**ENG. ZUBAIRU YAKUBU & ANOR**

**v.**

**MINISTRY OF HOUSING, ENVIRONMENT, BAUCHI STATE & ANOR**

IN THE COURT OF APPEAL OF NIGERIA

ON WEDNESDAY, THE 19TH DAY OF FEBRUARY, 2020

CA/J/93/2014

**LEX (2020) - CA/J/93/2014**

**OTHER CITATIONS**

3PLR/2020/16 (CA)

(2020) LPELR-49482 (CA)

**BEFORE THEIR LORDSHIPS**

ADZIRA GANA MSHELIA, JCA

MUDASHIRU NASIRU ONIYANGI, JCA

BOLOUKUROMO MOSES UGO, JCA-end!

**BETWEEN**

1. ENG. ZUBAIRU YAKUBU

2. MOHAMMED SAFFULLAH - Appellant(s)

AND

1. MINISTRY OF HOUSING, ENVIRONMENT, BAUCHI STATE

2. YAYARI SIDI - Respondent(s)-end!

**ORIGINATING COURT(S)**

High Court of Bauchi State sitting in Bauchi-end!

**REPRESENTATION**

A. A. Samuel Esq. - For Appellant

AND

A. H. Umar Esq. - For Respondent-end!

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

COMMERCIAL LAW - CONTRACTS:- A contractual transaction with an administrative agency – Action arising therefrom – Claim for specific performance - Whether subject to the limitation rule under section 2(a) of the Public Officers Protection Act

REAL ESTATE AND PROPERTY LAW – SALE OF PROPERTY:- Claim for specific performance against party who having collected consideration refused to transfer possession of property – Where offending owner of property is a public agency – Whether can validly invoke the limitation rule under section 2(a) of the Public Officers Protection Act

ADMINISTRATIVE AND GOVERNMENT LAW - PUBLIC OFFICER – CONTRACTS AND PUBLIC OFFICERS PROTECTION ACT: Limitation period for bringing an action against a public officer and effect of failure thereof whether Section 2(a) of Public Officers Protection Act applies to cases of contract

ADMINISTRATIVE AND GOVERNMENT LAW - PUBLIC OFFICER –PUBLIC OFFICERS PROTECTION ACT:- Limitation of action after the prescribed period – Date when cause of action deemed to have arisen – How determined-end!

**PRACTICE AND PROCEDURE ISSUES**

ACTION - STATEMENT OF CLAIM:- Rule that Court cannot grant a prayer outside the ones set down in a statement of claim – Duty of court thereto – Whether applies to mere phrasal difference between the order made by Court and what was prayed for in the Statement of Claim

APPEAL – ISSUE FOR DETERMINATION:- Where Respondent offers no argument in response to an issue before the Court – Legal effect

APPEAL – PRELIMINARY OBJECTION:- Where Respondent who filed same is absent on the hearing day despite evidence of service of hearing notice on him – Power of Court pursuant to Order 19 Rule 9(4) – Legal effect – Proper order for court to make

EVIDENCE - EVALUATION OF EVIDENCE: Duty of trial judge to evaluate evidence – Proper exercise of – Duty of appellate court to invitation to substitute own evaluation for that of trial court

JUDGMENT AND ORDER - AWARD OF COST:- Principles of law regarding award of cost - Discretion of the Court thereto – Proper exercise of

JUDGMENT AND ORDER - AWARD OF COST:- Two broad categories of costs recognized by Nigerian Court – How assessed - Necessary expenses in the proceedings made by a party and the cost in terms of the litigants "time and effort in coming to Court" – How assessed - Duty of court thereto

JURISDICTION – FCT HIGH COURT:- contractual obligation of offer and acceptance – Suit arising therefrom – Where one of the parties is a federal entity – Jurisdiction of FCT High Court thereto - Applicability of S. 2(a) of the Public Officer Protection Act, Cap. P41 LFN. 2004.

WORDS AND PHRASES:- “Cost of action” and “Cost filing the suit” – Whether means the same thing-end!

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The 2nd Respondent was allocated shop No. 53, Wunti Shopping Complex Bauchi through a letter of allocation issued by the 1st Respondent (Ministry of Housing, Environment, Bauchi State) dated 3rd February, 2005. Therein, the 2nd Respondent was to pay a total sum of N600,000.00 to the 1st Respondent through Yankari Saving and Loan Limited. The 2nd Respondent paid and was issued receipts for the said sum by two installments of N500,000.00 and N100,000.00 dated 21st day of February, 2005 and 29th December, 2005 respectively. Consequently, the Yankari Saving and Loan Limited issued to the 2nd Respondent a letter of confirmation of payment which purpose was to authorize the 1st Respondent/Ministry to release the keys of the said shop to the 2nd Respondent.

