the owner of the land until after he has sighted the receipt for the premium paid to the 2nd respondent and that he has dealt solely with the 1st respondent all along, and who has assured him of the genuineness of the transaction. He contends therefore that the 1st respondent never acted as a solicitor to the 2nd respondent who he has also claimed as an undisclosed principal in the transaction. He refers to the cases of *O'Herithy v. Hedges* (1803) 2 Sch & Lef.123 and *Montgomery v. U. K. Mutual SS Assan* (1891) 1 QB 370 at 372 and that he has sued the 1st and 2nd respondents i.e. as agent and principal as both are liable in this matter. See: *Ogida v. Oliha* (1986) 2 SC 406 and *NSP Ltd. v. Ogun & ors.* (1980) NCLR 233. Finally, the court is urged to allow the appeal set aside the judg-

ment of the lower court and restore the decision of the trial court.

The respondents have responded fully to the appellant's case as amply covered by the three issues raised by them.

Issue No. 1: They have submitted under it on the pleadings and evidence that the land has been sold to the appellant as per Exhibit A i.e. the Deed, as per the Customary Grant which contains all the incidents of customary sale of the said land as performed by the plaintiff (i.e. appellant) who also has admitted of having been put in possession of the land. They make the point that the payment of the premium in the deal coupled with having been put him in possession of the land confers on the appellant an equitable interest. See: *Ogunbambi v. Abowab* 13 WACA 222; *The Registered Trustees of Apostolic Faith Mission v. James* (1987) 3 NWLR (pt.61) 556; *Obijuru v. Ozims* (1989) 2 NWLR (pt.6) 167 and *Adeniji v. Onagoruwa* D (2000) 1 NWLR (Pt.639) 1 at 32.

And that having been put in possession the appellant is to secure his possession by warding off trespassers trespassing on the land. However, it is contended that there is no evidence of his having been confronted by any trespassers with a better title to his own. They submit that against this misconception by the appellant that he is armed with Exhibit A and that he has to convert his interest thereof into a statutory right of occupancy by complying with sections 5(1) and 9(1) of the Land use Act 1990 so as to have a certificate of occupancy granted to him. And that the instant transaction is not covered by section 22 as Exhibit A not being any instrument as an assignment, mortgage, transfer, lessor, sub-lease etc of land and subject to requiring Governor's consent and that the authorities cited in this appeal by him are inapplicable to the issue.

On issue two, they submit that the main plank of the appellant's allegation is of their having resold the land to another person to whom they have also secured the necessary consent of the Governor. On that premise he has asked that the respondents be made to refund the premium and pay general damages. They observe that the loss of possession has been through the appellant's fault as they the respondents have not resold the land to anyone as found by the court nor is it for want of the Governor's consent to the deal and that it lies on the appellant to ward off trespassers from his land as he has been put in possession as evidenced in Exhibit A. see: *WAEC v. Akinkunmi*

(2002) 7 NWLR (Pt.766) 327 at 345-344 and that on these facts the appellant is not entitled to his claim.

On issue three the respondents have submitted that the finding of the trial court and the lower court that the 1st respondent has acted as a solicitor as the 2nd respondent has not been faulted. They also have debunked the appellant's submission that the 1st respondent is the agent of the 2nd respondent which is not borne out by evidence. It is maintained that the 1st respondent has acted as solicitor to the 2nd respondent. B

They urge the court to dismiss the appeal and affirm the judgment of the lower court. C

I have more or less traversed the length and breath of the relative cases of both parties in the appeal as set out above before this court. As I understand this case the gravamen of the appellant's claim as plaintiff at the trial court is founded on the allegation that the respondents have after having sold the land to the appellant have resold the same to another person and have accessed for that other person the requisite statutory Governor's consent under section 22 of the Land Use Act and that the respondents have admitted the allegations when confronted by the appellant; vide paragraphs 13 and 14 of the appellant's statement of claim. Also the appellant has testified unequivocally to the effect that upon noticing the trespass on the said land he has rushed to the 1st respondent to enquire about the governors consent to effectuate a complete transfer of ownership of the land to him, being as it were, a sine qua non required to perfect his title to the land. It is therefore his case to show how not having obtained the Governors consent is instrumental to his losing possession of his land. It is on the backdrop of these premises that the appellant has therefore asked the court for the refund of the premium he paid to the respondents and general damages, again in legal parlance for the failure of consideration as regards the whole transaction as it is clear, he has opined, that the 2nd respondent cannot transfer what he does not possess. D E F G

The critical question that arises from the foregoing sumises is whether the appellant has discharged the evidential burden of establishing the above facts situation as per the said paragraphs 13 and 14 of his statement of claim to entitle him to the various reliefs sought in the claim. It is my view that the lower court rightly has found no basis H

for the plaintiff's averment as per the aforesaid paragraphs 13 and 14 of his statement of claim and so has spared no time in holding the trial court's findings and the award of the judgment in the matter to the plaintiff as groundless and perverse. Indeed, there is no justification on the findings of the trial court for the judgment wrongly given
 B in the plaintiff's favour by the trial court.

