

SUPREME COURT OF NIGERIA
FRIDAY 27TH FEBRUARY, 2015. SC. 41/2004
CORAM:- I. T. MUHAMMAD, J.A. FABIYI,
M. D. MUHAMMAD, C. B. OGUNBIYI,
K. M. O. KEKERE-EKUN, JJSC

BOLA OMINIYI APPELLANT/APPLICANT
AND
JACOB ADEGBOYEGA ALABI RESPONDENT

COURTS - Issue - Suo motu raising - Court is not entitled to raise an issue suo motu - And decide on it without affording parties opportunity to be heard (H1)

FAIR HEARING - Breach - Effect - Decision of CA arising from the issue raised suo motu - And without hearing the parties is a nullity - For being a breach of constitutional right to fair hearing (H2)

SUPREME COURT - Appeals - Hearing - Limit - The court hears appeals from valid judgments of CA - And having held a part of CA's decision as nullity - It has no jurisdiction to determine appellant's issue (H3)

FACTS

This action was instituted by plaintiff/appellant against defendant/respondent at the High Court of Osun State Osogbo, claiming inter alia for a specific performance of the agreement to sale the disputed property made between the parties, an order to tender Governor's consent, an account of money collected as rents from the property and an order for perpetual injunction. Appellant purchased a parcel of land with a completed building of 4 flats thereon from respondent at Osogbo, Osun State for an amount of money. A sale agreement was prepared and executed by the parties (Exhibit E). Appellant's contention is that respondent failed to obtain the Governor's consent for the purpose of effectively transferring title of the property to him (appellant). On his part, respondent denied any intention to sell the property. He rather stated that he had approached PW1 (Mr. Adebago) for a loan. He presented the document of the

property as a security for the loan.

Prior to giving him the loan, respondent stated that PW1 insisted that he should sign a document. Respondent stated further that he was initially reluctant to sign upon his realization that the document was an agreement for the sale of his property. Respondent maintained that although he signed some documents, he acted upon a misrepresentation by agents of appellant that the executed documents would be destroyed if he (respondent) repaid the loan at the agreed time. After hearing from the parties, the learned trial judge held that the transaction was an agreement for a loan and not for the sale of land. He however declined to exercise his discretion to grant an order for specific performance on the ground that there was a misrepresentation of fact. The court dismissed appellant's claims. Dissatisfied, appellant appealed to the Court of Appeal, Ibadan Division. The court disagreed with the trial court on the issue of misrepresentation. However, it upheld the refusal to make an order of specific performance but on different grounds, raised *suo motu* that the claim was statute barred. Appellant being dissatisfied with the part of the judgment refusing to order specific performance, appealed to Supreme Court.

ISSUE FOR DETERMINATION

"Whether the lower court was right in affirming the trial court's refusal to grant the relief of specific performance sought by the Appellant when this decision of the lower court was based on its findings on issues it raised suo motu without affording the appellant his right to fair hearing by failing to give him the opportunity to address it on the issues."

HELD (Unanimously allowing the appeal per **KEKERE-**

EKUN JSC)

COURTS - Issue - Suo motu raising

1. It follows from the above that in the absence of a respondent's notice, if the lower court intended to refuse the prayer for specific performance on any ground other than the ground relied upon by the trial court, such as the alleged fraud occasioned by the backdating of Exhibit A, the parties ought to

have been invited to address it on the issue. The settled position of the law, as correctly stated by learned counsel on both sides is that a court is not entitled to raise an issue suo motu and decide on it without affording the parties an opportunity to be heard. This is because in doing so the court is seen to leave its exalted position as impartial arbiter and descend into the arena of conflict. (p. 724 H)

FAIR HEARING - Breach - Effect

2. In the instant case, none of the special circumstances referred to in Effiom's case or Omokuwajo's case (supra) is applicable. The lower court based its reliance on the Limitation Law on an issue not raised by the parties i.e. the alleged back-dating of Exhibit A and the intention to deceive the Governor into giving his consent to the transaction. The case was fought on the basis of misrepresentation by the appellant and his intermediaries to the respondent about the nature of the transaction. The lower court therefore had a duty to call upon the parties to address it before reaching a decision. The lower court's refusal of the order for specific performance based on issues raised by it suo motu without hearing from the parties has, in my view, occasioned a substantial miscarriage of justice. The omission has very grave consequences for once it is shown that a party's right to fair hearing, guaranteed by Section 36 (6) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) has been breached, the decision reached, no matter how well considered, would be declared a nullity and is bound to be set aside. I hold that the part of the judgment complained of in the instant appeal is a nullity for lack of fair hearing. In the circumstances, I find merit in the appeal and it is hereby allowed. (p. 726 D)

