

SUPREME COURT OF NIGERIA
FRIDAY 6TH MARCH, 2015. SC. 185/2006
CORAM:- M. MUNTAKA-COOMASSIE,
O. RHODES-VIVOUR, N. S. NGWUTA,
K. B. AKA'AH, C. C. NWEZE, JJSC

DR. SOGA OGUNDALU APPELLANT
AND
CHIEF A.E.O. MACJOB RESPONDENT

EVIDENCE - Evaluation - And ascription of probative value to evidence - Are within the exclusive preserve of trial court - But where it relates to a document - Such rights are not exclusive to the court (H1)

PLEADINGS - Defence - Reply - Where defendant avers to a fact in statement of defence - And plaintiff fails to file a reply - Plaintiff may lead evidence to deny the averment in the statement of defence (H2)

LAND LAW - Sale - Agreement - The exhibits and respondent's testimony on oath - Confirm that there is an agreement to sell the land - And further agreement that payment shall be by installments (H3)

LAND LAW - Sale - Yoruba Customary Law - The sale is not valid under the custom - As respondent still retains the legal title over the land - Since the purchase price was not fully paid (H4)

LAND LAW - Lease - Forfeiture - Condition - Forfeiture on grounds of misconduct can only be ordered to determine a valid lease - And as there is no valid lease - The courts below wrongfully made the order (H5)

LAND LAW - Title - Smaller land - Where in a claim for title over a large area - Plaintiff succeeds in proving his claim for smaller area - Judgment should be given for the smaller area - Provided it is in dispute (H6)

APPEALS - Land law - Concurrent findings - Interference - The findings of title over the land verged red and blue are wrong - And hereby set aside for being perverse (H7)

LAND LAW - Specific performance - The sale of the land being invalid - Specific performance cannot be ordered as there is nothing to enforce (H8)

FACTS

Before the High Court of Ogun State sitting at Abeokuta, plaintiff/respondent commenced this action against defendant/appellant, seeking for a declaration of title, forfeiture on grounds of misconduct, damages for trespass and perpetual injunction over a disputed land. On his part, appellant counter-claimed for a declaration that the agreement between the parties was not leasehold, order for specific performance and perpetual injunction. The land in dispute verged blue on the survey plan (Exhibit 3) belongs to respondent. Appellant approached respondent and negotiated for the land for a piggery business. Respondent agreed. An agreed price of N7,000.00 was to be paid by appellant to respondent in installments.

However, appellant defaulted in making the payment as agreed. The major contention between both parties is whether the agreement was for a sale or leasehold. At the trial, the parties adduced evidence to prove their cases. Hearing commenced and at the end of which the court found for respondent. It held that the agreement was for a lease but that the same was invalid in the absence of the essential ingredients of a valid lease. The court despite its finding, made an order for forfeiture and injunction. The counter-claim was dismissed. Dissatisfied with the judgment, appellant lodged an appeal in the Court of Appeal Ibadan Division. The court affirmed the judgment of the trial court. Not satisfied, appellant appealed to Supreme Court.

ISSUES FOR DETERMINATION

1. Whether the sale or lease of the land in dispute was valid.
2. Whether the Court of Appeal was correct in affirming an order of forfeiture in favour of the respondent after the court had found that "...all the ingredients of a leasehold have not been established by the respondent."

3. Whether the trial court and the court below are right in granting an order of declaration of title in favour of the respondent.

4. Whether the counterclaim of the appellant was rightly rejected by both courts below.

HELD (Unanimously allowing the appeal in part per

RHODES-VIVOUR JSC)

EVIDENCE - Evaluation

1. I am now to decide if this finding by the Court of Appeal was flawed, and this can only be done by this court evaluating evidence. It is the duty of the trial judge to receive all relevant evidence. That is perception. The next duty is to weigh the evidence in the context of the surrounding circumstances of the case. That is evaluation. A finding of fact involves both perception and evaluation. Evaluation of relevant evidence before the trial court and the ascription of probative value to such evidence are the primary functions of the trial court. This is so since that court saw, heard and watched the demeanour of the witnesses when they gave evidence. Consequently where this is done the Appeal Court should always be reluctant to differ from the trial judge's finding. It is only where the trial court failed to evaluate such evidence properly that an appellate court can re-evaluate evidence. Furthermore, evaluation of a document is not within the exclusive preserve of the trial court. A trial court and an appellate court have equal rights in evaluation of documentary evidence. (p. 1035 H)

PLEADINGS - Defence - Reply

2. The respondent filed a reply, but did not join issues with the defendant/appellant. The position of the law is that where the defendant avers to a fact in his statement of defence and the plaintiff fails to file a reply to deny the averment, the plaintiff may lead evidence to deny the averment in the statement of defence. (p. 1037 C)

LAND LAW - Sale - Agreement

3. Purchase money is for the sale of land and not for a lease. Finally exhibits 4 and 7 are cheques for N4,000.00 which the appellant sent to the respondent to offset the outstanding sum of N4,000.00, but the respondent refused to accept. I am satisfied that the exhibits and even the testimony of the respondent (as plaintiff) under oath confirm beyond all doubt that the respondent agreed to sell the land in dispute and the appellant agreed to buy the land for the sum of N7,000.00. It was further agreed that payment shall be by installments.

The Court of Appeal fell into grave error when it said that exhibit 2 did not represent all the terms and conditions of the agreement to sell to the appellant and therefore insufficient to amount to a memorandum for purposes of section 67(i) of the Property and Conveyancing Law, Cap. 100... Rather exhibit 2 is a clear demand for N4,000.00 representing outstanding sum for the purchase price for the land. To my mind the Court of Appeal mixed up the requirement for a valid sale of land with a simple demand for outstanding sum due for purchase of the land. In the circumstances the findings of the trial court affirmed by the Court of Appeal that the agreement between the parties was for a lease of the land is perverse. The correct position is that the respondent agreed to sell the land to the appellant. (p. 1037 G)

LAND LAW - Sale - Yoruba Customary Law

4. This court held that to constitute a valid sale of land under Yoruba Customary Law three essential ingredients are required, and they are:

- 1. Payment of the purchase price,**
- 2. Purchaser is let into possession by the vendor, and**
- 3. In the presence of witnesses.**

It follows that where the purchase price is not fully paid there can be no valid sale even if the purchaser is in possession (as in this case). Where part payment of the purchase price was made and the purchaser defaults in paying the balance within a reasonable time the vendor would be at liberty to re-sell since legal title remains with the vendor until full

price is paid by the purchaser. The purchaser (i.e. the appellant) paid N2,000.00 on 7/11/88 and N1,000.00 on 23/10/89. The outstanding sum of N4,000.00 remained unpaid thereafter. On 28/11/89 the respondent wrote to the purchaser requesting that the balance of N4,000.00 be paid. It was not until 5/3/90 and 22/3/93 that the purchaser sent cheques for N4,000.00 to the respondent. Both cheques were rejected. It is clear that the sale of the land in dispute was not valid since the purchase price was not fully paid. Furthermore the purchaser has failed to pay the balance of the purchase price within a reasonable time. The sale of the land in dispute is in the circumstances not valid. On these facts, particularly the contents of exhibit 2 a lease was never contemplated by the parties.