The lower court per Ogebe JCA (as he then was) having appreciated the case of the appellant vis-à-vis the case of the respondents has rightly held as follows:

C *"I have carefully considered the arguments of both counsel with regard to the main appeal and it is my view that the crux of the appeal is a determination of whether or not the trial court was right in awarding damages to the plaintiff/respondents for the failure of consideration in respect of purchase of the disputed land.*

D *It is trite law that for the sale of customary land as in this case it is the payment of the purchase price together with being put in possession of the land that confers a purchaser with an equitable title to that land. See the case of Adeniji v. Onagoruwa (2000) 1 NWLR (part 639) page 1. There was clear evidence before the trial court*
 E *that by virtue of "Exhibit A" that is the Deed of the Customary Grant together with the evidence of the plaintiff/respondent that he was taken to the land and even paid a surveyor to survey the land as far back as 1995 that the transaction was complete.*

F *It was two years later that the plaintiff/respondent noticed trespassers on the land. At that point the land had already passed to him and it was his duty to pursue and chase away the trespassers.*

I do not agree with the view of the trial court that it was the responsibility of the seller of the land to obtain the consent of the Governor under the Land use Act. If the seller of the land had a certificate of occupancy in respect of the land and he wanted to dispose of it, it was his duty to obtain the consent of the Governor in order for the transfer of the land to be properly made to the purchaser. In this case what the appellant held was a customary Title and
 G *it was the duty of the buyer if he wanted the customary title to be converted to the Right of occupancy and subsequently to be issued with certificate of occupancy to apply to the Governor for such exercise.*
 H

The trial judge found at page 49 of the Record in his Judg-

ment as follows:

‘There is no proof that the 1st or 2nd Defendant subsequently re-sold the land in question to another person. What is proved is that the plaintiff did not get the land which he paid for.

There is no proof that the 1st Defendant is duty bound to obtain the Governor’s consent in the matter or that he Promised to do so.’ B

With this finding of the trial judge based upon the evidence, the entire claim of the plaintiff/respondent collapsed since his claim was based on the averment that the defendant resold the land to another person and also failed to obtain the Governor’s consent for the transfer of the land. There was therefore no Justification for giving judgment to the plaintiff/respondent at all as his claim was not proved. C

As I said earlier in this Judgment the plaintiff/respondent was put in possession of the land and the transaction between him and the defendants was complete. His inability to take firm control of the land was entirely his own doing for which the seller should not be held responsible.” D

The above excerpt of the judgment of the lower court is thorough and cannot be faulted. What is deducible from the above excerpt is that the appellant having bought the land in 1995 has been put in possession as per Exhibit A by the 2nd respondent and that he thereafter has abandoned the land until 1997 when the evidence of trespass has manifested and that he has never bothered even then to find out who has so trespassed on his land but has now instituted the instant action for failure of consideration. E F

It seems to me that the appellant has misconceived the import of Exhibit A tendered by him as a document evidencing the sale of the land to him by the 2nd respondent. It is clearly a memorandum of customary sale of land. Exhibit A has transferred to the appellant all the 2nd respondent’s customary interests, be it equitable in the land and in my view capable of defeating any subsequent purchaser and even then any adverse dealing by the 2nd respondent’s family. I agree with the respondents that the instant sale has been done under the custom; the wordings of Exhibit A makes this point self evident particularly as regard its habendum which reads thus: G H

"NOW THIS MEMORANDUM WITNESSETH that in pursuance of the said agreement and in consideration of the sum of one Hundred and Eighty Thousand Naira (N180, 000.00) paid by the Grantee to the Grantor the receipt whereof the Grantor hereby acknowledges and the performance by the Grantee of the customary
 B *rites consisting of the presentation of one hot drink and one goat slaughtered on the said land the Grantor as the beneficial owner of the land hereby grants, sells and transfers to the Grantee ALL that*
 C *land at Akwuefe Land of Umu Tasia family of Ogbeodogwu Village, Onitsha at mile '3'3, Onitsha which said land is more particularly shown in plan No.MEC/69/95 and therein verged in red to hold the same unto the Grantee subject only to the Land Use Decree."*

The allegation by the appellant of the absence of witnesses to the act of putting him in actual possession of the
 D **land thus removing the transaction from a customary sale lacks merit. I agree with respondents that being a fresh issue and not having been raised as an issue at the two lower courts as well as not having sought and obtained leave of court to raise the issue here that it is too late in the day to take the point and**
 E **so also the situation of the land whether in the urban or non-urban area of Onitsha. The parties' cases here on the facts show that both parties have fought this case in the two lower courts as founded under custom and so cannot now resile from their relative positions in this court.** See *Okenwa v. Military Governor Imo State* (1996) 6 NWLR (pt. 455) 394 at 407 E-G.
 F