SUPREME COURT - Appeals - Hearing - Limit

3. I now return to the reliefs sought by the appellant. The appellant's sole issue for determination is based on denial of fair hearing. The consequence of a successful argument that the appellant's right to fair hearing was breached is that the decision complained of would be declared a nullity and set

aside. A decision that is declared a nullity is as if it was never made. This court has jurisdiction to hear and determine appeals arising from valid judgments of the court below. Having held that the part of the decision complained of is a nullity for lack of fair hearing, this court has no jurisdiction to consider and determine the issue of specific performance, as requested on behalf of the appellant. Consequently, that part of the judgment of the Court of Appeal, Ibadan Division delivered on 9/7/2003 complained of is hereby set aside. The issue of specific performance is hereby remitted to the Court of Appeal, Ibadan Division for re-hearing by a different panel of that Court. (p. 727 A)

NOTABLE POINT OF INTEREST

KEKERE-EKUN JSC

Ratio decidendi and obiter dictum – Distinction

An appropriate place to commence the consideration of this appeal is to clarify the distinction between “obiter dictum” and “ratio decidendi”. This is because the law is settled that issues for determination must be distilled from the grounds of appeal, which in turn must be predicated upon the ratio decidendi of the decision of the court appealed against. The ratio decidendi of a case is the principle or rule of law upon which a court’s decision is founded. On the other hand obiter dicta or obiter dictum means, “something said in passing”. It is a judicial comment made while delivering a judicial opinion, but one that does not embody the decision of the court. (p. 722 D)

REPRESENTATION

KEHINDE OGUNWUMIJU ESQ., for the Appellant
OLUMIDE OLUJINMI ESQ. for the Respondent with Olukayode Ariwoola Jnr, Oluyomi Akintola (Miss) and Ifedolapo Esan (Miss)

CASES REFERRED TO

Kuti v. Balogun (1978) 1 SC 53
Lawal v. Coker (1972) 8-9 SC 83
Nwoga v. Benjamin (2009) 5 NWLR (pt. 1133) 152
Korede v. Adedokun (2001) FWLR (pt. 65) 421

Kuti v. Balogun (1978) 1 LRN 353

Adigun v. A-G Oyo State (1987) 1 NWLR (pt. 53) 678

Saraki v. Kotoye (1992) 3 NSCC 331

Effiom v. C.R.S.I.E.C. (2010) 14 NWLR (pt. 1213) 106

Omokuajo v. FRN (2013) 9 NWLR (pt. 1359) 300

Briggs v. C.L.O.R.S.N. (2005) 12 NWLR (pt. 938) 59

Dalek Nig. Ltd. v. OMPADEC (2007) All FWLR (pt. 354) 204

A.I.C. Ltd. v. NNPC (2005) 11 NWLR (pt. 937) 563

Ajibola v. Ajadi (2004) 14 NWLR (pt. 892) 14

Akibu v. Oduntan (2000) 13 NWLR (pt. 685) 406

Odessa v. F.R.N. (No.2) (2005) 10 NWLR (pt. 934) 528

STATUTE & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria 1999, s. 36(6)

High Court of Osun State (Civil Procedure) Rules, O. 25 r. 6

BOOK REFERRED TO

Black's Law Dictionary 8th ed.

LEAD JUDGMENT BY KEKERE-EKUN JSC

This is an appeal against the judgment of the Court of Appeal, Ibadan Division delivered on 9/7/2003 allowing in part the appellant's appeal from the judgment of the High Court of Osun State, Osogbo Judicial Division delivered on 3/3/1997. The part of the judgment complained of as stated in the Notice of Appeal filed on 3/10/2003 is *"that part relating to the refusal of the relief for specific performance based on the date stated on Exhibits A & B;F."*

A brief summary of the facts that led to the decision complained of are as follows: Sometime in 1993, the appellant purchased a parcel of land with a completed building of 4 flats thereon from the respondent at Osogbo, Osun State for N350,000.00. A sale agreement was prepared and executed by the parties (Exhibit E). In furtherance of the agreement the respondent also executed Exhibit A, titled "acknowledgment/ratification document". Letters of introduction/notice to quit (Exhibits C and C1) were written to the tenants of the building introducing the new owner. They were signed by the respondent. It was the appellant's case that the respondent failed to obtain the Governor's consent for the purpose of effectively trans-

ferring title of the property to him. He therefore instituted an action against him before the High Court of Osun State, sitting at Osogbo by a writ of summons dated 3rd April, 1995. By paragraph 12 of the statement of claim he sought the following reliefs:

B 1. Specific performance of an agreement between the plaintiff and the defendant dated 9th October, 1993 for the sale by the defendant to the plaintiff of all that piece or parcel of land measuring approximately 1332.005 square metres with the buildings thereon consisting of 4 flats and one uncompleted flat situate/lying and being at Old Ikirun Road covered by survey plan no, RAB/655/0Y/89.