It was agreed that the defendant should pay the price for the land verged BLUE instalmentally. The sum agreed was N7,000.00. Under Yoruba Customary Law the full purchase price for the land must be paid before there is a valid sale. Where the defendant makes part payment and the balance remains unpaid the legal title remains with the plaintiff (vendor) until the full price is paid by the defendant (purchaser). The defendant paid N3,000.00. The balance of N4,000.00 was never paid. Since the balance of the purchase price was never paid the legal title resides with the plaintiff (vendor).

In view of the fact that legal title resides with the plaintiff, the plaintiff is entitled to a statutory right of occupancy in respect of the land verged BLUE, measuring 492.630 square meters, situate, lying and being behind WAEC office, Onikolobo, Abeokuta. (pp. 1038 D/1042 G)

LAND LAW - Lease - Forfeiture - Condition

5. My lords, the appellant constructed a giant fence, gate and powerhouse on the land, without the consent of the respondent. He went on to claim that the respondent had sold the land to him. That is a challenge to the plaintiff/respondents title and it amounts to misconduct for which the appellant would forfeit possession of the land in dispute to the plaintiff. Such an order cannot be ordered because an order for forfeiture

can only be ordered if the lease is valid. An order for forfeiture cannot be ordered because the lease is invalid. Both courts were wrong to order forfeiture. Furthermore it was never in the contemplation of the parties that the agreement between them was for a lease. The agreement between them was for a sale of the land, and forfeiture relates to leases and not to sale of land. Forfeiture on the grounds of misconduct or any other ground can only be ordered to determine a valid lease. Since there was no valid lease in existence both courts below were in grave error to order forfeiture to determine an invalid lease. (p. 1040 C)

LAND LAW - Title - Smaller land

6. All the evidence pleaded, led and accepted by the trial judge is on the land verged BLUE, and the issues were whether the land verged BLUE was leased or sold to the defendant/appellant, whether an order of forfeiture should be ordered against the defendant/appellant on the land verged BLUE, whether an injunction should be granted to restrain the defendant/appellant from further acts of trespass on the land verged BLUE. It is long settled that where in a claim for declaration of title over a large area of land, the plaintiff succeeds in proving his claim for a smaller area, judgment should be given for the smaller area provided it is the area in dispute. It is not the business of the court to spend judicial time resolving matters not in dispute. The respondent established beyond all doubt that he owns the land verged BLUE and he is entitled to a declaration as prayed for failure of consideration. The appellant failed to pay the agreed purchase price for the land verged BLUE. (p. 1042 C)

Land law - Concurrent findings - Interference

7. An appellate court would rarely upset concurrent findings of fact of the two courts below except where there has been exceptional circumstances such as the findings are found to be perverse or cannot be supported by evidence before the court, or there is a miscarriage of justice.

Concurrent findings of both courts below that the re-

spondent is the person entitled to statutory right of occupancy over the land verged RED and BLUE is wrong and in the circumstances perverse. The land in issue is the land verged BLUE and not the land verged RED. Making far reaching pronouncements on the land verged RED is a deliberate but unsolicited venture into uncharted territory. The order of the trial court, affirmed by the Court of Appeal that:

“Declaration that the plaintiff is entitled to a statutory right of occupancy in respect of ALL THAT piece or parcel of land edged BLUE and RED situate, lying and being behind WAEC office Onikolobo Abeokuta” is hereby set aside for being perverse.

The correct order shall be:

“Declaration that the plaintiff is entitled to a statutory right of occupancy in respect of ALL THAT piece or parcel of land edged BLUE situate, lying and being behind WAEC office Onikolobo Abeokuta.” (p. 1043 B)

LAND LAW - Specific performance

8. Whether an order of specific performance can be ordered?

The issue is whether there exists in law a legally enforceable contract between the parties for the sale of the land. If such a contract exists, then an order of specific performance would issue to enforce the terms thereof.

The parties agreed on N7,000.00 for the land verged BLUE. The appellant paid the sum of N3,000 but failed to pay the balance of N4,000. A legally enforceable contract exists when both sides perform their own side of the contract. With the sum of N4,000.00 still unpaid there is in law a failure of consideration. Specific performance cannot be ordered as there is nothing to enforce. The sale being invalid. And so it is hereby ordered that the respondent makes a refund of N3,000.00 to the appellant. (p. 1045 D)

NOTABLE POINTS OF INTEREST

RHODES-VIVOUR JSC

1. Description of disputed land – Survey plan

The usual issues on land are lease, sale declaration of title, injunction etc. When the courts are to make pronouncements on land in dispute, it is mandatory that the land must be ascertained with definitive certainty and the reliable way to achieve this is for the plaintiff to produce a Survey Plan. (p. 1034 C)

B

2. Declaration of title is discretionary

In the Writ of Summons and Statement of Claim the plaintiffs claim for declaration is identical. The plaintiff asks for a declaration that he is entitled to statutory right of occupancy over all the land behind WAEC office, that is to say he is entitled to the said declaration over the land verged RED, i.e. over the four plots of land. The grant of a declaration is discretionary, and the power should at all times be exercised with caution. In that regard declarations should only be made when the court is satisfied that the party seeking it is entitled to have the court's discretion exercised in his favour. (p. 1042 B)

D

REPRESENTATION

O. O. Ojutalayo with A. A. Isiolaotan, for the Appellant

E P. A. Adesemowo, with A. A. Adebanjo (Mrs.), for the Respondent

CASES REFERRED TO

Woluchem v. Gudi (1981) 5 SC 219

F Ebba v. Ogodo (1984) 1 SCNLR 372

Omoregbe v. Lawani (1989) 3-4 SC 158

Olusoga v. Ricketts (1997) 7 SCNJ 136

Arabe v. Asanlu (1980) 5-7 SC 78

Awomuti v. Salami (1978) 3 SC 105

G State v. Rabi (2013) 2-3 SC (pt. iii) 63

Afolabi v. Western Steel Works Ltd. (2012) 7 SC (pt. iii) 64

Haruna v. AG Federation (2012) 3 SC (pt. iv) 40

Akande v. Adisa (2012) 5 SC (pt. i) 1

Ohochukwu v. AG Rivers State (2012) 2 SC (pt. ii) 102

H BCCI v. Stephens Ltd. (1992) 3 NWLR (pt. 232) 772

Arinze v. First Bank of Nig. Ltd (2004) 18 NSCQR 429

Ebevuhe v. Ukpahara (1996) 7 NWLR (pt. 460) 254

Dokubo v. Bob-Manuel (1967) 1 All NLR 113

STATUTES REFERRED TO

Lands Instrument Registration Law of Ogun State, s. 2

Contracts Law, s. 2

Property & Conveyancing Law of Ogun State, s. 67(i)

Evidence Act, ss. 199, 208, 209

B

LEAD JUDGMENT BY RHODES-VIVOUR JSC

This is an appeal from the decision of the Court of Appeal, (Ibadan Division) delivered on the 23rd day of November, 2004, which affirmed the decision of an Abeokuta High Court delivered on the 20th day of September, 1999. The respondent, as plaintiff sued the defendant/appellant on a 15 paragraph Amended Statement of claim for:

C

(a) A DECLARATION that the plaintiff is the person entitled to a statutory right of occupancy in respect of ALL THAT piece or parcel of land situate lying and being behind WAEC office Onikolobo Abeokuta.