When the 2nd Respondent presented the letter to the Ministry through the office of the 1st Appellant (Eng. Zabairu Yakubu), who was Permanent Secretary of the Ministry, 2nd Respondent allegedly abused and insulted by the 1st Appellant and possession refused. It emerged that the 1st Appellant/Permanent Secretary had allocated the shop to himself using the name of his son (2nd Respondent) as crony. Instructively, in 2005 when 2nd Respondent came for possession of the shop, neither the Permanent Secretary nor his son had made any payment on the shop. It was only on the 30th day of January, 2007 when the suit by the 2nd Respondent was pending that they made payment. Furthermore, they were only able to produce a certified letter of confirmation of payment dated 9th November, 2010, five years after the 2nd Appellant was issued his.

The trial judge after considering the case entered judgment in favour of the Plaintiff:-end!

DECISION(S) APPEALED AGAINST

The learned trial judge granted the following reliefs to the plaintiff/2nd Respondent-

“(a) The Plaintiff having successfully established the claims against shop No. 53 is entitled to possession of the shop and I hereby order the 2nd Defendant to deliver up possession of shop No. 53 Wunti Shopping Complex forthwith. The Plaintiff being the rightful allottee and having paid its full value.

(b) I hereby order a perpetual injunction restraining the 1st and 2nd Defendants from intruding with the Plaintiffs ownership of shop No. 53 and enjoyment thereof forthwith.

(c) With the Plaintiff now having established in principles his legal entitlement, I hereby assessed all order for the payment of a general damages of the total sum of N150,000 only against the Defendants relying on Mrs. RONKE OMIYELE V MOBOLAJI MACAULEY & 4 ORS (2007) 37 NSCQRL at page 906 ratio 6.

(d) The cost of filing the matter and all fees and for other processes as asked is awarded against the Defendants in the sum of N1,600.10 only payable to the Plaintiff.”-end!

ISSUE(S) FOR DETERMINATION ON APPEAL

*BY APPELLANT:*

(1) Whether from the fact and evidence, the trial Court has jurisdiction to adjudicate upon the suit No. BA/52/2007 filed by the 2nd Respondent as Plaintiff in the lower Court and against the Appellants as 1st and 2nd Defendants in the Lower Court.

(2) Whether the trial Court was right to enter judgment in favour of the Plaintiff in respect of the relief not sought by him before it.

(3) Whether in view of the evidence led, the trial Court was right to have entered judgment for the Plaintiff.

(4) Whether it is the duty of Plaintiff to rely on the strength of his case and not on the weakness of the Defendant’s case?

(5) Whether absence of the reference number and use of paper not being used by the 3rd Defendant in its custom and traditions in respect of Exhibits LD 1 makes it in law suspicious as to its originality and authenticity?-end!

*BY RESPONDENTS*

*[1ST RESPONDENT did not file any brief]*

*2ND RESPONDENT distilled one issue for determination:*

“Whether the lower Court was not right when having made specific finding and properly evaluated the evidence on the record, he came to the conclusion that the 2nd Respondent was the rightful person to be entitled to the ownership of shop No. 53, Wunti Shopping Complex Bauchi State, regard being had to Exhibit LD 4, the letter of confirmation of allocation and final payments."-end!

*AS ADOPTED BY COURT*

[Court adopted issues as distilled by the Appellant for the determination of the appeal]-end!

DECISION OF COURT OF APPEAL

All Issues (1 – 5) submitted for resolution resolved against the Appellants. Appeal deemed lacking in merit and therefore dismissed.-end!

**MAIN JUDGMENT**

MUDASHIRU NASIRU ONIYANGI, J.C.A. (Delivering the Leading Judgment):

The 2nd Respondent herein was the Plaintiff before the High Court of Bauchi State sitting in Bauchi in a suit he instituted on the 6th of March, 2007 against the 1st and 2nd Appellants and the 1st Respondent. It was his contention that he was allocated shop No. 53, Wunti Shopping Complex Bauchi vide a letter of allocation issued by the 1st Respondent through its Chief executive dated 3rd February, 2005 (The said letter was tendered and admitted as Exhibit LD 1). In the said letter, the 2nd Respondent was to pay a total sum of N600,000.00 to the 1st Respondent through Yankari Saving and Loan Limited. It is his case that he paid the said sum by two installments of N500,000.00 and N100,000.00 on the 21st day of February, 2005 and 29th December, 2005 respectively. Receipt for the payment were tendered and admitted in evidence as Exhibit LD 2 and LD 3. Consequent upon the foregoing payments, the Yankari Saving and Loan Limited issued to the 2nd Respondent a letter of confirmation of payment and which will authorize the 1st Respondent to release the keys of the said shop to the 2nd Respondent. The said letter was tendered and admitted as Exhibit LD 4. When the 2nd Respondent presented the letter (exhibits LD 4) to the 1st Appellant, who was the Permanent Secretary in the 1st Respondent’s ministry, he was allegedly abused and insulted by the 1st Appellant (Eng. Zabairu Yakubu). At that time, it was alleged that the 1st Appellant has allocated the shop to himself using the name of his son (2nd Respondent) as crony. It is the case of the 2nd Respondent that as at that time 2005, the 1st & 2nd Appellants have not made any payment on the shop. It was on the 30th day of January, 2007 when the suit by the 2nd Respondent was pending that payment was made. It was also his contention that the Appellant did not tender any letter of allocation of the said shop but lately produced a certified letter of confirmation of payment dated 9th November, 2010 (Exhibit Waziri 1)