C 2. An order directing the defendant to procure and tender to the plaintiff within thirty days from the date of judgment the consent of the Military Governor/Administrator of Osun State with a view to register deed of assignment.

D 3. An order directing the defendant to give account of all monies received as rents on the plaintiff's property from December 1995 till the date of judgment.

E 4. An order of perpetual injunction restraining the defendant by himself, through his servants/agents/or any person however deriving authority from the defendant from dealing with or interfering with the plaintiff's occupation and peaceful enjoyment of the property.

F The respondent, an accountant, denied any intention to sell the property to the appellant. His case was that he did not know the appellant before the transaction. That he approached one Mr. Adebago, PW1, who operated a finance company for a loan. That he deposited his plan and title documents with the said Mr. Adebago as security for the loan. When the money was ready PW1 insisted G that he should sign Exhibits E & A. According to him, he was initially reluctant to sign when he realised that it was an agreement for the sale of his property. Although he signed Exhibits E, A, C & C1, he claimed that he signed upon a misrepresentation by agents of the appellant, Mr. Adebago and one Alhaja Abeke Babatunde (PW2), H that the executed documents would be destroyed if he repaid the loan within the agreed three months.

The parties called witnesses and tendered documents. At the conclusion of the trial, the learned trial judge held that the transaction between the parties was an agreement for a loan and not for the

sale of land. He however declined to exercise his discretion to grant an order for specific performance on the ground that there was a misrepresentation to the defendant by PW1 that Exhibits A & E, which he was persuaded to sign, were merely security for the loan and not intended to transfer ownership. The appellant's claims were accordingly dismissed. B

On appeal to the Court of Appeal Ibadan Division, the lower court allowed the appeal in part. It disagreed with the trial court on the finding that the respondent signed Exhibits A & E as a result of misrepresentation. It however upheld the trial court's refusal to make an order of specific performance but on different grounds - that the claim was statute barred because it had been proved at the trial that Exhibit E, prepared in 1993, was backdated to 1977 in order to deceive the Governor into giving his consent to the transaction in the belief that the transaction took place before the promulgation of the Land Use Act of 1978. C D

The appellant, dissatisfied with the part of the judgment refusing to make an order for specific performance, filed a Notice of Appeal containing two grounds of appeal. The grounds are reproduced hereunder as follows: E

GROUND 1: The learned Honourable Justices of the Court of Appeal erred in law when they held as follows:

"I hold that Exhibit A is unenforceable as an agreement as it seeks to deceive; same is also barred from being enforced in a court of law pursuant to the provisions of Oyo State Statute of Limitation". F

PARTICULARS OF ERROR IN LAW:

1. The decision of the court was incompetent as there was no ground of appeal which raised the matters pronounced upon by the court. G

2. There was no cross appeal or a notice of the respondent to contend that the decision of the High Court be affirmed on those grounds.

3. The appeal was partly dismissed on the ground raised by the court suo motu without every opportunity of fair hearing granted to the appellant. H

4. The decision of the court occasioned a grave miscarriage of justice.

GROUND 2: The learned Justices of the Court of Appeal

acted without jurisdiction and erred in law when they refused to grant the appellants reliefs of specific performance and when the court did not fully agree with the decision of the trial court for refusing the order for specific performance.

PARTICULARS OF ERROR IN LAW:

B 1. The grounds for refusing the order of specific performance were not competent before the Court of Appeal and the court was bound to discountenance the matters relied on.

2. The Court of Appeal was bound only by the grounds of appeal and the issue properly raised therein.

C 3. The reasons and reasoning of the trial court for refusing the order for specific performance was not fully agreed with by the Court of Appeal.