(b) FORFEITURE on grounds of misconduct of any rights of interest in respect of any structure or structures held by the defendant on the said land.

E

(c) N50,000 damages for trespass committed by the defendant for going on the plaintiffs land.

(d) AN ORDER OF PERPETUAL INJUNCTION restraining the defendant his servants, agents, privies from committing any further acts of trespass on the said land.

F

The defendant responded by filing a 29 paragraph amended statement of defence and 6 paragraph counter-claim.

The defendant counter-claimed against the plaintiff as follows: G

(a) A DECLARATION that the agreement reached between the plaintiff and defendant on 6th November, 1988 was an agreement to assign the land in dispute which land in dispute is verged BLUE in Plan No. SOFG/06.001(D)/96 drawn by S.O. Fajobi, Licensed Surveyor and dated 8th February, 1996 and that the said agreement was not a leasehold.

H

(b) AN ORDER of specific performance compelling the plaintiff to execute or process the relevant title documents in favour of the defendant.

(c) AN ORDER of perpetual injunction restraining the plaintiff whether by himself, his servants, agents, privies from disturbing the possession of the counter-claimant in any way or manner whatsoever.

Finally the plaintiff filed a 20 paragraph reply to the amended
B statement of defence and 9 paragraph defence to counter-claim.

Trial commenced on the 10th of December, 1997. The plaintiff and two other persons gave evidence in support of the plaintiffs pleadings, while the defendant, and three other persons gave evidence in defence of the suit, and in proof of the counter-claim. Seven
C documents were admitted as exhibits. In a considered judgment delivered on the 20th of September, 1991, the learned trial judge gave judgment in favour of the plaintiff as follows:

(1) Declaration that the plaintiff is entitled to a Statutory right
D of occupancy in respect of ALL THAT piece or parcel of land edged BLUE and RED situate, lying and being behind WAEC office, Onikolobo, Abeokuta.

(2) Forfeiture on grounds of misconduct of the portion of the land now occupied by the defendant and sufficiently described in
E exhibit '3' and therein edged BLUE.

(3) Injunction restraining the defendant, his privies, servants and agents from committing any further act of trespass on the land sufficiently described in exhibit '3' and therein edged BLUE.

The counter-claim was dismissed. The defendant/appellant was
F not satisfied with the judgment. He appealed.

On the 23rd day of November, 2005 the Court of Appeal affirmed the judgment of the High Court and dismissed the appeal with N5,000 costs against the appellant.

The appeal is against that judgment. In accordance with Order
G 6 rule 5 of the Supreme Court Rules briefs were duly filed. The appellants brief was deemed duly filed on 9/4/08, while the respondents brief was filed on 26/5/08. The appellants filed a reply brief on 3/6/08.

Learned counsel for the appellant formulated four issues from
H his amended Notice of Appeal filed on the 25th of January, 2007. They are:

1. Whether it is proper for the Court of Appeal to affirm an order of declaration of title in favour of the respondent when that

order relates to land on which issues were not joined by the parties and substantial part of which land the respondent admitted he had sold.

2. Whether the Court of Appeal was correct in affirming an order of forfeiture in favour of the respondent after the court had found that "... all the ingredients of a leasehold have not been established by the respondent." B

3. Whether Exhibit 2 was correctly construed by the Court of Appeal under section 2 of the Lands Instrument Registration Law of Ogun State, S.2 of the Contracts Law and S.67(i) of the Property and Conveyancing Law of Ogun State instead of under sections 199, 208 and 209 of the Evidence Act in an endeavour by the Court to determine the nature of the transaction between the parties in relation to the land in dispute. C

4. Whether the Court of Appeal was not wrong when it failed D to hold that on a preponderance of evidence the appellant had established that the agreement between him and the respondent was for the sale of the land in dispute and not lease thus entitling the appellant to judgment on his counterclaim against the respondent who had failed to prove his entire case by adequate credible evidence and applying the rule in *Woluchem v. Gudi* (1981) 5 SC P219 and *Ebba v. Ogodo* (1984) 1 SCNLR P372. Whether the Court of Appeal ought not to have intervened in the evaluation of the evidence by the trial judge in view of the abdication of that responsibility F by the trial court.

On the other side of the fence the learned counsel for the respondent formulated three issues. They are:

1. Whether the trial court and the court below were right in granting an order of declaration of title in favour of the respondent. G
2. Whether the sale or lease of the land in dispute was valid.
3. Whether the counterclaim of the appellant was rightly rejected by the trial court and the court below.

A careful review of the pleadings, evidence led and accepted by the trial court and affirmed by the Court of Appeal, reveals that the threshold issue is whether the land in dispute was sold or leased and whether the findings of both courts below on this issue was correct. All subsequent pronouncements by the courts below on forfeiture, Declaration of title in favour of the plaintiff/respondent, specific H

performance, injunction flow from that finding. Accordingly the appellant's issues 1, 3 and 4 would not be considered. They are rather prolix and do not properly present the real issues. Rather the appellant's issue 2 and all the respondents issue to my mind properly address the real legal issues in this appeal. They are clear, simple
B straight to the point and cover all the grounds of appeals. They would be considered in this appeal.

The issues for determination are:

1. Whether the sale or lease of the land in dispute was valid.
- C 2. Whether the Court of Appeal was correct in affirming an order of forfeiture in favour of the respondent after the court had found that "...all the ingredients of a leasehold have not been established by the respondent."
3. Whether the trial court and the court below are right in
D granting an order of declaration of title in favour of the respondent.
4. Whether the counterclaim of the appellant was rightly rejected by both courts below.

At the hearing of the appeal on the 16th day of December, 2014, learned counsel for the appellant, Mr. O.O. Ojutalayo adopted
E his briefs and urged this court to allow the appeal and uphold the counterclaim.

Learned counsel for the respondent, Prince P.A. Adesemowo adopted the respondent's brief and urged this court to dismiss the
F main appeal, and counterclaim.

For clarity issue No.4 is the sole issue on the defendant/appellant counterclaim. I shall now address the issues, but before doing that, the facts are these.

The plaintiff is the owner of a piece of land, measuring 492.620
G sq. meters and verged BLUE on the Survey Plan, exhibit 3. The defendant approached the plaintiff and negotiated for the plot for a piggery business. The plaintiff agreed. The threshold issue is whether the plaintiff sold the land to the defendant for N7,000.00 or leased the land to the defendant for the same amount for the piggery business.
H Both courts below came to the same conclusion that the plaintiff leased the land to the defendant, but that the lease was not valid because essential ingredients of a lease, e.g. no commencement date, no mode of determination of the lease, were in the lease. The courts below rightly found the lease to be invalid but granted forfeiture of

an invalid lease.

The learned trial judge granting forfeiture of the lease said:

“...the defendant attitude of the defendant by brazenly constructing a giant fence and gate on the land in dispute is a defiant challenge to plaintiff’s title by the defendant, amounts to a misconduct and the defendant will forfeit possession of the said plot of land to the plaintiff and it is hereby forfeited.”

The above reasoning was affirmed by the Court of Appeal. All through the trial the defendant maintained that he bought the land from the plaintiff. He counter-claimed for specific performance. His counter-claim was dismissed. This was affirmed by the Court of Appeal. Finally the courts below granted the plaintiff statutory right of occupancy over a larger area of land than the area verged blue, and restrained the defendant from further trespass on the land verged Blue.

