**ACHONU**

**v.**

**OKUWOBI**

SUPREME COURT OF NIGERIA

THURSDAY, 13 APRIL 2017

SC.254/2006

**LEX (2017) - SC.254/2006**

OTHER CITATIONS

2PLR/2017/14 (SC)

**BEFORE THEIR LORDSHIPS:**

OLABODE RHODES VIVOUR JSC (Presided)

AMIRU SANUSI JSC

EJEMBI EKO JSC

PAUL ADAMU GALINJE JSC (Read the Lead Judgment)

SIDI DAUDA BAGE JSC

**BETWEEN**

FLORENCE ACHONU – Appellant

AND

OLADIPO OKUWOBI – Respondent

**ORIGINATING COURT**

1. COURT OF APPEAL, LAGOS JUDICIAL DIVISION

2. HIGH COURT OF LAGOS STATE

**REPRESENTATION/LAWYERS**

Mr. DOTUN ODUWOBI (with him, A. B. JIMOH) ­ For the Appellant.

Mr. A. R. FATUNDE (with him, C. A. MAKPU Esq, A. U. UMOSE) ­ for the Respondent

**ISSUES FROM THE CAUSE(S) OF ACTION**

REAL ESTATE AND PROPERTY LAW - LAND - PURCHASE PRICE:- Part payment of - Whether vests valid title in purchaser in possession.

REAL ESTATE AND PROPERTY LAW - LAND - SALE OF LAND - Contract for - Failure to pay purchase price thereto - Legal consequences of.

REAL ESTATE AND PROPERTY LAW - LAND - SPECIFIC PERFORMANCE - Nature of.

INTERPRETATION OF STATUTE - CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA, 1999 (AS AMENDED), SECTION 233(1) – Scope of.

**PRACTICE AND PROCEDURE ISSUES**

APPEAL - FRESH ISSUE ON APPEAL - Impropriety of when raised by the appellant – Whether may be allowed.

APPEAL - GROUND OF APPEAL - Nature and determinant of.- Where not based on decision being challenged - Competence of – Proper treatment of by court

APPEAL - GROUNDS OF APPEAL - How formulated - Purport of - Proper approach of court thereto - Whether can allege error in law and misdirection simultaneously.

APPEAL - MISDIRECTION AND FACT:- Meaning of - Error of fact and error of law - Whether may render a ground of appeal incompetent where particulars of are provided.

APPEAL - PRELIMINARY OBJECTION:- Propriety of – Duty of court to resolve same where raised

APPEAL - SUPREME COURT:- Appeal thereto on grounds of mixed law and facts or grounds of fact only - Propriety of - Whether leave of court required

APPEAL - SUPREME COURT - Concurrent findings of fact by lower courts - Attitude of the Supreme Court to invitation to interfere therewith – Section 233(1), 1999 Constitution considered.

COMMERCIAL LAW - CONTRACT - CONTRACT FOR SALE OF LAND: Failure to pay purchase price thereof - Legal consequence of.

COMMERCIAL LAW - CONTRACT - ENFORCEMENT OF:- Person seeking enforcement - What needs to be established.

COMMERCIAL LAW – CONTRACT:- When would be deemed discharged.

**PRACTICE AND PROCEDURE ISSUES**

APPEAL - CONCURRENT FINDINGS OF FACT BY LOWER COURTS - Attitude of the Supreme Court toinvitation to interfere therewith

COURT - DISCRETIONARY POWERS - Exercise of - Proper approach of court thereto.

COURT - DISCRETIONARY POWERS - Exercise of - Proper approach of court in respect thereof.

COURT - SUPREME COURT - Appeal thereto on grounds of mixed law and facts or grounds of fact only – Whether leave of court required – Legal implications

JURISDICTION - COURT’S JURISDICTION - Limitation of via establishment statute – Absence of jurisdiction - Whether party may conferred by parties - Failure to comply with procedural law – When would be deemed fatal.

JURISDICTION - Meaning and essence of.

PLEADINGS - BINDINGNESS OF PARTIES THEREBY - Evidence led at variance with the facts pleaded – Whether relevant.

**MAIN JUDGMENT**

**GALINJE JSC**: (Delivering the Lead Judgment:

By an amended statement of claim dated and filed on 29 October 1993, the appellant herein, who was the plaintiff at the High Court of Lagos State, claimed against the respondent the following reliefs:

1. Specific performance of the contract for the sale of the property situated at and being (sic at) No. 65 Bode Thomas Street, Surulere, Lagos by executing and doing in favour of the plaintiff all necessary acts, deeds, forms and things for the due vesting and registration of ownership of the said property in the plaintiff and obtaining and delivering to the plaintiff a valid copy of his tax clearance certificate and of all other documents necessary for supporting an application for change of ownership in favour of the plaintiff.

2. Mesne profits in the sum of N150,000.00 per annum with effect from 1 August 1992 in respect of the ground floor flat at 65, Bode Thomas Street, Surulere, Lagos State until possession is given up.”

This amended statement of claim is at pages 67 ­ 75 of the record of this appeal. By his amended statement of defence dated 15 February 1994 and filed on the 17 February 1994, the respondent as defendant at the trial court, denied liability. Issues having been joined, the case proceeded to trial. At the end of the trial and addresses by learned counsel for the respective parties, the trial court in a reserved and considered judgment delivered on 13 February 1997 granted to the appellant all the reliefs she sought. The respondent herein was thoroughly dissatisfied with the decision of the trial court. Being aggrieved, he appealed to the Court of Appeal, Lagos Division where the decision of the Lagos State High Court was reversed in favour of the respondent in a reserved and considered judgment delivered on 14 July 2005. The present appeal is against the decision of the Court of Appeal, Lagos. The appellant’s notice of appeal at pages 326 ­ 329 of the printed record of this appeal, dated 7 October 2005 contains five grounds of appeal.

Parties filed and exchanged briefs of argument. Mr. Dotun Oduwobi, learned counsel for the appellant distilled three issues for determination of this appeal as follows:

i. Whether ground (vi) contained in the notice of appeal filed by the defendant before the Court of Appeal ought not to have been struck out for want of competence.

ii. Whether the Court of Appeal was correct in its conclusion that the defendant’s tax clearance certificate had not been made an issue between the parties and whether the production of the said certificate by the defendant was not crucial or significant to the performance of the sale agreement.

iii. Whether the Court of Appeal was correct in treating time as being of the essence of the agreement between the parties. If not, then whether there was justifiable basis for the learned justices of appeal to have quashed the lower court’s order for specific performance.”