The parties duly filed and exchanged their respective briefs of argument in compliance with the rules of this court. The Appellant's Amended Brief of Argument settled by KEHINDE OGUNWUMIJU ESQ., was deemed properly filed on 29/4/2014, while his Reply Brief was filed on 11/7/2014. The Respondent's brief, settled by MESSRS. OLUWAGBEMIGA OLATUNJI and OLUMIDE OLUJINMI was filed on 18/6/2014. At the hearing of the appeal on 9/12/2014, KEHINDE OGUNWUMIJU ESQ., learned counsel for the appellant and OLUMIDE OLUJINMI ESQ., learned counsel for the respondent adopted their briefs and urged their respective positions on the court.

F The appellant distilled a single issue for determination thus:

"Whether the lower court was right in affirming the trial court's refusal to grant the relief of specific performance sought by the Appellant when this decision of the lower court was based on its findings on issues it raised suo motu without affording the appellant his right to fair hearing by failing to give him the opportunity to address it on the issues."

The respondent also formulated a single issue viz:

"Whether the Lower Court Judgment refusing to grant an order for specific performance was based on the Statute of Limitation Law of Oyo State."

The issue formulated by the appellant, in my view best captures the issue in contention in this appeal. I shall rely on it in resolving the appeal.

In arguing the appeal, learned counsel for the appellant in para-

graph 5.01 of his brief gave four reasons why the appeal should be resolved in the appellant's favour. They are:

- i. *"the lower Court rightly set aside the finding of the trial court by holding that the respondent validly sold the property in issue to the appellant;*
- ii. *having found that the respondent validly sold the property to the appellant, the lower court actually granted the reliefs sought by the appellant;*
- iii. *in spite of its findings and decision above the lower court refused to grant the order of specific performance sought by the appellant based on issues that were neither raised nor canvassed by any of the parties, thereby breaching the appellant's right to fair hearing; and*
- iv. *the decision of the lower court to refuse the appellant's prayer for specific performance ought to be set aside as it was arrived at in breach of his fundamental right to fair hearing."*

Learned counsel referred to the judgment of the lower court at page 98 lines 5 - 6 of the record wherein it resolved the first issue for determination in the appellant's favour and held thus:

"The judgment of the trial court is hereby set aside. In its place the plaintiffs/appellants claims are hereby granted."

He argued that the lower court having found that the respondent sold his property to the appellant and stating that his claims "are hereby granted," erred in refusing to grant the prayer for specific performance. In his view a consequential order of specific performance was the only way the court could have given effect to its findings. He argued further that by refusing to order specific performance the court had taken back with its left hand what it had given with its right. Relying on the authorities of: *Fidelitas Shipping Co. Ltd. Vs V/O Exportchleb* (1966) 1 OB 360 @ 642 *Lawal Vs Coker* (1972) 8 - 9 SC 83 and *Nwoga Vs Benjamin* (2009) 5 NWLR (PT.1133) 152 @ 180 D, he submitted that a court of law is not permitted to approbate and reprobate.

A fundamental issue raised in this appeal is the contention that the lower court breached the appellant's right to fair hearing by basing its refusal to make an order of specific performance on issues it raised suo motu without affording the parties the opportunity to address it on the issues so raised. The issues allegedly raised suo motu

by the court are:

a. That the contract agreement was statute barred by the provisions of the Statute of Limitation Law of Oyo State; and

b. That the act of backdating the contract to 1977 was made to deceive the Governor to give consent to the sale.

B On the need for the court to hear from the parties before determining an issue raised suo motu, learned counsel relied on the authorities of: *Korede Vs Adedokun* (2001) FWLR (Pt. 65) 421 @ 431 and *Kuti Vs Balogun* (1978) 1 LRN 353 @ 357. He submitted that apart from the fact that there was no pleading or evidence led at the trial regarding the statute of limitation, there was also no evidence that the statute of limitation of Oyo State applies in Osun State. He argued further that whether or not an action is statute barred is an issue of fact, which ought to have been addressed at the trial. He also submitted that from the pleadings of the parties the agreement between them was entered into in 1993 while the action was filed in 1995. On the reliance of the court on the issue of deceit, learned counsel submitted that there was no pleading or evidence to that effect by either of the parties and that in any event by the provisions of Order 25 Rule 6 of the High Court of Osun State (Civil Procedure) Rules issues of fraud and deceit must be specifically pleaded by a party seeking to rely on it. He noted that the deceit and fraud pleaded by the respondent was in respect of acts of the appellant's agents who deceived him into signing documents of sale. He maintained that the parties ought to have been heard before the court arrived at a decision on the issue.