ISSUE 1

Whether the sale or lease of the land in dispute was valid.

Learned counsel for the appellant observed that the appellant was able to establish that the agreement between the appellant and the respondent was for sale of the land in dispute under native law and custom. He further observed that the respondent allowed the appellant to pay the entire purchase price in installments, and he paid part of the purchase price and was put into possession of the land in the presence of DW3 (the appellant’s wife). He submitted that evidence led by DW1, DW3 and DW4 should have been believed and acted upon by the Court of Appeal. Reliance was placed on *Omoregbe v. Lawani* (1989) 3-4 SC P.158. He observed that the Court of Appeal misdirected itself when it relied on *Olusoga v. Ricketts* (1997) 7 SCNJ P.136 and found that there was no valid sale of the land by the respondent to the appellant. Learned counsel further observed that if this court examines the exhibits it would be convinced that there was a valid sale of the land in dispute by the respondent (vendor) to the appellant (purchaser). Concluding he submitted that the land in dispute was sold to the appellant by the respondent and at no time was the said land leased to the appellant.

Replying learned counsel for the respondent observed that the respondent pleaded and gave evidence that the leasehold commenced in January 1987 for 3 years and it was to terminate on the 31st day

of December, 1989. He further observed that the appellant made two payments amounting N3,000.00 (three thousand naira) only. i.e. N2,000 on 7/11/88 and N1,000 on 23/10/89 contending that an outstanding sum of N4,000 was unpaid. He submitted that a lease properly so called was not established in that the ingredients of a proper lease were not contained in the pleadings, contending that the court below was right to so hold. Concluding he submitted that he leased the land to the appellant, contending that the appellant failed to establish a valid sale of the land in dispute in his favour. He urged this court to hold that the respondent leased the land to the appellant.

The usual issues on land are lease, sale declaration of title, injunction etc. When the courts are to make pronouncements on land in dispute, it is mandatory that the land must be ascertained with definitive certainty and the reliable way to achieve this is for the plaintiff to produce a Survey Plan. See *Arabe v. Asanlu* (1980) 5-7 SC P.78, *Awomuti v. Salami* (1978) 3 SC P.105.

The land in dispute is behind WAEC office, Onikolobo Abeokuta. It measures 492.630 sq meters and it is the area edged BLUE on the Survey Plan, Exhibit 3. There is no doubt whatsoever on the identity of the land, and both sides are in agreement on the identity of the land. The dispute has to do with the appellant's interest on the land. The respondent says he leased the land to the appellant, while the appellant says he bought the land from the respondent. It must be noted that the purported lease is unwritten and no receipts and no agreement in writing were tendered to show a purported sale of the land.

The learned trial judge held as follows:

"...I find that DW4 is the lessee while DW3 carried on the piggery business. There is available evidence that the land was to be used for piggery business of DW3 and there is no dispute... However there was no mode of determination of the lease and no evidence was led on this. Coupled with this no evidence was led on the commencement date. I am in support of the learned defence counsel submission that all the essential ingredient of a leasehold have not been established by the plaintiff..."

His lordship concluded as follows:

"...it can be safely concluded that the parol agreement for the

lease is invalid for it did not state the commencement date.”

The finding of the learned trial judge is that the respondent leased the land to the appellant, but the lease was invalid. On whether the respondent sold the land to the appellant, this is what the learned trial judge had to say.

“...the defendant (purchaser) made part payment of N3,000.00 within a period of 2 years and offered to pay the balance of N4,000.00 in 1993 a period of 4 years after the plaintiff had made a demand for the balance. The question is? Was the balance paid within a reasonable period? To my mind, I will answer in the negative. The defendant was let into possession of the plot in dispute in June 1987 when they started the piggery business. First payment was made on 7/11/1988 of N1,000 and another payment of N2,000.00 in October, 1989. The balance was offered in March 1993 and the plaintiff declined to accept it...”

After referring to *Odusoga v. Ricketts* (1997) 7 SCNJ P.133 on the valid sale of land under Customary Law His lordship concluded thus:-

“...that where the purchase price is not fully paid there can be no valid sale, notwithstanding that the purchaser is in possession.”

The finding of the learned trial judge is that there was no sale of the land simply because the purchase price was fully paid. The Court of Appeal agreed with the findings of the learned trial judge when it held.

On the purported lease:

“I have taken a hard look at the totality of the evidence adduced by the parties at the court below that all the ingredient of a leasehold have not been established by the respondent.”

On the purported sale:

“I must say it loud again that there was no contact of sale either in writing or through parol evidence between the parties.”

The finding of the trial court was affirmed by the Court of Appeal, and it is that at no time did the respondent sell the land in question to the appellant, rather he leased the land to the appellant for piggery business, but the lease was invalid because some essentials of a lease were not present.

I am now to decide if this finding by the Court of Appeal was flawed, and this can only be done by this court evaluating

evidence. It is the duty of the trial judge to receive all relevant evidence. That is perception. The next duty is to weigh the evidence in the context of the surrounding circumstances of the case. That is evaluation. A finding of fact involves both perception and evaluation. Evaluation of relevant evidence before the trial court and the ascription of probative value to such evidence are the primary functions of the trial court. This is so since that court saw, heard and watched the demeanour of the witnesses when they gave evidence. Consequently where this is done the Appeal Court should always be reluctant to differ from the trial judge's finding. It is only where the trial court failed to evaluate such evidence properly that an appellate court can re-evaluate evidence. Furthermore, evaluation of a document is not within the exclusive preserve of the trial court. A trial court and an appellate court have equal rights in evaluation of documentary evidence. See *Iwuoha & Ors. v. Nigeria Postal Services Ltd. & Ors.* (2003) 4 SC (Pt.ii) P.37, *State v. Rabi* (2013) 2-3 SC (Pt.iii) P.63, *Afolabi & 6 Ors. v. Western Steel Works Ltd. & 2 Ors.* (2012) 7 SC (Pt.iii) P.64, *Haruna v. A.G. Federation* (2012) 3 SC (Pt.iv.) P.40.

I will now proceed to evaluate documentary evidence tendered and admitted as exhibits by the court to see if the agreement between the parties was for lease or sale of the land. Exhibit 2 is a letter written by the respondent to the appellant. It is dated the 29th day of November, 1989. The opening paragraph of the letter reads:

"Bearer is my daughter. I am sending her to collect the cheque or cash for the balance on the piece of land sold to you. (N4,000.00)"

The Court of Appeal had this to say on exhibit 2:

"It is my view that exhibit 2 on which the appellant relies on his claim of sale at the court below being a letter claiming balance of payment did not represent all terms and conditions of the agreement to sell to the appellant and therefore insufficient to amount to a memorandum for purposes of section 67(i) of the property and conveying Law Cap. 100 which require such agreement for sale or other disposition of land to be in writing. Exhibit 2 to my mind being a letter of demand at best indicating the existence of such agreement, it will not be enforced in the absence of clear evidence of its terms and failure to ascertain and identify the land being referred to in the said

exhibit”.

What does the opening paragraph of exhibit 2 mean or represent?