Mr. Adewumi R. Fatunde, learned counsel for the respondent issued a preliminary objection to the competence of the 2nd, 4th and 5th grounds of appeal on the ground that they were filed contrary to the provisions of section 233(2) and (3) of the 1999, Constitution of the Federal Republic of Nigeria.

Learned counsel argued the preliminary objection at pages 7­8 of the respondent’s brief of argument, and thereafter he formulated three issues for determination of this appeal as follows:

1. Whether ground (vi) contained in the notice of appeal filed by the defendant before the Court of Appeal ought not to have been struck out for want of competence.

2. Whether the Court of Appeal was correct in its conclusion that the defendant’s tax clearance certificate had not been made an issue between the parties and whether the production of the said certificate by the defendant was not crucial or significant to the performance of the sale agreement.

3. Whether the Court of Appeal was correct in treating time as being of the essence of the agreement between the parties. If not, then whether there was justifiable basis for the learned justices of appeal to have quashed the Iower court’s order for specific performance.

Learned counsel for the appellant filed a reply brief on 3 September 2007. I will consider it in the course of this judgment. The law is settled beyond, which there is no argument that where a preliminary objection is issued challenging the competence of an appeal, same shall be resolved before considering the appeal. This is so because the labour of hearing the appeal will be in vain if at the end of the day the appeal is found to be incompetent.

See Onyema & Ors. v. Egbuchulam (1996) 5 NWLR (Pt. 448) 224, (1996) 4 SCNJ 237. I will therefore consider the preliminary objection to the competence of the 2nd, 4th and 5th grounds of appeal first.

Learned counsel for the respondent submitted that the 2nd, 4th and 5th grounds of appeal are of mixed law and facts as such the appellant’s failure to seek leave of either the lower court or this court to file and argue them, is fatal to his appeal. According to the learned counsel, these grounds are incompetent and should not be allowed to stand. In aid, learned counsel cited Briggs v. Chief Lands Officer Rivers State (2005) ALL FWLR (Pt. 268) 1626. In a further argument, learned counsel urged this court to hold that all the issues formulated from the grounds aforesaid and the argument in support thereof are also incompetent and are liable to be struck out as well.

In aid, the authorities in Ehuwa v. Ondo State Independent Electoral Commission (2006) All FWLR (Pt. 298) 1299, (2006) 18 NWLR (Pt. 1012) 544 at pages 572­573, paragraghs C­B, Ministry of Benue State v. Ulegede (2001) FWLR (Pt. 78) 1268, (2001) 17 NWLR (Pt. 741) 194, (2001) 51 WRN 1 at pages 26­ 27 lines 40­25, were cited. Learned counsel on the authority of UAC Ltd v. Macfoy (1962) AC 152, (1961) 3 ALL ER 1160 urged this court to strike out the 2nd, 4th and 5th grounds of appeal as well as the issues formulated therefrom and the argument of counsel connected thereto.

In reply, learned counsel for the appellant argued that the 2nd, 4th and 5th grounds of appeal did not complain about specific findings of facts by the lower court, but the complaints therein are directed to the law applicable to uncontested facts which are already settled. This being so, learned counsel insists that the said 2nd, 4th and 5th grounds of appeal are grounds of law. In aid, learned counsel cited Bamgboye v. University of Ilorin (1999) 10 NWLR (Pt. 622) 290, (1999) 6 SC (Pt. II) 72, (2001) FWLR (Pt. 26) 484 at 491.

The grounds of appeal complained of are hereunder reproduced for clarity without their particulars as follows:

ii. The learned justices of appeal erred in law when they held and concluded that “the respondent’s averment at paragraph 8 in respect of tax clearance had not been made an issue between parties’’ and that “she did confirm the non­significance of the same tax clearance certificate”.

iv. The learned justices of appeal erred in law when they held that time was of the essence of the agreement and that the respondent had undertaken to pay the balance of the price within one week of 3 July 1992.

v. The learned justices of appeal erred in law when they held that the respondent was not ready and willing to perform the contract and that there wasn’t sufficient evidence on which the order of specific performance could have been made in her favour.

A close perusal of the three grounds reproduced above shows that the issues of facts complained of have to do with whether tax clearance was made an issue between the parties, or whether time was of the essence or whether there wasn’t sufficient evidence on which the order of specific performance could have been made in favour of the appellant. A ground of appeal does not qualify as a ground of law simply on the basis of its been so called. The determining factor in assessing whether or not a ground of appeal is one of law or of mixed law and facts or of facts alone is the complaint for which the ground had been employed. The type of complaint an appellant set out to make is invariably deciphered from an examination of the ground itself. Where the ground of appeal is based on a complaint of errors emanating from a conclusion or undisputed facts, the ground is a ground of law. If the errors complained of are founded on disputed facts and by the complaint the correctness of the ascertained facts is being challenged, the ground is one of mixed law and fact. Where the trial court is asked to exercise its discretion and the complaint in the ground of appeal relates to the exercise of the courts discretionary powers, the ground would be one of mixed law and fact. In the instant case, the facts disclosed in the disputed grounds of appeal are not in contention. They are no longer in dispute as they have been settled. What is in dispute is the law applicable to those sets of facts. I am of the firm view that the three grounds, subject of the objection are grounds of law that do not require the leave of this court. See UBA Ltd v. Stahlbau GMBH (1989) 3 NWLR (Pt. 110) 374, (1989) 6 SCNJ (Pt. 1) 1; ACB Ltd v Obmiami Brick & Stone Ltd (1993) 5 NWLR (Pt. 294) 399, (1993) 6 SCNJ 301; Metal Construction (W.A) Ltd v. Migliore (1990) 1 NWLR (Pt. 126) 299; Ifediorah v. Ume (1988) 2 NWLR (Pt. 74) 5; Ogbechie v. Onochie (1986) 2 NWLR (Pt. 23) 484; Nwadike v. Ibekwe (1987) 4 NWLR (Pt. 67) 718, (1987) 11­12 SCNJ 72.