For the foregoing, the 2nd Respondent instituted his action at the lower Court claiming as follows in paragraph 19 of his statement of claim (see page 6 of the Record of Appeal)-

The Plaintiff whereof claims against the Defendants jointly and severally:

(a) An Order of specific performance compelling the Defendants to deliver up possession or allow the Plaintiff access to the said shop No. 53 Wunti shopping complex, Bauchi being the original and rightful allotee of the said shop.

(b) An Order of perpetual injunction restraining the 1st and 2nd Defendants from interfering with the plaintiff’s ownership and enjoyment of the said shop No. 53 Wunti shopping complex, Bauchi.

(c) General damages of N500,000.00

(d) Cost of this action.

Issues were joined by parties. At the trial, the Respondent as Plaintiff testified and tendered 5 exhibits. On their behalf, the 1st and 2nd Appellants as 1st and 2nd Defendants called two witnesses in their defence and tendered Exhibit Waziri 1 and closed their case. The 1st Respondent as 3rd Defendant did not give any evidence but adopted the evidence of the 1st and 2nd Appellants. The learned trial judge in his wisdom entered judgment in favour of the Plaintiff (2nd Respondent) in the following terms: (See pages 127 - 128 of the Record of Appeal):

“On the whole, the Plaintiff having proved his case by preponderance of evidence is entitled to judgment in favour of the plaintiff(sic) in the following terms:

“(a) The Plaintiff having successfully established the claims against shop No.53 is entitled to possession of the shop and I hereby order the 2nd Defendant to deliver up possession of the shop No.53 Wunti shopping complex forthwith. The Plaintiff being the rightful allottee and having paid its full value.

(b) I hereby order a perpetual injunction restraining the 1st & 2nd Defendants from intruding with the Plaintiff’s ownership of shop No. 53 and enjoyment thereof forthwith.

(c) With the Plaintiff now having established in principle his legal entitlement, I hereby assend (sic) all order for the payment of general damages of the total sum of N150,000.00 only against the Defendants relying on MRS RONKE OMIYELE VS. MOBOLAJI MACAULEY & 4 ORS (2007) 37 NSCQLR at Page 906. Ratio 6.

(d) The cost of filing the matter and all fees paid for other processes as asked is awarded against the Defendants in the sum of N1,600.10 only payable to the Plaintiff”.

Let me quickly put on record here that the foregoing are reproduced verbatim.

Pained by the outcome of the trial, the Appellant initially filed the notice of Appeal dated 2nd April, 2013 containing a lone ground. Vide the order of this Court, an amended notice of Appeal filed on 3rd May, 2019 was deemed as properly filed and served on 7th day of May, 2019. It has four grounds. In paragraph 4 of the said amended Notice of Appeal, he sought for the following reliefs:

(1) An Order setting aside the judgment of the High Court Bauchi State presided over by Hon. Justice M. A. Sambo in suit No. BA/51/2007 delivered on the 22nd day of March, 2013 on ground of lack of jurisdiction.

OR in the alternative

(2) An Order setting aside the judgment of the High Court Bauchi State presided over by Hon Justice M. A. Sambo in suit No. BA/51/2007 delivered on the 22nd day of March, 2013 and dismissed same for lacking in merit.

Upon the transmission of the Record of Appeal on the 28th day of March, 2014 and which was deemed as properly compiled and transmitted on the 23rd day of March, 2017, respective Counsel filed and exchanged their brief of argument.

The Appellant’s amended brief of argument filed on the 9th day of October 2019 was deemed as properly filed and served on the 7th day of May, 2019. Therein, the following issues are presented for the determination of the Appeal.

(1) Whether from the fact and evidence, the trial Court has jurisdiction to adjudicate upon the suit No. BA/52/2007 filed by the 2nd Respondent as Plaintiff in the lower Court and against the Appellants as 1st and 2nd Defendants in the Lower Court.

(2) Whether the trial Court was right to enter judgment in favour of the Plaintiff in respect of the relief not sought by him before it.

(3) Whether in view of the evidence led, the trial Court was right to have entered judgment for the Plaintiff.

(4) Whether it is the duty of Plaintiff to rely on the strength of his case and not on the weakness of the Defendant’s case?

(5) Whether absence of the reference number and use of paper not being used by the 3rd Defendant in its custom and traditions in respect of Exhibits LD 1 makes it in law suspicious as to its originality and authenticity?

The 1st Respondent did not file any brief.