If pleadings are to be of any use parties must be held bound by them. See Akande v. Adisa & Anor (2012) 5 SC (Pt.i) P.1, Ohochukwu v. A.G. Rivers State & 2 Ors (2012) 2 SC (Pt.ii) P.102. B

In paragraph 21 of the statement of defence the appellant pleaded as follows:

“21. To the astonishment of the defendant the plaintiff wrote a letter dated 29th of November, 1989 seeking for payment of the sum of N4,000.00k (Four thousand naira) instead of the outstanding balance of N3,000.00k (Three thousand naira) on the sum originally mutually agreed upon.” C

The respondent filed a reply, but did not join issues with the defendant/appellant. The position of the law is that where the defendant avers to a fact in his statement of defence and the plaintiff fails to file a reply to deny the averment, the plaintiff may lead evidence to deny the averment in the statement of defence. See BCCI v. Stephens Ltd. (1992) 3 NWLR (Pt.232) P.772, Sketch Publishing Co. Ltd. v. Ajagbemokeferi (1980) 1 NWLR (Pt.100) E P.678.

Under cross-examination the plaintiff/respondent said.

“...I remember I wrote a letter in November, 1989 demanding for the balance of the purchase money for the land in dispute. I remember that the balance I demanded for was N4,000.00 because I needed the money.” F

By exhibit 2 the respondent is asking the appellant to pay the outstanding sum of N4,000.00 for the land. The contents of exhibit 2 are further confirmed by the respondent when he said on oath: G

“I wrote a letter in November, 1989 (exhibit 2) demanding for the balance of the purchase money”

Purchase money is for the sale of land and not for a lease. Finally exhibits 4 and 7 are cheques for N4,000.00 which the appellant sent to the respondent to offset the outstanding sum of N4,000.00, but the respondent refused to accept. I am satisfied that the exhibits and even the testimony of the respondent (as plaintiff) under oath confirm beyond all doubt that the respondent agreed to sell the land in dispute and the appel- H

lant agreed to buy the land for the sum of N7,000.00. It was further agreed that payment shall be by installments.

The Court of Appeal fell into grave error when it said that exhibit 2 did not represent all the terms and conditions of the agreement to sell to the appellant and therefore insufficient to amount to a memorandum for purposes of section 67(i) of the Property and Conveyancing Law, Cap. 100... Rather exhibit 2 is a clear demand for N4,000.00 representing outstanding sum for the purchase price for the land. To my mind the Court of Appeal mixed up the requirement for a valid sale of land with a simple demand for outstanding sum due for purchase of the land. In the circumstances the findings of the trial court affirmed by the Court of Appeal that the agreement between the parties was for a lease of the land is perverse. The correct position is that the respondent agreed to sell the land to the appellant.

Whether the sale of the land in dispute is valid? In *Odusoga v. Ricketts* (1997) 7 SCNJ P.135-

This court held that to constitute a valid sale of land under Yoruba Customary Law three essential ingredients are required, and they are:

- 1. Payment of the purchase price,**
- 2. Purchaser is let into possession by the vendor, and**
- 3. In the presence of witnesses.**

It follows that where the purchase price is not fully paid there can be no valid sale even if the purchaser is in possession (as in this case). Where part payment of the purchase price was made and the purchaser defaults in paying the balance within a reasonable time the vendor would be at liberty to re-sell since legal title remains with the vendor until full price is paid by the purchaser. The purchaser (i.e. the appellant) paid N2,000.00 on 7/11/88 and N1,000.00 on 23/10/89. The outstanding sum of N4,000.00 remained unpaid thereafter. On 28/11/89 the respondent wrote to the purchaser requesting that the balance of N4,000.00 be paid. It was not until 5/3/90 and 22/3/93 that the purchaser sent cheques for N4,000.00 to the respondent. Both cheques were rejected. It is clear that the sale of the land in dispute was not valid since

the purchase price was not fully paid. Furthermore the purchaser has failed to pay the balance of the purchase price within a reasonable time. The sale of the land in dispute is in the circumstances not valid. On these facts, particularly the contents of exhibit 2 a lease was never contemplated by the parties.

B

ISSUE 2

Whether the Court of Appeal was correct in affirming an order of forfeiture in favour of the respondent after the court had found that “...all the ingredients of a leasehold have not been established by the respondent.”

C

In ordering forfeiture the reasoning of the trial court is interesting. The learned trial judge said:

“I hold that the defiant attitude of the defendant by brazenly constructing a grant fence and gate on the land in dispute is a defiant challenge to plaintiffs title by the defendant, amounts to a misconduct and the defendant will forfeit possession of the said plot of land to the plaintiff and it is hereby forfeited.”

The learned trial judge thereafter proceeded to enter judgment for the plaintiff inter alia as follows:

E

“There shall accordingly be judgment for the plaintiff as follows:

2. Forfeiture on grounds of misconduct of the portion of the land now occupied by the defendant and sufficiently described in exhibit 3 and therein edged BLUE.”

F

The Court of Appeal agreed with the learned trial judge on forfeiture. The learned trial judge found that the purported lease was invalid because the essentials of a lease, e.g. commencement date, no mode of determination of the lease, were not present. But notwithstanding the invalid lease as found by the trial court, the court still went ahead to order forfeiture.

G

Learned counsel for the appellant observed that the Court of Appeal was wrong to order forfeiture since the respondent had failed to establish the relationship of lessor and lease between him and the respondent. He submitted that an order of forfeiture can only be validly made to determine a legally subsisting lease. He urged this court to correct the error by setting aside the order of forfeiture since there is no leasehold or tenancy to which the order can be attached.

H

Responding, learned counsel for the respondent observed that the courts below were right to order forfeiture. He submitted that it was wrong for the appellant to build a fence on the land, and a power house, contending that this amounts to a denial of the respondents title and that is a ground for forfeiture. Reference was made to *Dokubo & anor. v. Chief D. Bob-Manuel & anor* (1967) 1 ALL NLR p.113.

Where a lease agreement is valid, that is legally binding on the parties and the customary tenant (or lessee) exhibits conduct that shows he is claiming ownership of the subject matter (in this case land) that is to say he denies the lessor or overlord's title, this conduct amounts to a misbehaviour for which the lease is liable to be forfeited.

My lords, the appellant constructed a giant fence, gate and powerhouse on the land, without the consent of the respondent. He went on to claim that the respondent had sold the land to him. That is a challenge to the plaintiff/respondents title and it amounts to misconduct for which the appellant would forfeit possession of the land in dispute to the plaintiff. Such an order cannot be ordered because an order for forfeiture can only be ordered if the lease is valid. An order for forfeiture cannot be ordered because the lease is invalid. Both courts were wrong to order forfeiture. Furthermore it was never in the contemplation of the parties that the agreement between them was for a lease. The agreement between them was for a sale of the land, and forfeiture relates to leases and not to sale of land. Forfeiture on the grounds of misconduct or any other ground can only be ordered to determine a valid lease. Since there was no valid lease in existence both courts below were in grave error to order forfeiture to determine an invalid lease.

ISSUE 3

Whether the trial court and the court below were right in granting an order of declaration of title in favour of the respondent.

The order of the trial court which was affirmed by the Court of Appeal reads:

“Declaration that the plaintiff is entitled to a statutory right of occupancy in respect of ALL THAT piece or parcel of land edged BLUE and RED situate, lying and being behind WAEC office, Onikolobo, Abeokuta.”