For the reasons I have set out herein above, I find the preliminary objection unmeritorious and same shall be, and it is hereby overruled. On the main appeal, learned counsel for the respondent merely copied the issues formulated by the learned appellant’s counsel. Since the issues formulated by learned counsel for respective parties are the same, I will adopt those issues formulated on behalf of the appellant in the determination of this appeal. Before I proceed to do that, I will like to set out in brief the facts of this case as found by the lower court as follows:

Mr. Oladipo Okuwobi, the respondent in this appeal offered his property located at No. 65 Bode Thomas Street, Surulere, Lagos to the appellant herein to buy, at the price of N1,500,000.00. The appellant accepted the offer and made part payment of the purchase price in two installments of N500,000.00 and N200,000.00 and the two receipts evidencing these payments were issued on the 3 June 1992. The appellant promised to liquidate the balance of N800,000.00 within one week and when she failed to honour the promise, the respondent instructed his solicitors to write to the appellant informing her that he was no longer selling the property on the ground that the project for which he needed the money from the sale of the property had been frustrated by the appellant’s inability to pay the purchase price within the stipulated time agreed to.

Learned counsel for the respondent submitted in respect of the 1st issue for determination of this appeal that the lower court was wrong when it failed to strike out the 6th ground of appeal before it. According to the learned counsel, the said ground 6 complained about an error of law and fact at the same time as such it is incompetent and ought not to have been spared.

Learned counsel cited in aid the authorities in University of Ilorin v. Oyalana (2001) FWLR (Pt. 83) 2193 at page 2203 and Aniekwe v. Okereke (1996) 6 NWLR (Pt. 452) 60 and submitted that it was on the basis of the matters contended in relation to this incompetent ground of appeal that the respondent’s appeal was found to be meritorious by the lower court.

For the respondent it is argued that although the 6th ground of appeal was couched to combine error of law and error of fact which the courts have held to be incompetent, nevertheless, the application of such rules should not be reduced to a mere matter of technicality whereby the court will look at the form rather than the substance. Learned counsel made submissions on the purpose of setting out grounds of appeal and contended that the only area where the grounds of appeal will not be acted upon is only when it is vague or general in terms. In support of this argument, learned counsel cited Aderounmu v. Olowu (2000) 2 SCNJ 180, (2001) 4 NWLR (Pt. 652) 253 at 272 paragraphs ae; Jikamshi v. Matazu (2004) ALL FWLR (Pt. 230) 1077 at 1079. In a further argument, learned counsel submitted that this court should do substantial justice in this matter without adherence to the rules of procedural technicalities, as era of technical justice belongs to the past. In aid, learned counsel cited the following authorities ­ Inyang v. Ebong (2002) FWLR (Pt. 125) 703 at 714, (2002) 2 NWLR (Pt. 751) 284 ; Aqua Agro Industries Nig. Ltd v. Sagrani (1999) 1 NWLR (Pt. 585) 85; UBN Plc v. Sepok Nig Ltd (1998) 12 NWLR (Pt. 578) 479 and Jubrin v. N.E.P.A (2003) FWLR (Pt. 178) 1092 at 1095.

The appellant herein was the respondent at the lower court.

In that court he submitted the following issues for determination of the appeal thus:

1. Whether there was no valid contract of sale of the property (the subject matter of this appeal) between the appellant and the respondent upon which specific performance could be ordered.

2. Whether exhibit 1 was not rightly admitted in evidence having regard to section 5(3) Law Reform (contracts) Act 1961 applicable to Lagos State.

3. Whether there was no sufficient evidence to sustain the judgment of the Honourable court below.

From the issues reproduced herein above, which issues were canvassed at the lower court, the appellant did not raise any argument in connection with the competence of any of the grounds of appeal, even though he was aware of the way the 6th ground of appeal was couched. The general rule adopted in this court is that an appellant will not be allowed to raise on appeal to this court questions or issues which were not raised or considered by the lower court, but where the questions or issues involve substantial points of law substantive or procedural and it is plain that no further evidence could have been adduced which would affect the decision of them, the court will allow the questions to be raised and the points taken so as to prevent an obvious miscarriage of justice. See K. Apene v. Barclays Bank of Nigeria & Anor. (1977) 11 NSCC 29, (1977) 1 SC 47; Shonekan v. Smith (1964) ALL NLR 168 at 173; Stool of Abinabina v. Chief Kojo Eyinadu (1953) AC 209 at page 215.

One of the exceptions to this general rule is where the questions or issues in contention touch on the jurisdiction of the lower court, a party can raise them even for the 1st time without seeking the leave of this court. The Appellant’s complaint is that the 6th ground of appeal which was filed by the respondent at the lower court combines error of law and facts and that there have been several decisions of this court in which grounds that combine error of law and facts have been declared incompetent. In support learned counsel cited Obijuru v. Anokwuru (2002) FWLR (Pt. 1114) 567 at 568; Nwadike v. Ibekwe (1987) 4 NWLR (Pt. 67) 718, (1987) 11­12 SCNJ 72; Idaayar v. Tigidam (1995) 2 NWLR (Pt. 377) 359; Loke v. IGP (1997) 11 NWLR (Pt. 527) 57; Rotimi v. Fatorji (1996) 6 NWLR (Pt. 606) 305.

In Obijuru v. Anokwuru (supra) at page 573 paragraph E the Court of Appeal relying on the authority in Nwadike v. Ibekwe (supra) held:

“A ground of appeal cannot allege an error in law and a misdirection on the facts at the same time. Where it does so it is incompetent and is liable to being struck out by the court.”

Though persuasive, the Court of Appeal in Obijuru Anokwuru (supra) followed the decision of this court in Nwadike v. Ibekwe (supra), where this court per Nnaemeka Agu JSC held at page 744 paragraphs F­G as follows:

“Let me pause here to observe that a ground of appeal cannot be an error in law and a misdirection at the same time, as the appellant’s grounds clearly postulate. By their very nature one ground of appeal cannot be the two. For the word “misdirection” originated from the legal and constitutional right of every party to a trial by jury, to have the case which he had made either in pursuit or in defence, fairly submitted to the consideration of the tribunal.”