On behalf of the second Respondent, a brief of argument dated 21st day of April, 2017 was filed on the 24th day of April, 2017. The said brief was deemed as properly filed and served by this Court on the 7th day of May, 2019. However he was not in Court on the day of hearing despite being served with hearing notice. The said brief was treated as having being argued pursuant to Order 19 Rule 9 (4) of the Court of Appeal Rules, 2016. In the said brief, the following lone issue was presented for the determination of the Appeal”

“Whether the lower Court was not right when having made specific finding and properly evaluated the evidence on the record, he came to the conclusion that the 2nd Respondent was the rightful person to be entitled to the ownership of shop No. 53, Wunti Shopping Complex Bauchi State, regard being had to Exhibit LD 4, the letter of confirmation of allocation and final payments."

After a careful reading of the record of proceeding and the judgment of the trial Court and coupled with the Notice and ground of Appeal, I am of the view that adopting the issues raised by the Appellant for the determination of the Appeal would be apt in this circumstances hence, I adopt the issues formulated by the Appellant for the determination of this Appeal. Before then, I have noticed that the Respondent raised a Preliminary Objection somewhere in his unpaginated brief of argument deemed as properly filed on 7th May, 2019. It is on record that the Respondent was absent on the hearing day of this Appeal despite the service of hearing notice on him through his Counsel. Based on that, the Court invoked its powers under Order 19 Rule 9(4) and treated the Appeal as having being duly argued. That is to say that the Respondent was not available to pursue his contention as contained in the said notice of Preliminary Objection. On that note, the said notice of objection is deemed as abandoned and same be and is hereby struck out. Having said these, I will now proceed to consider the issues for determination presented by the Appellant. In doing this, I will take the first issue separately and take issues 2 - 5 together since they all tend to be challenging the appropriateness or other wise of or otherwise of the evaluation of the evidence, before the trial Court which led to the entering of judgment in favour of the Respondent.

In my view, that will also provide answers to the question whether or not Respondents case before the trial Court was weak or strong and whether Exhibit L D 1 was properly admitted in evidence.

ISSUE ONE

Whether from the facts and evidence the Trial Court has jurisdiction to adjudicate upon the suit NO. BA/51/2007 filed by the 2nd Respondent as Plaintiff in the lower Court and against the Appellants as 1st and 2nd Defendant in the lower Court.

The contention of the Appellant on this issue is that from the fact and evidence before the trial Court, is that the Court has no requisite jurisdiction to adjudicate over the suit filed by the 2nd Respondent as Plaintiff at the trial Court against the Appellants as 1st and 2nd Defendants. It is his contention that the 1st Appellant as 1st Defendant before the Court, was the Permanent Secretary of Bauchi State Ministry of Housing, Environment and resident in Bauchi. The 1st Respondent was the 3rd Defendant before the trial Court is a Ministry of Bauchi State Government (Government Agent) being charged with the task of building maintenance, allocation and any other matter in relation to house and shops owned by Bauchi State Government. It also looks after the general safety of the public environment. Therefore both the 1st Appellant and 1st Respondent before this Court are public officers. Therefore the alleged act said to have been done by the 1st Appellant were done in his capacity as Permanent Secretary Ministry of Housing and Environment Bauchi State. He referred to the evidence of the Plaintiff as PW1 contained in pages 54 lines 19-34. He submitted that based on the foregoing, the 1st and 3rd Defendant before the trial Court are public officers and that the alleged act was done in their official capacity. He added that the cause of action arose in February, 2005 and the 2nd Respondent in this Court as Plaintiff at the trial Court filed his suit on 14th day of March, 2007. He argued that the suit was filed after a period of 2 years from the date when the cause of action arose. He submitted that the failure of 2nd Respondent to file his suit before the trial Court against the 1st and 3rd Defendants before the trial Court with the time limited by law robbed the lower Court of the requisite jurisdiction to adjudicate on the matter. He relied on Section 2(a) of the Public Officer Protection Act Cap. P41 Laws of Federation of Nigeria (L.F.N) 2004.

Based on the foregoing he urged the Court to resolve this issue in favour of the Appellants.

I have carefully read through the brief of argument by the Respondent. Nowhere did he offer any argument in response to issue number one of the Appellant. Therefore, the argument of the Appellant on this issue would be considered on its merit.

The single question that really come to mind having regard to the contention of the Appellant on this issue is whether or not the suit by the 2nd Respondent at the trial Court against the 1st Appellant and the 1st Respondent is statute barred. By virtue of Section 2(a) of the Public Officers (Protection Act Cap. P41, LFN. 2004 which provided statutory limitation period prescribed 3 months within which an action can be instituted against a public officer. By this provision, where an action is brought against a public officer outside the time prescribed under that law, such proceedings should not be entertained by the Court because it is statute barred. See FORESTRY RESEARCH INST. OF NIGERIA V. GOLD (2007) 11 NWLR (Pt. 1044) 1 and AGBEFAWO AREMU TAJUDEED V. CUSTOMS, IMMIGRATION AND PRISON SERVICE BOARD (2009) LPELR- 3655. Where an action is statute barred, a Plaintiff who might have had a cause of action loses the right to enforce the cause of action by judicial process because the period prescribed by the imitation law for instituting such an action has elapsed. See ATTORNEY GENERAL OF ADAMAWA STATE & ORS V. ATTORNEY GENERAL OF THE FEDERATION (2014) LPELR - 23221, P.N. UDOH TRADING CO. LTD V. SUNDAY ABERE & ANOR (2001) LPELR- 2893. In order to determine whether or not an action is statute barred, the Court should confine itself to the averments in the Writ of Summons and the statement of claim which alleges the factual situation that gives rise to the cause of action. See UNION BANK OF NIGERIA V. ROMANUS C. UMEODUAGU (2004) 13 NWLR (Pt. 890) 352.