On the other aspect of the appellant's case of not having been put in possession; in that regard it is submitted he cannot be heard to challenge the fact of having been put in
 G **possession of the land by the 2nd respondent as this is evident by the slaughtering of a goat on the land as borne out by Exhibit A and I agree. The act is very symbolic of changing of possession under customary law. I have read the cases Aboyade Cole (supra), Lydia Erinoshio (supra) and Murana**
 H **Ajada (supra) stipulating the necessity of sales of land as in this instance being concluded in the presence of witnesses.**

It is beyond argument that the instant transaction is one performed under customary law. Exhibit A is a classic evidence of handing over possession of land as here to the appellant in

this case upon slaughtering of a goat on the instant land as it is an incidence of customary transfer of absolute interest in land matters. In the circumstances of this case Exhibit A as documentary evidence is the best evidence of its contents and also provides the criterion by which any oral evidence if at all given by any witnesses with regard to the evidence of having put the appellant in possession of the said land has to be received and assessed, and in this vein any evidence falling out of line with it has to be rejected although this issue on the face of Exhibit A is rebuttable, the appellant has not so rebutted it here and so it does not behoove him to challenge the consideration and evaluation of Exhibit A by the court - a document duly tendered by him.

In my view Exhibit A has clearly evidenced the transaction, it has thereby established the customary sale to the appellant beyond any reproach and the lower court rightly has relied on it as having established the transfer of the land under the customary Law to the appellant.

Having come this far, I agree with the respondent that the 2nd respondent's customary interest in the land is not at conflict with the provisions of section 22 (supra) as is being urged by the appellant. I shall expatiate anon on this question and even then the instant sale of the land to the appellant as per Exhibit A has been made subject to the Land Use Act. And so a holder of customary title to land situate in urban area as the appellant in this matter has to apply to the Governor under sections 5(1) and 9(1) of the Land Use Act to have issued to him a Certificate of Occupancy of the land. It is the only way to obtain a certificate of occupancy.

Sequel to the above reasoning it is apparent that the appellant has misconceived the import of the provisions of Section 22 (supra) and so in an obvious attempt to jump the gun has opined that it is for the 2nd respondent to seek and obtain the Governor's consent for transferring his customary interests in the land as per Exhibit A to him. This cannot be so on the facts and the law on this matter. It is clear that the appellant has floundered in his case and it must therefore fail.

In the light of the confusion that has pervaded the appellant's

case here I think it proper to scrutinize Section 22 which provides:

Section 22(1): *“It shall not be lawful for the holder of a statutory right of occupancy granted by the Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease, or other wise howsoever, without the consent of the Governor first had and obtained.*

(2) The Governor when giving his consent to an assignment, mortgage or sublease may require the holder of a statutory right of occupancy to submit an instrument executed in evidence of the assignment, mortgage or sublease and the holder shall when so required deliver the said instrument to the Governor in order that the consent given by the Governor under subsection (1) of this section may be signified by the endorsement therein.”

The above provision has come up for construction on numerous occasions before this court and it is in the case of *Awojugbagbe Light Industries Ltd. v. P. N. Chinukwe & Anor.* (supra) that this court has scrutinized the provision exhaustively. The issue posed in the case is whether a mortgage deed - Exhibit E in the proceeding is valid and lawful as it has been executed prior to seeking and obtaining the Governor’s consent for the transaction. This court in construing Section 22(1) applicable to the cited case has held that a holder of statutory right of occupancy can enter into negotiations, in the cited case for a mortgage transaction and the subsequent evidence of the same by a written agreement as Exhibit E which at that stage being an inchoate agreement does not require the consent of the Governor and is within the intendment of the section and so is not contrary to the law as it is to be eventually submitted to the Governor for his consent. This is followed by the second stage in the transaction i.e. of forwarding it to the Governor to append on the agreement his consent.