Misdirection is defined by Black’s Law Dictionary, 7th Edition as an erroneous jury instruction that may be grounds for reversing a verdict. While fact is defined by the same dictionary at page 610 as something that actually exists; an aspect of reality. An actual or alleged event or circumstance as distinguished from its legal effect, consequence or interpretation. From the definitions herein, a misdirection is certainly not the same thing as error of fact. Error of law and error of fact where particulars are provided cannot render a ground of appeal incompetent where the particulars are sufficiently provided. The 6th ground of appeal before the lower court reads thus:

“The learned trial judge erred in facts and in law when he held that time was not of the essence of the contract sought to be specifically performed.”

This ground was properly supported by particulars, as such I do not think it is incompetent. The Appellant did not challenge the 6th ground of appeal at the lower court. He can therefore not raise here a question which was not raised, or considered by the lower court without leave of either the lower court or this court. See Araka v. Ejeagwu (2000) 15 NWLR (Pt. 692) 684, (2001) FWLR (Pt. 36) 830; Oshatoba v. Olujitan (2000)5 NWLR (Pt. 655) 159, (2000) 75 LRCN 3512. There is no evidence that leave of this court was sought and obtained before the 1st ground of appeal was filed. If there is any ground to be struck out, it is the first ground of appeal before this court. Learned counsel for the appellant cannot urge that the 6th ground of appeal at the lower court challenged the jurisdiction of that court and therefore the issue canvassed by the 1st ground of appeal here can be raised at any stage and even in this court for the first time without seeking for and obtaining leave of either the lower court or this court.

Courts jurisdiction simply means the power and authority of the court recognized by law to adjudicate over a controversy. Generally, there are two types of jurisdiction. These are:

1. Jurisdiction as a matter of procedural law.

2. Jurisdiction as a matter of substantive law.

While a litigant may submit to a procedural jurisdiction, he cannot confer jurisdiction on a court where the constitution or statute or any provision of the common law limits the court’s jurisdiction. See Obiuweubi v. C.B.N. (2011) All FWLR (Pt. 575) 208, (2011) 7 NWLR (Pt. 1247) 465. Courts are creatures of statutes and it is the statute that creates a particular court that confers on it, its jurisdiction and this jurisdiction can only be extended by the legislature.

However, where the jurisdiction of a court is a matter of procedural law, failure to comply with certain aspect of the procedure is a mere irregularity which does not render the action incompetent. The failure of the appellant to object to the 6th ground of appeal at the lower court amounted to a waiver, since the issue complained of by 6th ground of appeal is a procedural irregularity which does not render the ground of appeal subject matter of the appellant’s complaint incompetent.

Finally, the essence of the grounds of appeal is to give sufficient notice to the adverse party of the nature of the appellant’s compliant that such adverse party will be confronted with in court. Once the notice is passed and the adverse party reacts to it without any complaint, it means the notice is clear and well understood. In Aderounmu v. Olowu (2000) SCNJ 180, (2001) 4 NWLR (Pt. 652) 253 at 272 paragraphs A­E which was cited and relied upon, by learned counsel for the respondent, this court per Ayoola JSC said:

The rules of our appellate procedure relating to formulation of grounds of appeal are primarily designed to ensure fairness to the other side. The application of such rules should not be reduced to a matter of mere technicality whereby the court will look at the form rather than the substance. The prime purpose of the rules of appellate procedure, both in this court and in the Court of Appeal, that the appellant shall file a notice of appeal which set forth concisely the grounds which he intends to rely upon on the appeal and that such grounds should not be vague or general in terms and must disclose a reasonable ground of appeal, is to give sufficient notice an information to the other side of nature of the complaint of the appellant and consequently of the issues that are likely to arise on the appeal. Any ground of appeal that satisfies that purpose should not be struck out notwithstanding, that it did not conform to a particular form.”

Apart from the fact that the appellant took steps after becoming aware of the irregularity by filing his brief of argument at the lower court, he also subjected himself to the hearing of the appeal which culminated into the judgment against which this appeal lies. Order 20, Rule 5 (1) of the Court of Appeal Rules 2011, provides as follows:

“An application to strike out or set aside for non­compliance with these rules, of any other irregularity arising from the Rules of Practice and Procedure in this court, any proceedings or any document, judgment or Order therein shall only be entertained by the court if it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.”

The lower court was therefore right when it did not strike out the 6th ground of appeal before it. The first issue is therefore resolved against the appellant, and in favour of the respondent. On the 2nd issue for determination of this appeal. Learned appellant’s counsel submitted forcefully that the lower court is wrong in its conclusion that the respondent’s tax clearance certificate was not made an issue between the parties at the trial court. Learned counsel made reference to paragraphs 8, 9 and 14 of the appellant’s amended statement of claim and contended that it was the respondent’s failure to produce the tax clearance certificate that led to the frustration of the contract between the parties. According to the learned counsel, the respondent joined issues with the appellant through paragraphs 15, 16 and 17 of the statement of defence where paragraphs 9, 10 and 11 of the amended statement of claim were denied. Finally, learned counsel urged this court to hold that the learned justices of the lower court’s treatment of the matter of the tax clearance certificate as being a non­issue and insignificant is erroneous and to resolve this issue in favour of the appellant.

Learned counsel for the respondent in his argument made reference to paragraph 11 of the amended statement of claim and the evidence of PW2 where evidence was given that sufficient money was made available/released to the appellant to cover the balance of N800,000 of the purchase price before the production of the tax clearance certificate and submitted that the tax clearance certificate did not affect the disbursement of the loan and the payment of the balance of the purchase price.

Paragraphs 8, 9 and 14 of the amended statement of claim which were referred to by the learned counsel for the appellant are hereunder reproduced as follows:

“8. The defendant did not produce his tax clearance certificate as and when requested to do so as agreed by him and by such conduct frustrated the whole agreement set up with progress bank with his knowledge and consent and in his presence and the completion and registration of the sale of the property in favour of the plaintiff was thereby frustrated.

9. The plaintiff avers (sic avers) that if the defendant had assiduously addressed himself on the 9 June1992 and the days immediately following to his self­assumed promises made in writing on that day, the loan would have been immediately made available.

14. Without such tax clearance certificate the transfer of the property to the plaintiff could not be registered and in absence of such registration, the Bank could not lend further money to the plaintiff when the document agreed to be used as security is not in the plaintiff s name.

These paragraphs of the amended statement of claim were denied by the Respondent at paragraphs 16, 17 and 19 of his statement of defence as follows:

“16. The defendant denies paragraph 8 of the statement of claim and states that he had actually released his tax clearance certificate of 6th July, 1992 to the plaintiff when she demanded for same. He did not, and could not have frustrated a loan to the plaintiff when he was already too pressed due to the plaintiff’s inabilities and misrepresentations as to her ability to pay for the property within the stipulated time.