Now, the plaintiff/respondents claim endorsed on the Writ of Summons reads in part:

“The plaintiff’s claim against the defendant/s jointly and severally is for-

(a) A DECLARATION that the plaintiff is the person entitled to a statutory right of occupancy in respect of ALL THAT piece of parcel of land situate lying and being behind WAEC office Onikolobo Abeokuta.” B

Paragraph 14 of the amended statement of claim reads in part:

“14. WHEREOF the plaintiffs claim against the Defendant are for:- C

(a) A DECLARATION that the plaintiff is the person entitled to a statutory right of occupancy in respect of ALL THAT piece or parcel of land situate lying and being behind WAEC office Onikolobo Abeokuta.” D

Learned counsel for the appellant observed that the area verged BLUE is the area in dispute and it falls within the area verged RED. He submitted that the Court of Appeal was wrong to have entered an order of declaration in favour of the respondent in respect of the area verged RED when no issues were joined by the parties in respect of that portion. He further submitted that an order of declaration can only be made or affirmed on the land edged BLUE” Reliance was placed on *Chinwendu v. Mbamali* (1980) 3 SC P.31. E

Learned counsel for the respondent observed that the grant of declaration of title to the respondent is as a result of concurrent findings of the two lower courts, that the respondent is entitled to the declaration. Relying on *Arinze v. First Bank of Nig. Ltd* (2004) 18 NSCQR p.429, *Ebevuhe v. Ukpahara* (1996) 7 NWLR (Pt.460) p.254. F

He urged this court not to depart from the finding of the two lower courts. G

Exhibit 3 is the Survey Plan of four plots of land verged RED behind WAEC office Onikolobo Abeokuta. The area verged Red is a very large area of land. It contains four plots of land and the said area verged Red measures 3925.496 square meters. Within the area verged Red (moving from left to right) is first a large plot of land, after it is learned measuring 919.858 square meters, verged GREEN. Beside it is land verged BLUE measuring 492.620 sq. meters, the land in H

dispute, and finally after the land verged BLUE is a large plot of land.

The area in dispute is the area verged BLUE it is 492.630 sq. meters. It is clear that the area verged BLUE falls within the area verged RED. In fact it is one of the four plots within the area verged RED.

B In the Writ of Summons and Statement of Claim the plaintiffs claim for declaration is identical. The plaintiff asks for a declaration that he is entitled to statutory right of occupancy over all the land behind WAEC office, that is to say he is entitled to the said declaration over the land verged RED, i.e. over the four plots of land. The grant of a declaration is discretionary, and the power should at all times be exercised with caution. In that regard declarations should only be made when the court is satisfied that the party seeking it is entitled to have the court's discretion exercised in his favour. ***All the evidence pleaded, led and accepted by the trial judge is on the land verged BLUE, and the issues were whether the land verged BLUE was leased or sold to the defendant/appellant, whether an order of forfeiture should be ordered against the defendant/appellant on the land verged BLUE, whether an injunction should be granted to restrain the defendant/appellant from further acts of trespass on the land verged BLUE. It is long settled that where in a claim for declaration of title over a large area of land, the plaintiff succeeds in proving his claim for a smaller area, judgment should be given for the smaller area provided it is the area in dispute. It is not the business of the court to spend judicial time resolving matters not in dispute. The respondent established beyond all doubt that he owns the land verged BLUE and he is entitled to a declaration as prayed for failure of consideration. The appellant failed to pay the agreed purchase price for the land verged BLUE.***

H It was agreed that the defendant should pay the price for the land verged BLUE instalmentally. The sum agreed was N7,000.00. Under Yoruba Customary Law the full purchase price for the land must be paid before there is a valid sale. Where the defendant makes part payment and the balance remains unpaid the legal title remains with the plaintiff (vendor) until the full price is paid by the defendant (purchaser). The defendant paid N3,000.00. The balance of N4,000.00 was

never paid. Since the balance of the purchase price was never paid the legal title resides with the plaintiff (vender).

In view of the fact that legal title resides with the plaintiff, the plaintiff is entitled to a statutory right of occupancy in respect of the land verged BLUE, measuring 492.630 square meters, situate, lying and being behind WAEC office, Onikolobo, Abeokuta.

An appellate court would rarely upset concurrent findings of fact of the two courts below except where there has been exceptional circumstances such as the findings are found to be perverse or cannot be supported by evidence before the court, or there is a miscarriage of justice. See Haruna v. A.G. Federation (2012) 3 SC (Pt.iv) p.40, Adekoya v. State (2012) 3 SC (Pt.iii) p.36

Concurrent findings of both courts below that the respondent is the person entitled to statutory right of occupancy over the land verged RED and BLUE is wrong and in the circumstances perverse. The land in issue is the land verged BLUE and not the land verged RED. Making far reaching pronouncements on the land verged RED is a deliberate but unsolicited venture into uncharted territory. The order of the trial court, affirmed by the Court of Appeal that:

“Declaration that the plaintiff is entitled to a statutory right of occupancy in respect of ALL THAT piece or parcel of land edged BLUE and RED situate, lying and being behind WAEC office Onikolobo Abeokuta” is hereby set aside for being perverse.

The correct order shall be:

“Declaration that the plaintiff is entitled to a statutory right of occupancy in respect of ALL THAT piece or parcel of land edged BLUE situate, lying and being behind WAEC office Onikolobo Abeokuta.”

ISSUE 4

Whether the counter-claim of the appellant was rightly rejected by both courts below.

The defendant/counter-claimants/appellant claim was for:

(a) A declaration that the agreement reached between the plaintiff and the defendant on 6th November, 1988 was an agree-

ment to assign the land in dispute which land is edged BLUE in

(b) Plan No.SOF/OG.ODI(D)/96 drawn by S. O. Fajobi, Licensed Surveyor and dated 8th February, 1996 and that the said agreement was not for a leasehold.

(c) An order of specific performance compelling the plaintiff to execute or process the relevant title documents in favour of the defendant.

(d) An order of perpetual injunction restraining the plaintiff, whether by himself, his servants, agents, privies from disturbing the possession of the counter-claimant in any-way or manner whatsoever.

The Court of Appeal dismissed the counter-claim. Dismissing the counter-claim the Court of Appeal was of the view that since the purchase price for the land edged BLUE was not fully paid there was no valid sale.

Agreeing with the learned trial judge the Court of Appeal said:

“It is manifest from the records that appellant pleaded and gave evidence that full payment or purchase price had not been paid.... As the appellant has not paid the full purchase price there was no sale of the land in dispute to the appellant under native law and custom.”

Both courts below dismissed the counter-claim. That in effect means, according to the courts below that the plaintiff did not sell the land edged BLUE to the defendant/appellant, (a finding that I have found to be perverse) and so an order of specific performance to compel the plaintiff to execute title document in favour of the defendant/appellant, and an injunction restraining the plaintiff from disturbing the possession of the defendant/counter-claimant appellant cannot be granted.

Learned counsel for the appellant observed that evidence led, and accepted at trial was that the agreement between him and the respondent was for sale of the land under native law and custom. Reliance was placed on exhibit 2, and evidence of DW1, 2, 3, and 4. He further observed that it was agreed that the purchase price shall be paid installmentally and he paid N3,000.00 but had not paid the balance of N4,000.00. He urged this court to set aside the erroneous finding of the Court of Appeal that there was no sale, as *Odusoga v. Ricketts* (supra) is distinguishable from this case.