The distinction between an agreement as contemplated under sections 22 and 26 of the Land Use Act and the instant customary sale agreement as per Exhibit A in the instant case (i.e. the crux of this appeal) is very clear. No doubt the two situations are miles apart. As a security for the loan in the cited case the plaintiff/appellant in that case has mortgaged his property situate in the urban area of Ibadan to the mortgagor as evidenced as per Exhibit E without the Governor’s consent first obtained before its execution that is to say,

as the land is within the urban area of Ibadan and so requires the Governor's consent for any dealing with it. The basis of the decision in the cited case turns on whether Exhibit E is valid and lawful in that it has been executed prior to the Governor giving his consent. This court in that case has been called to construe section 22(1) (supra) and the court found it not applicable to Exhibit E in the cited case. B

In the instant case, on the other hand, the parties have simply executed Exhibit A as a customary sale agreement thus transferring the aforesaid land to the appellant here. In contrast to the cited case there is no evidence in the instant case where the said plot of land sold to the appellant is situate, whether in the urban or non-urban area of Onitsha as to require or not require the Governor's consent. This is the gaping lacuna very damaging to the appellant's case in this matter. The two situations not being the same the decision in the cited case cannot decide the instant case. C D

Without going further into the dialectics of the construction of the foregoing provision let me come down to how its application i.e. of Section 22 (supra) is relevant to the instant case if at all. Flowing from reading the provision it is clear that it is only whenever Certificate of Occupancy has been granted or is deemed granted and a holder of such certificate is desirous to transfer, assign, mortgage, lease and sublease of the land that is subject of such certificate that the Governor's consent is required under the said section. Meaning that Exhibit A is not a document to which the Governor has to give his consent under the section as it is neither a granted certificate of occupancy nor a deemed one. It follows also that the appellant has gotten his case all wrong as it concerns this question by suggesting that the 2nd respondent has firstly to seek and obtain the Governor's consent for the transaction, so as to perfect the appellant's title to the land. I hold that the execution of Exhibit A as encompassing the transaction between the appellant and the 2nd respondent vis-à-vis the 2nd respondent's customary interests in the said land, does not therefore require any Governor's consent and being otherwise valid and subsisting as between the appellant and the 2nd respondent it has transferred to the appellant all the 2nd respondent's interests thereof and so the appellant can exer- E F G H

cise his rights of ownership under Exhibit A and besides he is also lawfully in exclusive possession of the land; these rights extend to protecting his land from trespassers.

It is settled law that trespass is an infraction of the right of exclusive possession to land and as the appellant here has been put in exclusive possession of the aforesaid land, an action in trespass is certainly maintainable by him by virtue of his rights against any trespasser who in law cannot claim to be in possession by mere entry which is complained of by the appellant. See: *Browne v. Dawson* (1840) 113 ER 95 and *Philips v. Ogundipe* (1967) 1 ANLR 258. **It is therefore deprecated that the appellant instead of initiating an action to eject the trespasser(s) from his land has rather resorted to an action to rescind the contract of sale without any justification. And he must fail.**

On issue 3: on this issue the appellant has failed to discharge the onus of showing that the 1st respondent has not otherwise acted as solicitor for the 2nd respondent in this land deal. His attitude on this issue has attracted severe condemnation from the lower court and I am at one with that court. I reject the appellant's case insinuating that the 1st respondent never acted as solicitor to the 2nd respondent. I find his case in this regard most distasteful and baseless.

On the whole I find no merit whatsoever in this appeal, it lacks any substance and I have no hesitation in dismissing it. Appeal dismissed with N100,000 costs against the appellant.

G **MOHAMMED JSC**

This appeal is against the judgment of the Court of Appeal Enugu Division delivered on 19th April, 2007 in which that Court found the present Respondent's appeal meritorious and allowed it resulting in setting aside the judgment of the trial High Court in favour of present Appellant and dismissing his cross-appeal and claims at the trial Court. Appellant is now on a further appeal to this Court raising three issues for determination in his Appellants brief of argument.

The case of the Appellant at the trial High Court where he was the plaintiff involved a claim for damages against the Respondents

for breach of contract of sale of land being a plot in Akwuefe Layout of Umutasia of Ogbadogwu in Onitsha, Anambra State. My learned brother Chukwuma-Eneh JSC, has clearly stated the facts and genesis of this case in his lead judgment. I entirely agree with my learned brother that the appeal is without merit and ought to be dismissed.

It is significant to note that the issue raised and strongly canvassed in the Appellant's brief of argument that the plot of land sold to the Appellant by the 2nd Respondent was located within the Urban Area of land as designated by Designation of Urban Area Order Anambra State, where customary tenure of land does not apply under the Land Use Act 1978, was not raised and determined at the trial Court or the Court of Appeal. In otherwords in the absence of clear evidence that the plot the subject of sale which was allocated to the 2nd Respondent by his Umutasia family was located in Urban Area, it is wrong as argued by the Appellant to subject that piece of land to the provisions of Sections 34(7) and 22 of the Land Use Act to require the 2nd Respondent to seek the consent of the Governor before the sale of his plot given to him as part of his family property could be valid. This is because unless the Appellant had led clear evidence to locate the plot he bought from the 2nd Respondent in a designated Urban Area of Anambra State, the 2nd Respondent cannot be deemed to be a holder of a statutory right of occupancy to justify the application of the law on his right to dispose off his right in the plot given to him as his share of family property.