17. The defendant vehemently denies paragraphs 9, 10 and 11 of the statement of claim and states that he did not renege on any of his obligations to the plaintiff and that he is not aware that the receipt referred to in the said paragraph 11 could be a substitute to tax clearance certificate, assuming without conceding that it was given at the instance of the defendant and after the deposit of N700,000.00.

19. The defendant denies paragraphs 13, 14 and 15 of the statement of claim and states that he did not represent to anybody that as at 3rd June, 1992 he had a current tax clearance certificate and that the plaintiff and neither have registered a properly for herself when she had not purchased same, nor used same as security for a loan”.

From the pleadings, I have reproduced hereinabove, parties did join issues on tax clearance certificate. The question now is whether it was the failure of the respondent herein to produce the tax clearance certificate that led to the collapse of the contract between the parties. The appellant at paragraph 11 of his amended statement of claim pleaded that in order to convince the Bank to release the balance of N800,000.00, an arrangement was made between the defendant and herself that a receipt for N200.000.00 should be issued in her favour acknowledging that the respondent received a further sum of N200.000.00 from her so as to strengthen her hand in pressing that the bank expedite the release of the N 800,000.00 to her. This clearly shows that the release of the N800.000.00 by the bank was not solely dependent on the production of tax clearance certificate by the respondent herein. This is even made more evident in the testimony of PW2, an Assistant Manager in the Legal Department of Progress Bank where the appellant’s application for loan was being processed. This is what he said at page 132 of the printed record of this appeal.

“ I came into the matter when the Managing Director invited me to his office on 8 June 1992, when the two parties named in Exhibit 5 were in the Managing Director’s office and I was asked to prepare Exhibit 5. The Bank was prepared to give a loan of up to N2millon to Miss Achonu, but at that time, the Bank had already given some money to Miss Achonu to pay to the defendant for the purchase of the property No. 65, Bode Thomas Street, Surulere by Miss Achonu, the plaintiff.”

Under cross-examination, this witness admitted that the bank had given the appellant enough money to cover what was required for payment of the balance of the purchase price and that at the time, the encumbrance on the property had been removed. From the evidence of this witness, it is very clear that the release of the money to the appellant by the Bank and the removal of the encumbrance from the disputed property were carried out by 15 June, long before the appellant’s promise on 3 July 1992 to pay the balance of the money due on the property to the respondent within one week. See paragraph 12 of the amended statement of claim. On this piece of evidence, the Court of Appeal in its judgment at page 315 of the printed record of this appeal held:

“If the charge had been removed by 15 June 1992 any delay in disbursing the loan after that date cannot be attributed to the appellant’s failure to furnish his tax clearance certificate. It was no longer the fault of the appellant that the documents could not be formalized since he has surrendered the land certificate and the tax clearance certificate to Progress Bank.”

I entirely agree with the lower court that the delay in payment by the appellant to the respondent cannot be attributed to the respondent’s inability to furnish his tax clearance certificate to Progress Bank. This is so because there is in evidence that the encumbrances on the property had been removed by 15 June 1992 and the appellant admitted in his evidence in chief that the matter of tax clearance did not affect the approval of the loan. It was therefore no longer the fault of the respondent that the bank’s documents could not be formalized, since he had surrendered the tax clearance certificate and the land certificate to the bank. I also agree with the lower court that the production of the tax clearance by the respondent was not crucial or significant to the performance of the sale agreement. This issue is accordingly resolved against the appellant and in favour of the respondent.

On the 3rd issue for determination of this appeal, learned counsel for the appellant submitted that the lower court took paragraph 12 of the amended statement of claim in isolation of the context in which it was made, placed undue reliance on the said paragraph of the amended statement of claim and arrived at a wrong conclusion. According to the learned counsel, the agreement between the parties, exhibit 1 and the tripartite memorandum of understanding between the parties herein and the Progress Bank, exhibit 5 made no reference to the deadline for payment of the balance of N800.000.00. It is learned counsel’s contention that pleadings should be considered in their totality and not in isolation of the context in which they are made or other matters contained in other paragraphs. In aid, learned counsel cited Fadlallah v. Arewa Textiles Ltd (1997) 8 NWLR (Pt. 518) 546. Learned counsel further submitted that a contract in which time is of the essence, must fall within the three guiding principles, enunciated by this court in Nigeria Banks for Commerce and Industry v. Integrated Gas (Nig.) Ltd (2004) 16 NWLR (Pt. 901) 487, (2005) ALL FWLR (Pt. 250) 1. Learned counsel urged this court to hold that this case does not fall within the class of contracts bound by time stipulation. Finally, learned counsel urged this court to resolve this issue in favour of the appellant.

For the respondent, it is argued that time was of the essence in the contract of sale between the parties and that the lower court followed the principles enunciated by this court in N.B.C.I v. Integrated Gas (Nig.) Ltd (supra). Learned counsel submitted that it was the appellant who voluntarily pleaded that the balance of the money due to the respondent, according to their agreement; was to be paid within one week, as such it does not matter whether the time limit was included in exhibit 1 or exhibit 5.

Learned counsel urged the court to resolve this issue in favour of the respondent. Paragraph 12 of the amended statement of claim is hereunder reproduced as follows:

“Pursuant to their agreement such receipt was issued and an aide memoire was prepared and signed by the plaintiff on 3 July 1992 signifying that in the fact such sum of money (N200,000.00) was yet to pass and that the balance of the purchase price would be paid within a week.”

At paragraph 18 of the amended statement of defence, the respondent herein denied the averment in paragraph 12 of the amended statement of claim in the following words:

“18. The defendant denies paragraph 12 of the statement of claim and states that the undertaking of 22 July 1992 (written) was the final grace he gave to the plaintiff to pay for the property or he would not sell same any longer. The undertaking was not made on 3 July 1992 as claimed.”

At page 119 of the printed record of this appeal, the appellant who testified in chief denied giving any undertaking that the balance would be paid in one week. This is what she said:

“I did not give any undertaking that the balance would be paid in one week. I told my lawyer that the defendant wanted me to give an undertaking to pay the balance within one week and I said I could not.”