Learned counsel for the respondent submitted that the courts

below were right to dismiss the counter-claim. He observed that it is the date full purchase price is paid that a sale of land is concluded under native law and custom. Reliance was placed on *Odufulu v. J. Adeoye & Fatoke* (1977) 2 SC p.11.

Finally he submitted that the appellant is not entitled to an equitable decree of specific performance because the appellant has a remedy by asking for a refund of the sum of N3,000.00

The well laid down position, is that before there is a valid sale of land under Yoruba native law and custom payment must be made in full for the land. In this case both sides agree that N7,000.00 was agreed. Unchallenged evidence is that N3,000.00 was paid. A balance of N4,000.00 was never paid. There was no valid sale. Both courts below were correct to rule that there was no valid sale of the land verged BLUE in the Survey Plan, exhibit 3.

Whether an order of specific performance can be ordered?

The issue is whether there exists in law a legally enforceable contract between the parties for the sale of the land. If such a contract exists, then an order of specific performance would issue to enforce the terms thereof.

The parties agreed on N7,000.00 for the land verged BLUE. The appellant paid the sum of N3,000 but failed to pay the balance of N4,000. A legally enforceable contract exists when both sides perform their own side of the contract. With the sum of N4,000.00 still unpaid there is in law a failure of consideration. Specific performance cannot be ordered as there is nothing to enforce. The sale being invalid. And so it is hereby ordered that the respondent makes a refund of N3,000.00 to the appellant.

The judgment of the trial court affirmed by the Court of Appeal reads as follows:

1. Declaration that the plaintiff is entitled to statutory right of occupancy in respect of ALL THAT piece or parcel of land edged BLUE and RED situate, lying and being behind WAEC office, Onikolobo, Abeokuta.

2. Forfeiture on grounds of misconduct of the portion of the land now occupied by the defendant and sufficiently described in exhibit 3 and therein edged BLUE.

3. Injunction restraining the defendant his privies, servants and agents from committing any further act of trespass on the land sufficiently described in exhibit '3' and therein edged BLUE.

The appeal succeeds in part, and for clarity the judgment of this court is as follows:

- B 1. The plaintiff/respondent is entitled to a statutory right of occupancy in respect of ALL THAT piece or parcel of land edged BLUE, lying and being behind WAEC office, Onikolobo Abeokuta.
- 2. Order of forfeiture is hereby set aside
- C 3. Order of injunction is hereby set aside
- 4. The plaintiff/respondent is hereby ordered to return the sum of N3,000.00 to the appellant forthwith.

D MUNTAKA-COOMASSIE JSC

This is an appeal against the judgment of the Court of Appeal Ibadan Division delivered on 23/11/2004, which court affirmed the decision of an Abeokuta High Court.

E The respondent herein, as the plaintiff sued the defendant now appellant on a 15 paragraphs amended statement of claim for:-

- 1. The plaintiff is a businessman and resides at Onikolobo opposite Abeokuta Girls Grammar School, Abeokuta.
- 2. The defendant is a Medical Doctor with the Mercy Group Clinics, Panseke Abeokuta.

F 3. The plaintiff avers that the land in dispute is situate lying and being behind the WAEC office Onikolobo Abeokuta and it does not form part or portion of the land originally sold to the defendant for residential purpose.

G 4. The plaintiff aware that the wife of the defendant. Approached the plaintiff some times in January, 1987 For a lease of the Land in dispute for the purpose of carrying on the piggery business at an agreed rent of N3,000:00 per annum, the defendant from there took further transactions on the land with the Plaintiff and there-
H after proceeded to build a wall fence round the land in dispute installed a giant Generating set thereon without the consent knowledge and approval of the plaintiff.

5. The plaintiff avers that on the basis of the said agreement a sum of N3,000:00 was paid by two Installments of N2,000:00 and

N1,000:00 respectively by the defendant to the plaintiff, whilst the balance of N4,000:00 Was never paid by the defendant despite persistent call for its payment due to some mis-understandings going on in the defendant's establishment as at the time.

6. The plaintiff further states that to his utmost astonishment the piggery business carried on by the defendant's wife on the disputed piece of land was closed down sometimes in the middle of July, 1989. B

7. Sometimes, in February, 1993, 4 years thereafter, the plaintiff took a surveyor to survey the whole plot of his unsold portions thereof including the land in dispute and on getting to the land the surveyor met the defendant's wife who advised him to see her husband about the disputed land before carrying out the surveyor. The plaintiff declined seeing the defendant for he sees no reason for doing so. C D

8. The plaintiff avers that to his utter dismay he was later confronted by a strong fence built round the dispute plot of land with a gate firmly fixed thereon together with a plant house to accommodate a heavy generating plant and which was carried out on the land in dispute by the defendant without the plaintiff's consent, knowledge and authority. E

9. The plaintiff shall adduce evidence at the trial that the plot of land in dispute was never bought from him by the defendant and that it never forms any part or portion of the land sold to the defendant by the plaintiff. The part or portion sold to the defendant had been fully developed and the defendant resides therein. F

10. The plaintiff states that there was no agreement at all between the parties for selling or transferring the disputed plot of land to the defendant in any form or shape and shall contend that the plaintiff does not intend to sell and will not sell or transfer the plot of land to the defendant or to any other person at the trial of this suit. G

11. The plaintiff further declares that the mutual agreement reached by the parties to this suit on the piece of land does not allow nor permit the development or erection of any structure whatsoever on the piece of land now in dispute, but to be used essentially for the piggery business of the defendant's wife' H

12. The plaintiff has commissioned Mr. F. O. Fajobi a land surveyor to survey the land in dispute and the surveyor has handed

over to be plaintiff the survey plan No.SOF.GG - 001 (D)/96. The plaintiff shall rely on this plan at the trial.

13. By a solicitor's letter dated 26th March, 1993, the defendant was given 7 days to remove all the structures unlawfully erected on the land by way of trespass, but the plaintiff refused so to do. The plaintiff shall found on this letter at the trial of this suit.

14. WHEREOF the plaintiffs claim against the defendants are for:

(a) A DECLARATION that the plaintiff is the person entitled to a statutory right of occupancy in respect of All THAT place or parcel of land situate lying and being behind W.A.E.C. Office Onikolobo Abeokuta

(b) FORFEITURE on grounds of misconduct of any rights of interest in respect of any structure or structures held by the defendant on the said land.

(c) N50,000:00 damages for trespass committed by the defendant for going on to the plaintiffs land.

(d) AN ORDER OF PERPETUAL INJUNCTION restraining the defendant his servants, agent's privies from committing any further action acts of trespass on the said land.

15. The annual rental value of the land is N100.00

Amended 7th day of Jan. 98 pursuant to the order of Court.

Dated the 7th day of January, 1998

The trial court at the end of the trial held thus see pp 104 - 135 of the record at p.135 the trial judge held thus:-

"There shall accordingly be judgment for plaintiff as follows:-

1. Declaration that the plaintiff is entitled to a statutory right of occupancy in respect of ALL THAT piece or parcel of land edge blue and red situate, lying and being behind WAEC office, Onikolobo, Abeokuta.

2. Forfeiture on grounds of misconduct of the portion of the land now occupied by the defendant and sufficiently described in Exhibit '3' and therein edged blue.

3. Injunction restraining the defendant his privies, servants and agents from committing any further acts of trespass on the land sufficiently described in Exhibit '3' and thereon edged blue.