The law is trite that a party will not be allowed to introduce an issue in this Court which was not raised and pursued in the Courts below thereby setting up an entirely new case in his appeal before his Court. See *Adegoke Motors Ltd. V. Adesanya* (1989) 3 N.W.L.R. (pt. 109) 250 at 266. In this respect, the cases of *International Textile Industries (Nigeria) Limited v. Dr. Ademola Oyekanmi Aderemi & Ors.* (1999) 8 N.W.L.R (Pt. 614) 268 and *Awojugbagbe light Industries Ltd. v. Chinukwe* (1995) 4 S.C.N.J. 162 at 216 - 217, do not apply to the present case.

On the whole therefore, I am in full agreement with my learned brother Chukwuma-Eneh JSC in his judgment in dismissing the appeal. I also dismiss the appeal and abide by the order on costs in the lead judgment.

OGUNBIYI JSC

I have read in draft the lead judgment just delivered by my learned brother Chukwuma-Eneh, JSC and I agree that the appeal is devoid of any merit and should be dismissed.

B The facts of the case have been well stated in the lead judgment of my brother. Suffice it to say however that, while the appellant now before us was the plaintiff at the Anambra trial High Court, the 1st and 2nd respondents were also the 1st and 2nd defendants as the legal practitioner and the vendor respectively.

C The trial court gave judgment in favour of the plaintiff against the 2nd defendant and dismissed the claim as it affected the 1st defendant. The 2nd respondent herein was aggrieved by the trial court's decision and therefore appealed against same before the court below; the appellant also cross appealed the said trial court's judgment. D While the Court of Appeal allowed the appeal of the 2nd respondent the cross appeal as well as the plaintiffs claim were both dismissed, and hence the appeal now before us.

The 1st issue raised by the appellant in this appeal is whether the learned justices of the Court of Appeal grossly erred when they E held that in the circumstances of this case it was the duty of the purchaser of land to obtain the consent of the Governor.

On the one hand, the totality of the submission by the appellant's learned counsel was that the 2nd respondent, as the vendor of the land in dispute had the responsibility to have obtained the F consent of the Governor for purpose of transferring the interest in his plot of land to the appellant; also that the 2nd respondent did not part with possession of the said land to the appellant.

On the other hand and in summary on behalf of the respondents, it was also submitted and argued that the lower court was in G order when it rightly concluded that, what the 2nd Defendant/Respondent held was a customary title and which did not therefore conflict with Section 22 of the land use Act as wrongly submitted by the appellant's counsel. The respondent's counsel predicated his H contention on Exhibit A which he argued made it clear that the customary sale of land was subject to the provision of the Land Use Act; furthermore, counsel maintained, that a holder of a customary title, like the appellant in this case has only to apply to the Governor under Section 5(1) and 9(1) of the land Use Act, to be issued with a

Certificate of Occupancy.

The provision of section 22 of the Land Use Act Cap 202 Laws of the Federal Republic of Nigeria has provided in clear terms that no assignment of interest in land can be effected in an area designated as Urban without the consent of the Governor of the state. It is on record that the land, the subject matter of contention is located at Onitsha. The law is also well settled by this court in the case of Owoniboys Technical Services V. Union Bank of Nigeria (2003) 15 NWLR (pt.844) 545 at 583 that:-

“It is the owner of the Statutory Right of Occupancy that is obliged to obtain the consent of the Governor of the State in respect of the land which he wishes to sell, transfer, mortgage etc by virtue of Section 22 of the Land Use Act.”

The application of section 22 of the Land Use Act can only come to play when there is certainty and determination of the location of the land in question. In other words, the responsibility to obtain the Governor’s consent falls on the 2nd respondent only after the confirmation by evidence that the land is indeed located within an urban Area. On the record before us, there is no proof or evidence to show that the land was designated an urban area and thus coming within statutory Right of Occupancy.

In the absence of such definite proof, Exhibit ‘A’ can only be termed a customary right of occupancy which requires that a purchaser should only be put in possession. In other words, all that is required in the sale of customary land is the payment of the purchase price; and the putting in possession of the land will therefore confer a purchaser with an equitable title to that land. By Exhibit A, evidence avails that the Deed of the customary grant together with the evidence of the plaintiff/respondent that he was taken to the land and paid the Surveyor to survey the land as far back as 1995, had rendered the transaction as complete. It is on record also that the plaintiff, whose duty it was to keep watch over his property did not take measures in good time when he noticed the trespassers. He cannot therefore hold the respondent responsible for his lapses.

On the totality of this appeal, it is devoid of any merit and I dismiss same in terms of the lead judgment of my learned brother Chukwuma-Eneh, JSC. I also abide by the order made as to costs.