Clearly the evidence given by the appellant herein is at variance with paragraph 12 of her statement of claim. The law is settled that a party will not be allowed after pleading a particular set of material facts to turn round and base his case on a totally different set of fact without an amendment of his pleading. In other words, parties are bound by their pleadings and evidence which is at variance with the averments in the pleadings go to no issue and should be disregarded by the court. In the instant case the evidence­in­chief of the appellant at the trial court was not in line with paragraph 12 of the amended statement of claim and therefore went to no issue. See Emegokwe v. Okadigbo (1973) 1 All NLR (Pt. 1) 379, (1973) 4 SC 113, Ekpeyong v. Ayi (1973) 3 ECSLR 411, Odumosu v. African Continental Bank Ltd (1976) 1 1 SC 55; Njoku v. Eme (1973) 5 SC 293, (1973) 1 NMLR 420; Ogboda v. Adulugba (1971) 1 ALL NLR 68, (1971) NSCC 66; Ehimare v. Emhonyon (1985) 1 NWLR (Pt. 2) 177; Metalimpex v. Leventis (Nig.) Ltd (1976) 2 SC 91. Having failed to amend the averment at paragraph 12 of the amended statement of claim, the appellant is bound by the contents thereof, since her evidence in support goes to no issue. The lower court was thereof right when it held that time was of the essence in the execution of the contract. The law is settled that where a purchaser of land makes payment of the purchase price, but defaults in paying the balance, there can be no valid sale even where the purchaser is in possession. Such possession is incapab1e of defeating the vendor’s title. See Odusoga v. Rickets (1997) 7 NWLR (Pt. 511) 1.

In the instant case, the purchaser, that is the appellant had failed to pay the balance of the purchase price at the expiration of the one week agreed upon by her and after extension of time and repeated demands for payment by the respondent. The learned justices of the Court of Appeal were therefore justified when they quashed the trial court’s order for specific performance. This issue is accordingly resolved against the appellant and in favour of the respondent.

Having therefore resolved all the three issues against the appellant, this appeal, shall be, and it is hereby dismissed. I make no order as to costs.

**RHODES-VIVOUR JSC**: I read in draft, the leading judgment delivered by my learned brother, Galinje JSC. I agree with his reasoning and conclusion that the Court of Appeal is amply justified in allowing the appeal by the respondent and dismissing the claim of the appellant. I intend to make some observations on what a person seeking to enforce a contract must show.

In the trial High Court the plaintiff herein appellant’s first claim reads:

1. Specific performance of the contract for the sale of the property situated at and being at No. 65 Bode Thomas Street, Surulere, Lagos by executing an d doing in favour of the plaintiff all necessary acts, deeds, forms and things for the due vesting and registration of ownership of the said property in the plaintiff and obtaining and delivering to the plaintiff a valid copy of his tax clearance certificate and of all other documents necessary for supporting an application for change of ownership in favour of the plaintiff.

Specific performance is an equitable remedy given at the discretion of a judge when satisfied that legal or common law remedy, e.g. damages would not meet the ends of justice. The law is long settled that a person seeking to enforce a contract must show:

1. That all conditions precedent have been fulfilled.

2. That he has performed all the terms which he ought to perform, or is willing to do so if he has not done so. See Coker v. Ajewole (1976) 10 NSCC 429, (1976) 9­10 SC 17. A plaintiff who files an action in court, asking the court to enforce the contract in his favour cannot expect to succeed if he failed to discharge his obligation under the contract.

The respondent agreed to sell his house at No. 65 Bode Thomas Street, Surulere, Lagos for N1.5m and the appellant agreed to buy the house. The appellant paid N700,000 and was unable to pay the balance of N800,000 within one week after 3 July 1992 (an undertaking she gave. See paragraph 12 of her pleadings). The appellant failed woefully to discharge her obligation under the contract of sale of the property (supra). The contract cannot be enforced on her behalf, and so is not entitled to specific performance.

It is for this, and the comprehensive reasoning in the leading judgment that this appeal fails. It is accordingly dismissed.

**SANUSI JSC**: I was opportuned to read in advance, the judgment just rendered by my learned brother, Pau1 Adamu Galinje JSC.

I endorse his reasoning and conclusion that this appeal is devoid of merit and should be dismissed. While adopting his reasoning and conclusion as mine, I wish to also make few remarks to support the Judgment.

At the trial court, the plaintiff now appellant, took a writ of summons seeking the following reliefs vide her amended statement of claim dated 29 October 1993 against the present respondent as plaintiff there at. The reliefs sought read thus:

i. Specific performance of the contract for the sale of the property situated at and being at ,No. 65 Bode Thomas Street, Surulere, Lagos, by executing and doing in favour of the plaintiff all necessary acts, deeds, forms and thing for the due vesting and registration of ownership of the said property in the plaintiff and obtaining and delivering to the plaintiff a valid copy of his tax clearance certificate and of all other documents necessary for supporting an application for change of ownership in favour of the plaintiff.

ii. Mesne profits in the sum of N150,000.00 per annum with effect from 1 August 1992 in respect of the ground floor flat at 65, Bode Thomas Street, Surulere, Lagos State until possession is given up.”

The facts giving rise to this appeal and submission by learned counsel for the parties have been thoroughly summarised in the lead judgment and therefore need not be reproduced here again. I will therefore concern myself with the issue of specific performance claim, which is the substance of the plaintiff’s (now appellant’s) claim at the trial court after the plaintiff and respondent presented their cases at the trial court, the learned trial judge found that there was a valid and subsisting contract of sale of the property in dispute between the parties. He found that there was part performance on the basis of which he held that the plaintiff/appellant was entitled to an order specific performance and he proceeded to grant same. Aggrieved with the decision of the trial count, the respondent successfully appealed to the Court of Appeal (the court below) which in its considered judgment delivered on 14 July 2005 agreed that there was evidence of part payment for the purchase of the property and that the parties had indeed negotiated a contract of sale. It however found that time was of the essence of the contract and that there was no sufficient evidence on the basis of which the order of specific performance could have been made in favour of the plaintiff. In its words, the court below stated thus:

“The respondent was not ready and willing to perform the terms and conditions which she was required to perform on the contract and used delay and tardiness of the appellant as a lame excuse for her inability or willing to abide by the terms of the contract. She in fact frustrated the appellant by not paying the balance of the purchase price despite her undertaking”

Against the decision of the court below, the appellant appealed to this court.