In urging this court to hold that the appellants right to fair hearing was breached, learned counsel submitted that it is of no moment if the decision would have been the same had the parties been heard. He submitted that once it is established that a party's right to fair hearing has been infringed an appellate court is duty bound to set aside the decision. He referred to: *Adigun Vs A.G. Oyo State* (1987) 1 NWLR (Pt. 53) 678 @ 721 C - D. Curiously after making this submission, learned counsel urged the court to set aside the part of the judgment complained of and to grant the order of specific performance. I shall return to this anomaly anon.

In reply to the above submissions, learned counsel for the respondent contended that the ratio of the court's decision was that

the contract was unenforceable because Exhibit A was “bedeviled by deceit.” He argued that the issue of the action being statute barred was not the ratio decidendi of the decision appealed against. He contended that the observation was obiter as it was merely made in passing. He submitted that this court has made numerous pronouncements to the effect that no appeal can arise out of the obiter dictum of a court. He referred to: Saraki & Ors. Vs Kotoye (1992) 3 NSCC 331. He submitted that the appellant’s ground of appeal premised on the Limitation Law of Oyo State is incompetent and should be struck out. He argued further that assuming, without conceding, that issue of the Limitation Law constitutes part of the ratio decidendi of the case, the applicability of the Limitation Law is a point of law, which could be raised at any stage. He relied heavily on the decision of this court in: Effiom Vs C.R.S.I.E.C. (2010) 14 NWLR (Pt.1213) 106 @ 133 - 134 where it was held thus:

‘the principle that the court ought not to raise an issue suo motu and decide upon it without hearing from the parties applies mainly to issues of facts; In some special circumstances, the court can raise an issue of law or jurisdiction suo motu and decide upon it without hearing the parties before it; (Underlining and emphasis by learned counsel).

He submitted that the court could take judicial notice of the time of accrual of the cause of action without calling on the parties to address it on the issue. In further reliance on Effiom’s case (supra), learned counsel submitted that in order to warrant the reversal of the decision, the appellant must go further to show that the failure to hear him on the point occasioned some miscarriage of justice. He submitted that the appellant herein has failed to show that the failure to hear him on the issues raised had occasioned a miscarriage of justice against him. He urged this court not to disturb the concurrent findings of the two lower courts to the effect that Exhibit A is unenforceable since it is based on deceit. He contended that the appellant has not appealed against the finding of the two lower courts on the issue of deceit.

He is also of the view that the appellant’s sole issue for determination and the arguments in respect thereof go to no issue because they are not based on the ratio of the decisions of the lower courts. He argued that the lower courts’ decisions are based on find-

ings of fact, which the Supreme Court would not interfere with except in exceptional circumstances and that the appellant has failed to show any such circumstance in this case. He referred to: *Adeleke Vs Serifa* (1990) 3 NWLR (Pt.136) 94 @ 104 D - E and *Igwego Vs Ezeugo* (1992) 6 NWLR (Pt. 249) 561 @ 574 H - A. He urged the court to dismiss the appeal for lack of merit with substantial costs.

In reply to the submissions of learned counsel for the respondent, learned counsel for the appellant rejected the contention that the appeal is against obiter dicta of the lower court. He referred to a portion of the judgment at page 105 lines 27 - 30 of the record and submitted that the excerpt shows clearly that both the alleged deceit and the issue of the Limitation Law were not obiter dicta but the ratio decidendi of the court's refusal to make an order for specific performance.

An appropriate place to commence the consideration of this appeal is to clarify the distinction between "obiter dictum" and "ratio decidendi". This is because the law is settled that issues for determination must be distilled from the grounds of appeal, which in turn must be predicated upon the ratio decidendi of the decision of the court appealed against. See: *Honika Sawmill (Nig.) Ltd. Vs Hoff* (1994) 2 NWLR (Pt.325) 252, *Briggs Vs C.L.O.R.S.N.* (2005) 12 NWLR (Pt.938) 59 at 90 F-H; *Dalek Nig. Ltd. Vs OMPADEC* (2007) ALL FWLR (Pt.354) 204 at 226 F-H. The ratio decidendi of a case is the principle or rule of law upon which a court's decision is founded. See: *Black's Law Dictionary* (8th edition); also: *A.I.C. Ltd. Vs NNPC* (2005) 11 NWLR (Pt.937) 563; *Ajibola Vs Ajadi* (2004) 14 NWLR (Pt.892) 14. On the other hand obiter dicta or obiter dictum means, "something said in passing". It is a judicial comment made while delivering a judicial opinion, but one that does not embody the decision of the court. See: *Black's Law Dictionary* (supra) and *A.I.C. Ltd. Vs NNPC* (supra); *Akibu Vs Oduntan* (2000) 13 NWLR (Pt. 685) 406; *Odessa Vs F.R.N.* (No.2) (2005) 10 NWLR (Pt.934) 528 at 555 B.