AKA'AH'S JSC

The Plaintiff now Appellant took out a Writ of summons on 11th day of June, 1998 claiming against the Defendants/ Respondents both jointly and severally damages totaling N1, 227,000.00 for their failure to obtain consent of the Military Administrator of Anambra State to enable him obtain title to a plot of land measuring 507.289 square metres at Akwuefe land layout of Umu-Tasia Ogbeodogwu village land, Onitsha area known in Onitsha as "3-3". He made payment of the agreed sum of N180, 000.00 on 10/3/95 to the 1st Defendant who issued him receipt No. 001408. The Plaintiff claimed that unknown to him the Defendants sold the land to another person to whom they gave conveyance and all necessary statutory consents. He said the Defendants cannot fulfill the agreement between them and him after he had made many demands on them and they have refused to give back the equivalent value of the land and would continue to refuse unless they are ordered to do so by the Honourable Court and in paragraph 20 of the Statement of Claim, he claimed for special and general against the Defendants jointly and severally as follows:-

- E A. Special Damages
Particulars:
 (i) Cost of Preparing the Survey Plan by M. N. Chukwurah N10, 000.00
 (ii) Cost of preparing the Deed N17, 000.00
- F B. Damages of N1, 200,000 being the Present cost of acquiring a plot of land of this dimension at Akwuefe land layout Umu - Tasia Ogbeodogwu land "3-3" Onitsha N1, 200,000.00
Total N1,200.000. 00

G Each of the Defendants filed his own Statement of Defence. The 1st Defendant who is a Legal Practitioner admitted he introduced the Plaintiff to the 2nd Defendant who was the owner of the land but he merely acted as a Solicitor. He denied there was any agreement in which he and 2nd Defendant undertook to obtain the statutory consent at their own expense. The 2nd Defendant admitted that the 1st Defendant received payment of the purchase price of the land on his behalf but denied ever selling the land to another person other than the Plaintiff.

At the trial before the High Court, the Plaintiff testified in

person. He called Celestine Ugonabo, an Estate Surveyor and valuer who testified on his behalf while Fidelis Nnemeka, the 2nd Defendant testified on his own behalf. Learned counsel for the parties then addressed the court.

Judgment was delivered on 29th April, 2004. The trial court entered Judgment for the Plaintiff against the 2nd defendant and ordered him to refund the purchase price of N180, 000.00 for a consideration that failed and also awarded N1,020,000.00 as general damages which was the difference between the purchase price and the current price of land at the 3-3 area of Onitsha and its neighbourhood. The plaintiff was awarded N3, 000.00 as costs. The court found that the Plaintiff did not deal with the 1st Defendant as the owner of the land in question but as a Solicitor who rendered legal services to the 2nd Defendant. B
C

The 2nd Defendant was dissatisfied with the Judgment and appealed to the Court of Appeal in his Notice of Appeal dated and filed on 6th July, 2004. The Plaintiff also cross - appealed on 20th July, 2004 against the finding that the 1st defendant acted as a lawyer to the 2nd defendant. He also appealed against the award of N180,000.00 instead of N1, 200, 000.00 as cost of the land. On 19th April, 2007, Judgment was delivered by the Court of Appeal, Enugu allowing the appeal and setting aside the Judgment of the trial court in its entirety and dismissing the cross - appeal. It is against this Judgment that the Plaintiff/Appellant appealed to this Court on four grounds of appeal in his Notice of Appeal filed on 24th May - 2007. D
E
F

Three issues were distilled for determination and they are:-

1. Were the learned Justices of the Court of Appeal not grossly in error when they held that in the circumstances of this case it was the duty of the purchaser of land to obtain the consent of the Governor? G

2. Were the learned Justices of the Court of Appeal not grossly in error when they held that the appellant was put in possession of the land and therefore had taken title to the land?

3. Were the learned Justices of the Court of Appeal not grossly in error when they held that the 1st Respondent only acted as a legal practitioner in the sale of land transaction in this case? H

The Respondents also identified three issues for determination as follows:-

1. Were the learned Justices of the Court of Appeal not correct when they held that by the nature of the transaction in this suit and based on the pleadings, that what the 2nd Respondent held was an equitable title, based on customary law, which he transferred to the Appellant and which transfer was complete upon payment of the purchase price and being put into possession in 1995, and therefore it was the duty of the appellant to apply for the consent of the Governor to convert such a title to a certificate of occupancy and to chase away trespassers to the land and not the duty of the 2nd Respondent to do so?

2. Were the learned Justices of the Court of Appeal not correct, when they held that the learned trial Judge was wrong in law when he awarded to the Plaintiff his Claims, after having found that the Respondents did not resell the land to anybody, which was the basis of the claims before the court?

3. Were the learned Justices of the Court of Appeal not correct, when they held that the 1st Respondent, from the records before the court, only acted as a legal practitioner to the 2nd Respondent, and that it was therefore wrong and condemnable to have joined him in this suit?