In line with the decisions in the foregoing decided case which in the main saddled the Court with the responsibility of looking into the endorsement in the writ of summons and the statement of claim, I will proceed to examine the aforementioned processes. In the writ of summons by the 2nd Respondent before the trial Court, the following are the reliefs sought against the Defendants jointly and severally-

(A) An order of specific performance compelling the Defendant to deliver up possession or allow the Plaintiff access to the said shop No. 53 Wunti Shopping Complex, Bauchi being the original and rightful allotee of the said shop.

(B) An order of perpetual injunction restraining the 1st and 2nd Defendants from interfering with the Plaintiff’s ownership and enjoyment of the said shop No. 53 Wunti Shopping Complex, Bauchi.

(C) General damages of N500,000.00 (Five Hundred Thousand Naira Only)

(D) Cost of this action.

In the statement of claim by the Plaintiff (2nd Respondent), paragraphs 4-18 suggests to me that the 1st Respondent offered for sale to the general public in Bauchi State Shops built by Government at Wunti Shopping Complex Bauchi for N600,000.00. The 2nd Respondent applied and was allotted shop No. 53 at Wunti Shopping Complex. He paid an initial down payment of N500,000.00 and later the balance of N100,000.00. Having done this, he applied for delivery of the said shop after being issued with the certificate of completion of payment by the Yankari savings and loans Bauchi. This bid met a stone wall when the Permanent Secretary (1st Appellant) refused and told him that the said shop was allocated to another person who was later discovered to be his son.

This situation motivated the 2nd Respondent to institute the action. In my humble view, the relationship between the 1st and 2nd Respondents is that of a contractual obligation of sale of landed property (shop). There is that offer of the shop to the general public in Bauchi State and the acceptance by the said Respondent and payment of consideration which is the sum of N600,000.00. that clearly suggest no other thing than a contractual relationship of sale of a shop which is a landed property. The question now is whether the limitation law (Section 2(a) of the Public Officer Protection Act) applies to cases of contract. My response to this is in the negative. My view is buttress with the dictum in the case of OSUU S. C. ODUKO V. GOVT OF EBONYI STATE OF NIGERIA AND 3 ORS (2004) 13 NWLR (Pt. 891) pg. 487 at 493 where the Court said thus:

“Section 2(a) of the Public Officer Protection Act which provides that an action, prosecution or proceeding shall not lie or be instituted against my person for an act done in pursuance of execution or intended execution of any act or law or of any pubic duty or authority or any alleged neglect or default thereof unless it is commenced within three months after the act, neglect or default complained of does not apply to cases of recovery of land, breach of contract, claim for work and labour done. In the instance case Section 2(a) of the Act cannot allow the 3rd Respondent’s action leading to the appeal because the Appellants claim was founded on contract. The trial Court was absolutely in error when it held that the Appellant action is statute barred. See SALAKO V. L.E.D.B. AND ANOR (1953) 20 NLR 169, JUDICIAL SERVICE COMMISSION V. ALAKA (1982) 8-10 CA 42, ALAPIKI V. GOVT OF RIVERS STATE (1991) 8 NWLR (P. 211) 575.”

Considering the forgoing and the transaction between the Appellant, 1st and 2nd Respondents which is based on a contractual obligation of offer and acceptance of sale of shop No. 53 at Wunti Shopping Complex and the payment of the consideration, it is my candid view that the suit of the 2nd Respondent is not statute barred. The trial Court has the jurisdiction to entertain the suit. The Appellants cannot take refuge under the provision of S. 2(a) of the Public Officer Protection Act, Cap. P41 LFN. 2004. I accordingly so hold. Therefore I answer the question in the negative and resolve issue one against the Appellants.

ISSUES 2, 3, 4 & 5

The next question is whether the trial Court entered judgment in favour of the Plaintiff in respect of the relief not sought.

The contention of the Appellant is that the trial Court erred in entering judgment in favour of the Plaintiff in respect of relief not sought. It is his argument that the Respondent as Plaintiff only claimed the cost of the action simplicita but the Court in its judgment suo motu assessed and awarded cost of filing the suit. He added that there is no sufficient evidence before the Court to grant such award. He submitted that it is a long settled principle of law that Court does not grant the relief not sought. He relied on the case of KEREWE V. ABRAHAM (2010) 1 NWLR (PT. 1176) P. 443 at P. 450 R. 7, UDO ESEIN AKPAN AKPAKPAN V AKPAN AKPAKPAN (2010) 1 NWLR (PT. 1176) P. 627 at P. 628 to 629 R. 1.