Having carefully examined the judgment, I am of the humble opinion that the decision regarding the applicability of the Limitation Law of Oyo State was not obiter. The lower court held at page 97 lines 12 - 30 of the record:

"There is the uncontroverted evidence that PW3 backdated Exhibit A to 1977 to conform with the provision of the Land Use Act.

This Exhibit along with Exhibits E, C1 & C2 were made the same time in 1993. Thus, if as given in evidence before the lower court that Exhibit A was made in 1977, some twenty-six years ago, there is no doubt that Exhibit A, the Agreement for Sale, has ceased to be enforceable being barred by the limitation Act among other provisions which prevents the issue of a discretionary order of specific performance. The purport of backdating Exhibit A made in 1993 to 1997 was to deceive the Governor as consenting officer that the document was made in 1977 before the Land Use Act of 1978. This incident of deceit in Exhibit A renders the document void for the purpose of obtaining the consent of the governor for the transaction. While it is trite that an agreement must exist before the deed seeking the consent of the Governor is inserted, it is equally trite that the agreement on which basis the governor gives his consent should not be affected by fraud, deceit of laches (sic). In the instant case, I hold that Exhibit A is unenforceable as an agreement as it seeks to deceive, same is also barred from being enforced in a court of law pursuant to the provision of Oyo State Statute of Limitation.

There is no doubt that the Exhibit A relied upon for the application for an order of specific performance is bedeviled by deceit. One is therefore not surprised that the lower court restrained itself from exercising its discretion to grant specific performance." (Underlining mine for emphasis)

As can be seen from the portion of the judgment reproduced above, the court below gave two clear reasons for affirming the trial court's refusal to order specific performance:

- a. Deceit by backdating Exhibit A.
- b. That the action was statute barred by virtue of the provisions of the Limitation Law of Oyo State.

This appeal is based on that refusal. The backdating of Exhibit A, however, and its implication on the claim for specific performance was never raised or made an issue at the trial court nor at the court below. The contention of the respondent was that the transaction was a loan agreement and not an agreement for the sale of land. The trial court held the view that the respondent was deceived into signing the documents. The Court of Appeal on the other hand did not agree that the respondent was deceived into signing the agreement for sale or the letters to the tenants. At page 102 lines 18 - 30, page

103 lines 1 - 10 and page 104 lines 14 - 17 of the record, His Lordship, Omaxe, JCA, in his concurring judgment held:

“The decision arrived at in the court below is that specific performance claimed by the plaintiff fails because the court ruled that the transaction between the parties was founded on the deceit of the defendant/respondent by the plaintiff. However, a proper construction of the effect of the testimonies before the court should be founded on Exhibit A and E, which are said to be written agreements between the plaintiff rather than between the intermediaries of the plaintiff PW1 and PW2, and the defendant. Evidence shows that Exhibit A purporting to transfer the title deed to the plaintiff was backdated to 1977 by the solicitor who drew up the agreement on the instruction of PW1. The defendant signed the agreements which purported to transfer to the plaintiff the landed property of the defendant, which includes the four flats and the uncompleted flat of the defendant. The defendant did not deny knowledge of the contents of Exhibits A and E. The defendant also deposed that he signed the said exhibit knowing that the documents transferred his ownership in the land to another in exchange for N350,000.00.

Subsequently, according to the testimony of the defendant, the intermediaries of the plaintiff PW1 and PW2 took to the defendant, the exhibits admitted as Exhibits C1 and C2, which the defendant also signed, knowing that the documents gave authority to another to collect rent on the property which he had lately transferred to another; If there was any doubt in his mind when he first signed the agreement, his signature on Exhibit C1 and C2 leaves no doubt that he has divested himself of the ownership of the land and buildings thereon. It is our law that a literate person of full age and capacity at law is presumed to understand the document to which he appends his signature. He is deemed to be bound by whatever the document says. See Egbase vs Ohiareghan (1985) 2 NWLR (Pt. 1-0) 884, at 889.

In response to issue one formulated by the appellant and the respondent the totality of the evidence in the court below, whether oral or written do not justify the decision reached by the court below: and a case of fraudulent misrepresentation was not established by the respondent.”