I have read the leading Judgment of my learned brother, Chukwumah-Eneh, JSC, and I agree that the appeal lacks merit. The pleadings and evidence adduced clearly show that contrary to the Plaintiffs averment in paragraph 14 of the statement of Claim, none of the Defendants admitted the land had been sold to another person or that the N17, 000.00 paid to the 1st defendant was to cover the Solicitor's fees for the memorandum of customary grant of land and obtaining the consent of the Military Administrator to alienate the land. In paragraphs 11b, 12, 13 and 14 of the Statement of Claim, the Plaintiff averred as follows:-

"11b. Before procuring the - aforementioned memorandum of customary grant of land by the 1st Defendant as averred above, it was agreed between the parties to this action that the sum of N17, 000.00, (Seventeen Thousand Naira) only paid to the 1st Defendant by the Plaintiff should cover the Solicitor's fee of the 1st Defendant in preparing the aforesaid memorandum of customary grant of land and securing the consent of the Ministry (sic) Administrator as is expected under the Land Use Act.

12. However till date the defendants have neither attempted to obtain nor intend in the future to obtain the consent of the Military Administration (sic) of Anambra State to effectively pass title to the land.

13. Now the defendants have sold the land the subject matter of this action to another person unknown to the plaintiff who they had given conveyance with all necessary statutory consents dully (sic) observed. B

14. When the Defendants were confronted with the new development they admitted doing so as averred to in paragraph 13 above” C

The 1st Defendant/Respondent’s response to the above averments are contained in paragraphs 12, 13, 15 and 20 of his Statement of Defence wherein he specifically denied the Plaintiff s averments. He stated as follows:- D

“12. The 1st Defendant denies paragraph 10 of the, Statement of claim and puts the Plaintiff to the strictest proof thereof. In answer thereto, the 1st Defendant states that at no time was their (sic) an agreement that he and the 2nd defendant will obtain the statutory consent at their own expenses and that it is a figment of the Plaintiff’s imagination. E

13. The 1st Defendant denies paragraphs 11a and 11b of the Statement of claim and puts the Plaintiff to the strictest proof thereof. In answer thereto, the 1st Defendant states that he is entitled to his professional fees for drawing up the conveyancing document between the Plaintiff and the 2nd Defendant and states further, that there was never a time he agreed that his professional fee for preparing the said documents shall cover the securing of consent of the Military Administrator. F

15. The 1st Defendant denies paragraphs 13 and 14 of the Statement of Claim and puts the Plaintiff to the strictest proof thereof. In answer thereto, the 1st Defendant states that he never or at all sold the land to any other person and that he never or at all admitted having done so to anybody. 1st Defendant states that this action is an attempt by the Plaintiff and his solicitor to impugn his character for no just cause. G

20. In further answer thereto, the 1st defendant state that the Plaintiff waited for too long, and was only woken up by the tres- H

pass unto the land by someone who was claiming through the Federal Ministry of Works and Housing via allocation by one Mr. Agbekata a staff of the Ministry who wrought quite a havoc in the area when he was at Onitsha. ”

The 2nd Defendant/Respondent also denied the Plaintiffs assertions of selling the land to another person when he stated in paragraphs 6 and 10 of his Statement of Defence-

“6. The 2ND Defendant denies paragraphs 13 and 14 of the Statement of Claim and puts the plaintiff to the strict proof thereof. In answer thereto, the 2nd defendant states that he never or at all sold the land to another person and that he never or at all admitted having done so to anybody. 2nd defendant states that he only sold to the Plaintiff and no other person.

10. The 2nd Defendant denies paragraph 19 of the Statement of Claim and puts the Plaintiff to strict proof thereof. In answer thereto, the 2nd Defendant states that he fulfilled the contract between him and the Plaintiff by putting the Plaintiff into possession after the sale. The 2nd Defendant further states that he has not in any way or manner whatsoever, trespassed onto the said land after the said sale. 2nd Defendant further states that it is not for him to protect the land against trespassers for the plaintiff. The 2nd Defendant states that the plaintiff was duly warned to build something on the land to show his presence in order to avoid trespass which is very common in the area but that the Plaintiff chose to drag his foot only to turn round now to falsely accuse the 2nd Defendant of selling the Land.

It is trite that he who asserts must prove. The defendants by specifically denying selling the land to another person and procuring consent of the Military Administrator to alienate the land to the unknown person effectively traversed the plaintiff’s averments in paragraph 13 of the Statement of Claim. The Plaintiff had a heavy burden to discharge to prove that the Respondents went behind his back to sell the land to another person and also took a further step to secure the consent for the alienation of the land to the unknown Person.