On whether in view of the evidence led, the trial Court was right to have entered judgment for the Plaintiff. His contention is that from the evidence led, the Plaintiff (2nd Respondent) is not entitled to an order of specific performance. His argument is that the 2nd Respondent evidence on page 54 lines 18-20 of the record of proceedings is that he got allocation letter, Exhibit LD1 on 3rd February, 2005 from the 1st Respondent and he made his first payment of N500,000.00 on 21st February, 2005 and paid the balance of N100,000.00 on 29th December, 2005 i.e. more than 10 months after instead of in 30 days as contained in the allocation letter Exhibit LD1. Therefore the 2nd Respondent neglected to comply with the condition of the allocation. He failed to make the complete payment within 30 days prescribed in Exhibit LD1. He added that he who seek equity must show that he is vigilant and does all what is required of him to clean hand to enforce it. He referred to the case of NLEWEDIM V UDUMA (1995) 30 LRCN Pg. 113 at 115-116 R. 2 and 3 and 5, F.G.N. V. ZEBRA (2003) 105 LRCN Pg. 363 at 369 R. 11. He submitted further that where contract is made subject to the fulfillment of certain specific terms and condition, the contract is not form and not binding unless and until those terms and conditions are complied with or fulfilled. He added that the contract is not formed because the conditions for the allocation are breached. Therefore, something cannot be put on nothing. He relied on the case of BEST (NIG.) LTD V. BLACKWOOD HODGE (NIG.) LTD (SURPA) (2011)R. 7. He urged the Court to hold that the failure of the 2nd Respondent to comply with the terms of the contract as contained in Exhibit LD1 will negate his right to claim for specific performance of an order to take possession of the said shop.

On the contention that the 2nd Respondent relied on the weakness of the Appellants’ case, he argued that it is the duty of the Plaintiff to prove that he has done all that is required of him or that he has met and complied with all the condition enumerated in the letter of allocation. He referred to the following case EYO V. ONUOHA & ANOR (2011) VOL. 195 Pg. 38 at 45 R. 4, BAYOL V. AHEMBA (1999) 71 LRCN Pg. 2347 at 2356 R. 9 and OKONKWO V OGBOGU (1996) 5 NWLR (PT. 449) PG. 420 at 422 R. 2.

He urged the Court to hold that the trial judge erred in law when he held that the 2nd Appellant made payment after 2 years nine months upon allocation and that the 2nd Appellant is guilty of the same wrong as the 2nd Respondent and cannot rely on same as shield.

Another complaint of the Appellant is that Exhibit LD1 bears no reference number and that it is contained in a different paper compared with what the 1st Respondent by tradition uses, he contended that the paper used for Exhibit LD1 raises some suspicion as to its originality and authenticity. He urged the Court to discountenance Exhibit LD1. He relied on the case of UDEH V. OKOLI (2009) 7 NWLR (PT. 1141) pg. 571 at 575 to 577 R. 4. In conclusion, he submitted that in view of the foregoing, the trial Court was wrong to have come to the conclusion that the 2nd Respondent (Plaintiff) proved his case by preponderance of evidence warranting him to judgment as specified on pages 127-128 of the record.

He urged the Court to allow the appeal, set aside the decision of the trial Court and dismiss the claim of the 2nd Respondent before the trial Court.

The reaction of the 2nd Respondent to the foregoing argument of the Appellants is that the decision of the lower Court is unassailable and that it is on a firma terra, regard being had to the pleadings of the parties and the evidence on record. He added that the trial Court took its time to properly evaluate the evidence on record before coming to specific finding and conclusion. He submitted that evaluation is the primary responsibility of a trial Court. He added that where the record of proceedings show that a trial Court assessed the evidence produced before it and accorded probative value to same before coming to a conclusion and making a finding of fact, the appellate Court will not interfere with the conclusion nor substitute its own view for that of the trial Court. He referred to the following cases AKINLOYE VS EYIYOLA (1968) NMLR 92 AT 93, AJIBULU V AJAYI (2014) 2 NWLR (PT. 1392) 483, IKUMONIHAN V STATE (2014) 2 NWLR (PT. 1392) 564 and MOGAJI V. ODOFIN (1978) 4 SC 91. Further to these, he referred to page 119 lines 31-38 made findings on the merit of the case of the 2nd Respondent, pages 120-121, lines 35-37 on principle of estoppel that operate against the 2nd Appellant, pg. 121, lines 33-38 on the unreliability of the evidence of the Appellants, page 122, lines 15-21 on the unassailability of the 2nd Respondent’s case vis-a-vis Exhibits LD1 and LD4, page 124, lines 6-12 on the evidence of the witnesses of the Appellant which reinforced the case of the 2nd Respondent, page 124, lines 6-12 on the evidence of the Appellant that supports and reinforce the case of the 2nd Respondent and page 127, lines 19-29 on the competing rights of the 2nd Respondent and the 2nd Respondent on shops No. 53 Wunti Shopping Complex Bauchi. He argued that from the aforesaid positive findings of fact by the lower Court, it is very clear that the judgment of the trial Court is unassailable. He added that the pleading of the 2nd Respondent is well rooted. Cogent oral and documentary evidence establish the case of the 2nd Respondent that he was the person to whom shop No. 53, Wunti Shopping Complex Bauchi State has been allocated and that he paid the agreed sum, his payment was confirmed by the relevant authority, therefore the 1st and 2nd Appellants has no valid right or interest whatsoever on the subject matter. He concluded that the lower Court committed any error in the judgment hence this Court has no business whatsoever in disturbing the decision of the lower Court. He relied on the following cases NTEYOHO V UDO (1991) 5 NWLR (PT. 189) 100, OGUNLEYE V. AINA (2011) 3 NWLR (PT. 1235) 479, MBA V AGU (1998) 9 SCNJ 34, BAKARE V BELLO (2002) FWLR (PT. 107) 1298. For the foregoing, he urged the Court to dismiss the appeal with substantial cost and affirm the decision of the trial Court.