It follows from the above that in the absence of a

respondent's notice, if the lower court intended to refuse the prayer for specific performance on any ground other than the ground relied upon by the trial court, such as the alleged fraud occasioned by the backdating of Exhibit A, the parties ought to have been invited to address it on the issue. The settled position of the law, as correctly stated by learned counsel on both sides is that a court is not entitled to raise an issue suo motu and decide on it without affording the parties an opportunity to be heard. This is because in doing so the court is seen to leave its exalted position as impartial arbiter and descend into the arena of conflict. See: Kuti Vs Balogun (1978) 1 SC 53 @ 60, Obawole Vs Williams (1996) 10 NWLR (Pt.477) 146, Stirling Civil Eng. (Nig.) Ltd. Vs Yahaya (2005) 11 NWLR (Pt.935) 181; Omokuajo Vs F.R.N (2013) 9 NWLR (Pt.1359) 300. There are a few exceptions to this general rule.

In the case of Effiom Vs C.R.S.I.E.C. (2010) 14 NWLR (Pt.1213) 106, relied upon by learned counsel for the respondent, this court reiterated the general principle stated above. His Lordship, Tabai, JSC, who wrote the lead judgment went on to state at page 133 - 134 H - A (supra):

"As I indicated above this principle that the court ought not to raise an issue suo motu and decide upon it without hearing from the parties applies mainly to issues of fact; In some special circumstances, the court can raise an issue of law or jurisdiction suo motu and without hearing the parties decide upon it; Tukur Vs Government of Gongola State (1989) 4 NWLR (Pt.117) 517 is instructive on this point. In that case, although the issue of venue was not raised and argued by the parties in their briefs, it being an issue of jurisdiction, was taken by the court.

In the instant case therefore the court below would be at liberty to raise the issue of locus standi of the appellants if such an issue was relevant to the proper determination of the case. It is to be noted however that the issue of locus standi of the plaintiffs/appellants was raised at the trial court and effectively determined therein in favour of the appellants. The respondent did not appeal against it and so it was not an issue before the court below. It was irrelevant and so the courts deliberation on it was an exercise in futility.

The rare exceptions to the general rule were further eluci-

dated in the case of Omokuwajo Vs F.R.N. (supra) at 332 B - F where His Lordship Rhodes-Vivour, JSC in his concurring judgment stated:

"The need to give the parties a hearing when a Judge raises an issue on his own motion or suo motu would not be necessary if:

(a) the issue relates to the courts own jurisdiction.

B *(b) both parties are/were not aware or ignored a statute which may have a bearing on the case. That is to say where by virtue of a statutory provision the Judge is expected to take judicial notice. See Section 73 of the Evidence Act.*

C *(c) when on the face of the record serious questions of the fairness of the proceedings is evident."*

His Lordship concluded by restating the general principle thus:

D *"It is not open to the Court of Appeal to raise issues which the parties did not raise themselves either at the trial court or during the hearing of [the] appeal."*

In the instant case, none of the special circumstances referred to in Effiom's case or Omokuwajo's case (supra) is applicable. The lower court based its reliance on the Limitation Law on an issue not raised by the parties i.e. the alleged
 E ***backdating of Exhibit A and the intention to deceive the Governor into giving his consent to the transaction. The case was fought on the basis of misrepresentation by the appellant and his intermediaries to the respondent about the nature of the***
 F ***transaction. The lower court therefore had a duty to call upon the parties to address it before reaching a decision. The lower court's refusal of the order for specific performance based on issues raised by it suo motu without hearing from the parties has, in my view, occasioned a substantial miscarriage of***
 G ***justice. The omission has very grave consequences for once it is shown that a party's right to fair hearing, guaranteed by Section 36 (6) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) has been breached, the decision reached, no matter how well considered, would be declared a***
 H ***nullity and is bound to be set aside.*** See: Mfa & Anor. Vs Inongha (2014) 1 - 2 SC (Pt.1) 43 @ 72; Tsokwa Motors (Nig.) Ltd. Vs U.B.A. Plc. (2008) All FWLR (Pt.403) 1240 @ 1255 A - B; Adigun Vs A.G. Oyo State ((1987) 1 NWLR (Pt.53) 674; Okafor Vs A.G. Anambra State (1991) 3 NWLR (Pt.200) 59; Leaders & Co. Ltd. Vs Bamaiyi

(2010) 18 NWLR (Pt.1225) 329. ***I hold that the part of the judgment complained of in the instant appeal is a nullity for lack of fair hearing. In the circumstances, I find merit in the appeal and it is hereby allowed.***