The defendant's claims in the counter-claim are dismissed in their entirety".

On appeal to the court of Appeal it was held that “the briefs of the appellant are loaded with legal technicalities. In the face of the evidence before the trial court, it will amount to sheer folly and injustice to defeat the cause of justice on mere technicalities. The trend in the Supreme Court and this court is to lean towards doing substantial justice in place of technicalities and strict legalism. See *Nwosu v. Imo state Environmental sanitation Authority* (1990) 2 NWLR (Pt.125) p. 638 at p.717; *The State v. Gwonto Europharm & 4 Ors.* (1983) 3 SC 62 at p.76; *U.B.A. v. (Nig) Ltd & Anor* (1990) 6 NWLR (Pt.155) 239-242.

In the instant case, to shut out the respondent from the plot of land in dispute will amount to injustice based on legal technicalities, having established that the title to the plot of land in dispute is still vested in him though he parted with the possession when he let the appellant into possession of the said plot in 1987 for piggery business, a fact which was not denied by the appellant.

In the final analysis, I hold that this appeal lacks merit and it is therefore dismissed. I uphold the judgment of the lower court delivered on 20/9/99.

The appellant still not satisfied with the unanimous decision of the court below filed an appeal to this court on a notice of appeal containing five (5) grounds of appeal. They are hereunder reproduced without their respective particulars.

1. The learned Justices of the Court of Appeal erred in law when they granted an order of declaration of entitlement to right of Occupancy to the Respondent in respect of a parcel of land which was not in dispute and on which issues were not joined by parties in both their pleadings and evidence.

2. Having held that “...all the ingredients of a leasehold have not been established by the respondent” in respect of the land in dispute the learned Justices of the Court of Appeal erred in law when they awarded an order of forfeiture to the respondent.

3. The learned Justices of the Court of Appeal misdirected themselves on the facts when they held that: “...as the appellant has not paid the full purchase price there was no sale of the land in dispute under native law and custom” when evidence on record did not support the finding thus making it perverse and which finding has engendered a gross miscarriage of justice to the appellant.

4. The learned Justice of the Court of Appeal misdirected themselves in law when they held that Exhibit ‘2’ (letter written by the respondent to the appellant to demand for the balance of the consideration for land “sold”) is not an instrument affecting land within Section 2 of the Land Instruments Registration Land Cap 53 Laws of Ogun State thereby resolving the efficacy of Exhibit 2 against the appellant which decision has led to a miscarriage of justice.

5. The learned Justices of the Court of Appeal erred in law when they upheld the case of the respondent and dismissed the counter claim of the appellant when the decision is not borne out by the evidence on record.

On 16/12/2074 the parties have adopted their briefs of argument and filed issues for determination thus:-

The appellant formulated four (4) issues as follows:-

1. Whether it is proper for the court of Appeal to affirm an order of declaration of title in favour of the respondent when that order relates to land on which issues were not joined by the parties and substantial part of which land respondent admitted he had sold.

2. Whether the Court of Appeal was correct in affirming an order of forfeiture in favour of the respondent after the court had found that “...all the ingredients of a leasehold have not been established by the respondent” in respect of the land in dispute the learned justices of the Court of Appeal erred in law when they awarded an order of forfeiture to the respondent.

3. Whether Exhibit 2 was correctly construed by the Court of Appeal under Section 2 of the Lands Instrument Registration Law of Ogun State; S.2 of the Contracts Law and S.67(1) of the Property and Conveyancing Law of Ogun State instead of under Sections 199, 20B and 209 of the Evidence Act in an endeavour by the court to determine the nature of the transaction between the parties in relation to the land in dispute.

4. Whether the Court of Appeal was not wrong when it failed to hold that on a preponderance of evidence the appellant had established that the agreement between him and the respondent was for the sale of the land in dispute and not lease thus entitling the appellant to judgment on his counter claim against the respondent who had failed to prove his entire case by adequate credible evidence and applying the rule in *Woluchem V. Gudi* (1981) 5 SC 291

and Ebba V. Ogodo (1984) 1 SCNLR 372 whether the Court of Appeal ought not to have intervened in the evaluation of the evidence by the trial judge in view of the abdication of that responsibility by the trial court.

The respondent, on his part distilled three (3) issues for consideration of this appeal. He urged this court to dismiss this appeal in its entirety. B

It goes without saying and the law affirms that, i.e. where parties to a contract or agreement are not agreeable for ad idem there can be no valid transmission of interest. C

Appellant, Dr. Soga Ogundalu, insisted that there is a right of sale of the land dispute in his favour, the respondent herein, Chief A. E. O. Macjob is only talking about leasing the property in question to the appellant and never sold to him he claims to have title in the property rest in him. D

I was fortunate to have read in advance the lead judgment of my learned brother Rhodes-Vivour JSC. I entirely agree with his lordship's conclusion that the appeal succeeds in part. The decision of this court, for the avoidance of any possible doubt is as follows:-

(i). The plaintiff/Respondent is entitled to a statutory right of occupancy in respect of all that piece or parcel of land edged blue, lying and being behind WEAC office Onikolobo Abeokuta. E

(ii). Order of forfeiture is set aside.

(iii). Order of injunction is hereby set aside. F

Appeal dismissed.

NGWUTA JSC

I read in draft the well reasoned judgment just delivered by my learned brother, Rhodes-Vivour, JSC, and I entirely agree with the reasoning and conclusion arrived at.

Based on the said reasoning and conclusion, I also allow the appeal in part and adopt the orders made by His Lordship. H

AKA'AH S JSC

I read before now the judgment of my learned brother Rhodes-Vivour JSC. The judgment is quite lucid.

It is obvious that the disputed area is the one edged Blue which is 492.630 sq. meters in size. This is the area the plaintiff/respondent claimed to have leased to the defendant/appellant but which the latter prayed the court to order specific performance in the counter - claim. As it turned out, even though the plaintiff/respondent expressed an intention to sell the land by asking for the balance of the purchase price in Exhibit 2 the full amount was not paid to validate the sale and the tendering of the balance was not done within a reasonable time to entitle the defendant/appellant to an order of specific performance. A person seeking to enforce his right under a contractual agreement must show that he has fulfilled all the conditions precedent and that he has performed all those terms which ought to have been performed by him. See: BFI Group Corporation vs B.P.E. (2012) 18 NWLR (part 1332) 209.

The appellant is only entitled to a refund of the N3,000.00 (Three Thousand Naira) only part - payment which he made for the disputed land.

The order for forfeiture was wrong since no lease was proved to have existed.

In view of the fact that the legal title to the disputed piece of land still resides with the plaintiff/respondent and he has been ordered to refund the N3,000.00 (Three Thousand Naira) only he collected from the appellant, he is entitled to the statutory right of occupancy over the said piece of land verged Blue and measuring 492.630 sq. meters.

The appeal partially succeeds. The counter - claim is hereby dismissed with no order as to costs.

G

NWEZE JSC

My distinguished Lord, Olabode Rhodes-Vivour, JSC, obliged me with the draft of the leading judgment just delivered now. I endorse the conclusion that the appeal succeeds in part.

For the elaborate reasons in the said leading judgment, I, too, shall enter an order allowing this appeal in part. I abide by the consequence orders in the said leading judgment.