In the instant case there is no dispute that the appellant as plaintiff at the trial court entered into a valid contract with the defendant now respondent for the sale of the respondent’s house situate at No. 65, Bode Thomas Street, Surulere Lagos at a sum of N 1,500,000 million. The appellant agreed to buy that property on the agreed sum. Sequel to that she made a part­payment of N700,000 with an undertaking to settle the outstanding balance of N800,000 within one week. The appellant however reneged her undertaking, by failing to pay the balance of the agreed sum on the agreed date. She instead approached the trial court to enforce the contract on her behalf. In contract of sale of land, the law is well settled that failure to pay the purchase price constitutes fundamental breach which obviously goes to the root of the case upon which the court cannot decree specific performance. See Nidocco Ltd v. Mrs. I. A. Gbajabiamila (2013) 7 LPELR 2, (2013) 6­7 SC (Pt. 10) 92, (2013) 14 NWLR (Pt. 1374) 350, (2014) All FWLR (Pt. 724) 1; Nlewedim v. Uduma (1995) 6 NWLR (Pt. 402) 383.

My understanding of the action filed by the plaintiff/ appellant by seeking from the trial court a decree of special performance is based on her assumption that the contract she entered with the defendant/respondent is still subsisting hence her insisted that it should be performed.

In other words, she did not want the contract repudiated except if the trial court did not want to assist to enforce specific performance. I am mindful of the fact that court has discretionary powers to grant specific performance. However, courts could always grant discretionary powers judicially and judiciously and certainly not arbitrarily. It must weigh the consequences and hardship on the defendant as well as the conduct of plaintiff before granting the order of specific performance. See MTN Nigeria Communications Ltd v. Wigatap Trade & Investment Ltd (2013) All FWLR (Pt. 684) 123, (2013) 4 NWLR (Pt. 1344) 276; Enejo v. Sanusi (2008) All FWLR (Pt. 412) 1084, (2008) All NWLR (Pt. 412) 1084; Olowu v. Building Stock Ltd (2010) 2 NWLR (Pt. 117) 310, (2011) All FWLR (Pt. 560) 1336.

In the instant case the plaintiff/appellant failed to meet or satisfy the mutually agreed condition under the contract by not paying the outstanding balance as agreed upon between the parties. It will therefore be inconceivable and unfair to approach the court to urge it discharge her own obligation. She is therefore rightly adjudged by the lower court not to be entitled to that claim she sought. It is even worthy of note that even time was extended for her by the defendant/respondent beyond the seven days earlier given to her and despite repeated demands, she failed to meet the condition for settlement of the outstanding balance of N800,000. She was therefore granted too much indulgence but all to no avail.

Thus, in the light of these few comments I advance above and for the more detailed reasons marshaled in the lead judgment. I too find no merit in this appeal. It is accordingly dismissed by me. Appeal dismissed.

**EKO JSC:** The facts of this case have been adroitly summarised in the judgment just delivered by my learned brother, Paul Adamu Galinje JSC. I had the privilege of reading the judgment in draft. The Appellant filed five (5) grounds of appeal to articulate her grievance or complaint against the decision of the Court of Appeal (hereinafter called “the court below”). The respondent objected to 3 out of the 5 grounds of appeal. The objection is that grounds ii, iv and v of the grounds of appeal are grounds of mixed law and facts which by dint of section 233(3) of the 1999 Constitution, leave first and obtained is the sine qua non for their competence. This court, like any other court of law, is competent to entertain or hear appeals or complaints of any litigant before it if, among other things, the case that comes before it was or has been initiated by due process of law and upon fulfilment of any condition precedent to exercise by it of its jurisdiction. See Madukolu v. Nkemdilim (1962) 1 All NLR 587 at 593; Skenconsult (Nig.) Ltd v. Ukey (1981) 1 SC (Reprint) 4, (1981) 1 NSCC 1, (1981) 1 All NLR 587. It follows, therefore, that the notice of appeal or every ground of appeal therein, shall strictly comply with either the enabling statute or the rules, failing which the appellate court cannot exercise jurisdiction over the appeal as ground of appeal. See Akubue v. C.O.P. (1977) LMSLR 164 at 168.

Section 233 of the Constitution vests exclusive jurisdiction on this court to hear and determine appeals from the Court of Appeal. The only circumstances appeals from the Court of Appeal can be heard as of right are those circumstances set out in sub­section (2) thereof. Any ground of appeal not falling within the scope of section 233(2) of the Constitution, particularly grounds of appeal complaining about facts, or mixed law and facts against the decision of the Court of Appeal (the court below) shall only lie to this court upon leave of the court below or this court first sought and granted. See section 233(3) of the Constitution.

From a long line of decided cases, and it is now settled, that this court is not a court of fact in which appeals to it on facts or mixed law and facts lie as of right. It should now be clear to every appellate lawyer that the purpose of Section 233 (3) of the Constitution requiring that appeals on facts, or mixed law and facts shall lie to this Court only upon leave first sought and obtained, is that such appeals shall lie to, and be heard by, this court only on exceptional circumstances. After all, on facts or mixed law and facts it should be assumed, correctly too, that the trial court or the court below are well grounded. Therefore, upon concurrent findings of fact the appellant is enjoined to show exceptional circumstances why his appeal on facts, or mixed law and facts should be heard.

It has been the stance of this court, dictated by public policy not to disturb the concurrent findings of fact by the trial court and the Court of Appeal. The policy, according to Oputa, JSC in Nwadike v. 1bekwe (1987) 11­12 SCNJ 72, (1987) NWLR (Pt. 67) 718:

“Is dictated both by good sense and by what should be the proper role of the Supreme Court, ­ it should be in everybody’s interest that there should be an end to litigation. It should be of concern to the State that lawsuits should not be too protracted. When two courts have considered the facts of a case and made concurrent findings, the parties ought to be concluded on those facts. The Supreme Court should really not be bothered with messy issues of fact. It should be given ample time and opportunity to concentrate on, and shape, the law of this country and interprete the Constitution. These two functions are those that rightly belong to any country’s court of last resort. An appellant appealing to this court and seeking to upset two concurrent findings in favour of the respondent is thus faced with an uphill task of considerable magnitude. He has to show exceptional circumstances either that there was some miscarriage of justice or a serious violation of some principle of law and procedure: Enang v. Adu (1981) 11­12 SC 25 at page 42, (1981) [2017] All FWLR Achonu v. Okuwobi (Eko JSC) 1333-1334 5 SC 291, (1981) NSCC 453; Lokoye v. Olojo (1983) 8 SC 51 at pages 58­73, (1983) All NLR 461; Ojomu v. Ajao (1983) 9 SC 22 at page 53, (1983) 2 SCNLR 156.