I now return to the reliefs sought by the appellant. The appellant's sole issue for determination is based on denial of fair hearing. The consequence of a successful argument that the appellant's right to fair hearing was breached is that the decision complained of would be declared a nullity and set aside. A decision that is declared a nullity is as if it was never made. This court has jurisdiction to hear and determine appeals arising from valid judgments of the court below. Having held that the part of the decision complained of is a nullity for lack of fair hearing, this court has no jurisdiction to consider and determine the issue of specific performance, as requested on behalf of the appellant. Consequently, that part of the judgment of the Court of Appeal, Ibadan Division delivered on 9/7/2003 complained of is hereby set aside. The issue of specific performance is hereby remitted to the Court of Appeal, Ibadan Division for re-hearing by a different panel of that Court.

The parties shall bear their respective costs in the appeal.

I. T. MUHAMMAD JSC

I read in advance the judgment just delivered by my learned brother, Kekere-Ekun, JSC. I agree with my lord's reasoning and conclusion which I adopt. I abide by all orders made in the lead judgment.

FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother - Kekere-Ekun, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the appeal has merit; in the main.

Let me observe it in passing that the lower court descended into the arena of conflict by raising a determinant vital issue suo motu without inviting the parties and more especially the appellant to ad-

dress it on same.

The issue relates to an alleged backdating of Exhibit'-A' with the intention to deceive the Governor to give his consent to the land transaction and the effect of the Limitation law.

It should be re- iterated at this point that it is not the duty of
 B a court to set up for parties a case different from the one set up by the parties themselves. See *Oniah v. Onyiah* (1989) 1 NWLR (Pt. 99) 514, *Ojo-Osagie v. Adonri* (1994) 6 NWLR (pt. 349) 131. It goes without saying that the court below erred in the step taken by it in the
 C wrong direction.

A judge should not raise a point like the one pin-pointed above suo motu without hearing from the parties; more especially, the party that will be adversely affected as a result of same. A judge should not descend into the arena of conflict, if he does not want to
 D get messed up therein. A court has no duty to bridge the yawning gap in the case of a party to the proceedings. See: *Ajuwon v. Akanni* (1993) 9 NWLR (Pt. 316) 182, *Salubi v. Nwariaku* (1997) 5 NWLR (Pt. 505) 442. The step taken by the lower court was clearly in breach of the dictate of section 36(6) of the 1999 Constitution of the Federal
 E Republic of Nigeria. It engendered want of fair hearing to the appellant and thereby precipitated underserved miscarriage of justice.

Based on the constitutional breach as clearly depicted in the lead judgment, the decision reached by the court below must be
 F declared a nullity and set aside.

I order accordingly and hereby endorse the consequential orders contained in the lead judgment; that relating to costs inclusive.

G ***M. D. MUHAMMAD JSC***

I have read in draft the lead judgment of my learned brother Kekere- Ekun, JSC whose reasoning and conclusion that the appeal is meritorious I entirely agree with, I adopt the judgment as mine in
 H allowing the appeal as well as the consequential orders reflected in the said judgment including the order on costs.

OGUNBIYI JSC

I read in draft the lead judgment of my learned brother,

Kudirat Motonmori Olatokunmbo Kekere- Ekun JSC and I am in total agreement with the reasoning and conclusion arrived thereat.

The facts of this case are well stated in the lead judgment. The appellant's claim is for a specific performance against the respondent as detailed in paragraph 12 of his statement of claim as reproduced in the lead judgment. The lower court, it was alleged, refused to make an order for such specific performance by reason of an issue it raised suo motu and upon which parties were not afforded the benefit to address the court thereon. B

The crux of this appeal therefore questions = the validity and legality of the decision arrived thereat by the lower court without complying with the constitutional provision of the right to fair hearing. C

The law is well settled that it is open for the court to raise issues suo motu; the rider however is also sacrosanct that for such decision, to have a force of law, parties affected therewith must be given opportunity of being heard on the issue so raised by the court. The right is a constitutional embodiment accruing to the parties. It is also very fundamental and cannot be denied the parties, as doing so will render the entire proceedings as nonexistent. It is without question that the lower court did breach the appellant's right to fair hearing. D E

My learned brother has dealt very adequately with all the nutty issues in the appeal and I totally endorse her conclusion that in the circumstance, this court has no jurisdiction to consider and determine the issue of specific performance. In the same vein as my learned brother, I also set aside that part of the judgment of the lower court complained of and abide by all incidental orders made there in the lead judgment inclusive of that made as to costs. F G