On the first complaint of the Appellants that the Court granted relief not sought by the 2nd Respondent. To determine this, both the statement of claim and the judgment of the trial Court have to be visited. The statement of claim can be found from pages 3-7 of the record. In paragraph 19 of the statement of claim contained on page 6 of the record of appeal, the Plaintiff (2nd Respondent) claimed as follows:

Paragraph 19:-

“The plaintiff whereof claims against the defendants jointly and severally

(A) An Order of specific performance compelling the Defendants to deliver up possession or allow the Plaintiff access to the said shop No. 53 Wunti Shopping Complex, Bauchi being the original and rightful allotee of the said shop.

(B) An Order of perpetual injunction restraining the 1st and 2nd Defendants from interfering with the plaintiff ownership and enjoyment of the said shop No. 53 Wunit Shopping Complex Bauchi.

(C) General damages of N500,000.

(D) Cost of this action.

The learned trial judge in his considered judgment concluded on pages 127-128 granted the following reliefs to the plaintiff (2nd Respondent)-

“(a) The Plaintiff having successfully established the claims against shop No. 53 is entitled to possession of the shop and I hereby order the 2nd Defendant to deliver up possession of shop No. 53 Wunti Shopping Complex forthwith. The Plaintiff being the rightful allottee and having paid its full value.

(b) I hereby order a perpetual injunction restraining the 1st and 2nd Defendants from intruding with the Plaintiffs ownership of shop No. 53 and enjoyment thereof forthwith.

(c) With the Plaintiff now having established in principles his legal entitlement, I hereby assessed all order for the payment of a general damages of the total sum of N150,000 only against the Defendants relying on Mrs. RONKE OMIYELE V MOBOLAJI MACAULEY & 4 ORS (2007) 37 NSCQRL at page 906 ratio 6.

(d) The cost of filing the matter and all fees and for other processes as asked is awarded against the Defendants in the sum of N1,600.10 only payable to the Plaintiff.”

The complaint in the main is that the Plaintiff asked for cost of action and the Court awarded cost of filing the suit. In my humble view, the complaint of the Appellant is unfounded and of no probative value. It is clear that the 2nd Respondent asked for cost of the action. The Court in its choice of word in awarding the cost christened it cost of filing the suit. Cost of action and cost of filing to me are one and same thing. The general rule is that cost follows event and a successful party is entitled to cost. The award or refusal of cost is at the discretion of the Court provided it is exercised judicially and judiciously. See NIGERIA NATIONAL PETROLEUM CORPORATION (NNPC) PENSION LIMITED V. VITA CONSTRUCTION LTD (2016) LPELR - 41259, UBN LTD V. NWAOKOLO (1995) 6 NWLR (PT. 400) 127, STABILINI VISINONI LTD V MALLISON AND PARTNERS LTD (2014) 15 NWLR (PT. 1164) 344, F.A. AKINBOBOLA V PLISSON FISKO NIGERIA LTD AND ORS (1991) 1 NWLR (PT. 167) 270. The purpose of award of cost is for the purpose of meeting the legitimate expenses of the successful party either wholly or partially as the Court may deem fit. See ADEBUYI LAYINKA AND ANOR V. ADEOLA MAKINDE & ORS (2002) 10 NWLR (PT. 775) 358. EKO JCA (as he then was, now Justice of the Supreme Court) in the case of LONESTAR DRILLING NIGERIA LIMITED V. NEW GENESIS EXECUTIVE SECURITY LTD (2011) LPELR 4437 said thus on categories of cost-

“It is abundantly clear from the foregoing that costs fall in two broad species, namely the necessary expenses in the proceedings made by a party and the cost in terms of the litigants “time and effort in coming to Court". The former category includes filing fees, and solicitors fees. This category belongs to the realm akin to special damages. They are easily ascertainable by producing for instance receipts. That is why the Rules classify them as expenses. The latter category which the Rule allow the litigant to be compensated for is the litigants “time and effort in coming to Court". The Court under this category, usually take into account the number of appearances of the litigant and his Counsel in Court.”