In his evidence -in- chief the Plaintiff stated that after he had paid the agreed price of N180, 000.00 the 1st Defendant issued him a receipt and it was then he understood that the 1st Defendant acted

on behalf of the 2nd Defendant. The 1st defendant then prepared the memorandum of customary grant which was signed by the Plaintiff and the 2nd defendant. The 1st Defendant also signed to show that he prepared the document. One Mr. Chukwurah, a surveyor was engaged to prepare a site plan No. NEC/09/65 after they had been shown the land for which he Paid N10, 000.00. B

Under cross - examination, the Plaintiff was asked if he was shown the plot after paying the purchase price and he answered that they all went there. He was asked if there was any encroachment as at the date he was shown the land and he replied that there was none. He was further asked the following question: C

"Will it be correct to assume that at the time you engaged a surveyor to survey the land, there was no encroachment?"

The question elicited a different reply since the Plaintiff stated that- D

"We, myself and the 1st Defendant engaged a surveyor".

Counsel to the Defendant insisted if there was encroachment as at that date to which he replied-

"There was none"

He was finally pinned down to say that he first noticed the encroachment sometime in 1997. E

The Plaintiff was thus put in possession of the plot in 1995 after he had paid the purchase price and went on to engage the surveyor who prepared the plan. (See page 6 of the records). F

The appellant in this appeal has predicated his claim on the premise that the respondents did not obtain consent of the Governor to alienate the land to him but went ahead to sell the land to another person and to obtain the necessary consent on behalf of that person. No evidence however was adduced by the plaintiff/appellant for this claim. There is a misconception by the appellant on the nature of the interest he acquired. It is clear that the memorandum of customary grant of land which he entered into with the 2nd respondent after he had paid the purchase price would at best entitle him to equitable interest since there is evidence that he was let into possession of the land by the vendor after paying for the land. See: Ogunbambi v. Abowab (1951) 13 WACA 222; Cole v. Folami (1956) SC NLR 180; Adeniji v. Onagoruwa (2000) 1 NWLR (Pt. 639) 1. H

From the evidence on record, the plot of land sold to the

appellant was under the control and management of the local government within the area of jurisdiction of which the land was situated to which section 6 (1) (a) of the Land use Act applies which stipulates as follows:

B “6(1) It shall be lawful for a local government in respect of land not in an urban area to-

(a) grant customary right of occupancy to any person or organisation for the use of land in the local government area for agricultural, residential and other purposes;

C Sections 5 (1) (a) and 9(1) & (2) enable the Governor to grant statutory rights of occupancy to any person for all purposes and to issue a certificate as evidence of such right of occupancy. The sections stipulate as follows:-

D “5 (1) It shall be lawful for the Governor in respect of land, whether or not in an urban area to-

(a) Grant statutory right of occupancy to any person for all purposes;

9(1) It shall be lawful for the Governor-

E (a) when granting a statutory right of occupancy to any person; or

(b) when any person is in occupation of land under a customary right of occupancy and applies in the prescribed manner; or

F (c) when any person is entitled to a statutory right of occupancy, to issue a certificate under his hand in evidence of such right of occupancy.

(2) such certificate shall be termed a certificate of occupancy and there shall be paid therefore, by the person in whose name it is issued, such fee (if any) as may be prescribed”

G The interest which the appellant possessed over the plot was a customary right which he could convert to a statutory right after applying under section 9(1) (b) of the Land Use Act. Neither the appellant nor the 2nd respondent possessed a statutory right of occupancy over the plot as to invoke Section 22 of the Act for its alienation as the appellant has sought to do. It was therefore a misconception on the part of the appellant to expect the respondents to apply to the Military Administrator in Anambra State for his consent to alienate the plot to him. I would have however agreed with the appellant that it was the duty of the 2nd respondent to apply for the consent to

transfer his interest to the appellant if there was clear evidence showing that the plot was within the designated urban area. In such a case the interest of the second respondent would be a deemed grant under section 34 of the Land Use Act.

It was therefore the fault of the appellant that he failed to register his presence over the plot and thus allowed a trespasser to take possession of it. B

The lower court was right to set aside the Judgment entered in favour of the Plaintiff/Appellant by the trial court despite the finding by that court that there was no evidence that the 1st and 2nd Defendants subsequently re - sold the plot nor was there proof that the 1st Defendant was duty bound to get the Governor's consent. The award of damages did not flow from this finding and the lower court had a duty to set aside that Judgment. The lower court too was right to dismiss the cross - appeal and affirm the finding by the trial court that the 1st respondent acted only as a Solicitor to the 2nd respondent. The receipt issued by the 1st respondent to the appellant after he had paid the purchase price of the plot showed that he was acting for the 2nd respondent. C

It is for these reasons and the ones contained in the Judgment of my learned brother, Chukwumah-Eneh, JSC that I too dismissed the appeal and award N100,000 to the respondents against the appellant. D

F

G

H