Thus, appeals on facts, or mixed law and facts are not primarily within the jurisdiction of this court. The three (3) grounds of appeal the subject of the objection, horn of their particulars, are:

“ii. The learned justices of appeal erred in law when they held and concluded that “the respondent’ averment at paragraph 8 in respect of tax clearance had not been made an issue between the parties’ and that “she did confirm the non­significant of the same tax clearance certificate.

iv. The learned Justices of appeal erred in law when they held that time was of the essence of the agreement and that the respondent had undertaken to pay the balance of the price within one week of 3 July 1991.

v. The learned Justices of appeal erred in law when they held that the Respondent was not ready and willing to perform the contract and that there wasn’t sufficient evidence on which the order of specific performance could have been made in her favour”.

Ground ii, above reproduced, is a complaint about a finding of fact or a conclusion upon existing facts that tax clearance certificate is not an issue between the parties on the facts pleaded. The ground is one of facts. It questions the evaluation of the facts pleaded. See Ehinlanwo v. Oke (2009) 10 NWLR (Pt. 1113) 357. Ground iv, complaining whether time was of the essence of the agreement, is not of law. It is also a complaint about the finding of fact that time was of essence of the agreement and that the respondent was required to pay the balance of purchase price within one week after 3 July 1992. Notwithstanding its label or toga of error of law, the ground is not a complaint about any misunderstanding or misapplication of law to the facts. The complaint here is about a finding of fact, which should ordinarily not concern this court. Ground v is a complaint that the learned justices of the court below erred when they held, as a fact, that the respondent was not ready and willing to perform the contract and that there was insufficient evidence on which an order for specific performance could have been made in favour of the appellant, as the plaintiff. In my firm view, this is not a ground of appeal that can be placed within the parameters of section 233(2) of the 1999 Constitution. It accordingly requires leave first sought and granted as sine qua non for its competence.

The Appellant has tagged the 3 grounds of appeal as “errors of law” merely to avoid the inconvenience of seeking leave to bring them up. This is a classical case of the old adage that says

“a hood does not make the Monk”. The said three grounds ii, iv and v are incompetent. They are offensive without leave first obtained for their filing. They are accordingly struck out. Issue No. 2, formulated by the appellant, is from the incompetent ground ii and the competent ground iii. It is not for the court to sieve the shaft from the grain in order that Issue 2 may be competent. Issue 3 has been formulated from the two incompetent grounds iv and v. issues 2 and 3 are in the circumstance incompetent, and are hereby struck out. Of the three issues formulated by the appellant for the determination of this appeal, only Issue 1 for now, stands for consideration. It has been formulated from appellant’s ground 1 of the grounds of appeal. The complaint in the ground is that the court below erred in law when it failed to strike out ground (vi) of the grounds of appeal at the court below for being incompetent. The said ground (vi) of the grounds of appeal at the court below was not one of the grounds of appeal from which the appellant herein, as the respondent at the court below, had raised her 3 issues for the determination of the appeal at the court below.

The appellant, as the respondent at the court below, never raised any eye brow or objection to the competence of the said ground vi at the court below. The respondent herein, as the appellant at the court below, also did not formulate any issue for the determination of the appeal at the court below from the said ground vi of the grounds of appeal at the court below. The said ground vi was, therefore, an abandoned ground of appeal. See Aina v. U.B.A. Plc (1997) 4 NWLR (Pt. 498) 181. It formed no part of any issue on which the appeal at the court was determined. Every ground of appeal shall arise from the judgment or decision appealed, and must be connected to the controversy between the parties. See Saraki v. Kotoye (1992) 11­12 SCNJ 26; (1992) NWLR (Pt. 264) 156. It should constitute a challenge to, or an attack on, the ratio of the decision on appeal. It follows that where a ground of appeal, as formulated, does not arise from the judgment on appeal, and it purports to raise and attack an issue not decided by the judgment appealed against, as is evident in the instant appeal, the same is incompetent and liable to be struck out: See C.C.B. Plc v. Ekperi (2007) 3 NWLR (Pt. 1022) 493.

This apart, the general rule is that a party cannot, and will not be allowed to, raise fresh issues at the appellate court without leave of court. At the court below the question of the competence or otherwise of ground vi of the grounds of appeal at the court below was never an issue at that court. There was no decision of the court below on the points. The issue is being raised as a fresh issue in this court without leave of court. The appellant will not be allowed to raise any such fresh issue in this court without leave. On this, I agree with my learned brother, Paul Adamu Galinje JSC 1 adopt his conclusions on this issue. From all I have been trying to say above, I am of the firm view that issue 1 is also incompetent. It is accordingly struck out. This appeal is nothing but a sheer frivolity and vexation. The leading judgment just delivered by my learned brother, Galinje JSC. From the reasons given in the said leading judgment, I have no reason to depart from them. I can only add a few words in support. A contract is discharged only when both parties are released from their obligation under the agreement. A contract is usually discharged by performances. If both parties have done all that is required of them by the express agreement. The principle in Mersey Steel And Iron Co. v. Naylor (1884) 9 A.C. 434 comes to bear; as the authority that, a contractor was not justified in repudiating the contract, as the appellant had not shown an intention on their part to abandon or repudiate. It is true that non­payment of an instalment would not, in the absence of express provision, in itself excuse the contractor from refusing or delaying execution of his part of the contract but the circumstances of non­payment may be evidence of an intention to abandon and that is so here. In the instant case, the purchaser, that is the appellant had failed to pay the balance of the purchase price at the expiration of the one week as expressly agreed by the parties. Time was extended and repeated demands for payment made by the respondent, but all to no avail. I agree with the decision of the court below which quashed the trial court’s order for specific performance. For more detail reasoning’s contained in the lead judgment, I do not find merit in the appeal, it is also dismissed by me. I abide by the order as to cost contained in the lead judgment.

Appeal dismissed.