I am not unmindful of the position of the law that a Court or Tribunal will not grant a prayer outside the ones set down in statement of claim, petition etc. See IGE FELIX OYEBISI V HON. TIJANI TUNDE SULEIMAN & ORS (2008) LPELR - 4288, UGO V. OBIEKWE (1989) 1 NWLR (PT. 99) 566,THE NIGERIA AIR FORCE V WING COMMANDER T.I.A SHEKETE (2002) 18 NWLR (PT. 798) 129, DR. T.E.A. SALUBI V. MRS BENEDICTA E. NWARIAKU 2003) 7 NWLR (PT. 819) 426, AISHA JUMMAI ALAHASSAN AND ANOR VS MR DARIUS DICKSON ISHAKU AND ORS (2016) LPELR- 40083. Having shown that the cost granted by the Court is not what was not claimed but that which is claimed in paragraph 19 of the statement of claim by the Plaintiff (2nd Respondent) this question therefore is answered in the negative.

What is next is whether in view of the evidence led, the trial Court was right to have entered judgment for the Plaintiff.

It is common ground that the duty of a trial Court is to adequately evaluate the evidence adduced in the case and make appropriate finding of fact in respect of all issues arising in the case and material to the determination of the case. SeeT.A.O. WILSON AND ORS v. A.B. OSHIN & ORS SCNLR 1215 at 1240. A. R. MOGAJI AND ORS V MADAM RABIATU ODOFIN AND ORS (1978) 4 SC 91. That is why in deciding whether a certain set of facts given in evidence by one party in a civil case before a Court in which both parties appears is preferable to another set of fact given in evidence by the other party, the trial judge, after a summary of all the facts must put the two set of facts on an imaginary scale, weigh one against the other then decide upon the preponderance of credible evidence which weigh more and acceptable in preference to the other and then apply the appropriate law to it. What I am saying in essence is that before a judge before whom evidence is adduced by the parties in a civil case comes to a decision as to which evidence he believes or accepts and which evidence he rejects, he should first of all put the totality of the testimony adduced by both parties on that imaginary scale, he will put the evidence adduced by the Plaintiff on one side of scale and that of the Defendant on the other side and weigh them together. He will then see which is heavier not by number of witnesses called by each party but by the quality or the probative value of the testimony of those witnesses. See the case of MUSA SHA (JNR) & ORS V DA RAP KWAN AND ORS (2000) 8 NWLR (PT. 670) 685 at 705.

In the case at hand the Plaintiff (2nd Respondent) testified to the effect of how he paid for the shop by two installments of N500,000.00 and N100,000.00 making up the N600,000.00 for the shop. Not these alone, he tendered document of offer Exhibit LD1 and Exhibit LD2-4 to show his respective payments and the letter of compliance by the chosen bank by the 1st Respondent. All these are not in dispute. Not these alone, the witnesses of Appellant who are staff of the Ministry (Respondent) confirmed the authenticity of the signature on Exhibit LD1. Meaning that Exhibit LD1 was not disputed. Therefore the complaint on which Exhibit LD1 is made is of no substance but an empty complaint. For the foregoing, I have no hesitation in coming to the conclusion that the learned trial judge adequately and properly evaluated the evidence before it and applied the appropriate law to it before arriving at the conclusion reached. By the foregoing, both the questions 3 & 4 on whether the Court relied on the weakness of the case of the Appellant and the issue of reference number on Exhibit LD1 are all answered in the negative. That is to say that the Exhibit LD1 is authentic and that the trial Court did not take advantage of the weakness of the case of the Appellant but the preponderance of the evidence of the 2nd Respondent in arriving at the conclusion reached.

In the final analysis, I resolve all the issues 2 - 5 against the Appellants. The result is that the appeal by the Appellants is lacking in merit and hence dismissed.

In consequence, the judgment of the High Court of Justice Bauchi State in suit BA/51/2007 Coram Justice Moh’d A. Sambo is hereby affirmed.

Parties to bear their respective cost.

**ADZIRA GANA MSHELIA, J.C.A.:**

I had the advantage of reading the draft of the lead Judgment just delivered by my learned brother, Oniyangi, J.C.A, I agree that this appeal being devoid of merit should be dismissed. I abide by the orders in the lead Judgment, inclusive of costs.

**BOLOUKUROMO MOSES UGO, J.C.A.:**

I was privileged to read in draft the lead judgment of my learned brother MUDASHIRU NASIRU ONIYANGI, J.C.A. and I am in agreement with his reasoning and conclusion. I also dismiss the appeal.

Parties are to bear their respective costs.-end!