**OSHAFUNMI AND ANOTHER**

**V.**

**ADEPOJU AND ANOTHER**

COURT OF APPEAL

20TH DAY OF FEBRUARY, 2014

CA/K/316/2008

**LEX (2014) - CA/K/316/2008**

OTHER CITATIONS

2PLR/2014/143 (CA)

(2014) LPELR-23073(CA)

**BEFORE THEIR LORDSHIPS:**

THERESA ORJI-ABADUA, JCA

ITA GEORGE MBABA, JCA

HABEEB ADEWALE OLUMUYIWA ABIRU, JCA

**BETWEEN**

1. MR. SUNDAY OSHAFUNMI

2. MRS. CHRISTIANA OSHAFUNMI (substituted for Mr. Joash Oshafunmi (deceased)) – Appellants

AND

1. MRS. SHERIFAT ADEPOJU

2. MRS. MARY JAMES JAMO – Respondents

**ORIGINATING COURT**

HIGH COURT OF KADUNA STATE (M. LADAN J., Presiding)

**REPRESENTATION**

C. IROEGBU for Appellant

TAJUDEEN OLADOJA with FAUSAT ABDUL SALAAM, M. T. RASHID M. B. YUSUF and ABUBAKAR UMAR for Respondent

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

REAL ESTATE AND PROPERTY LAW – LAND:-whether damages is an adequate remedy contracts for sale or purchase of land- difference between occupation and possession

CONSTITUTIONAL LAW- concept of fair hearing- test of- whether it exists in absolute terms- effect of breach of- whether Appellant can complain of being denied fair hearing when he has been given opportunity to present his case to the Court and he failed to

CHILDREN AND WOMEN LAW: Women - Right over interest in property – valid transfer of ownership in property – essential ingredient for a valid sale of property

**PRACTICE AND PROCEDURE ISSUES**

ACTION – ADJOURNMENT:- Application for adjournment - discretion of the trial court in refusing or grant same

APPEAL:- Competency – Proper notice of appeal and grounds of appeal - whether an appellate court can proceed over an appeal against a judgment with no valid notice or ground of appeal filed before it

ACTION – PARTIES:- what party seeking to enforce his right under a contractual agreement must show- whether court will exercise its discretion to impair the rights of third parties

EVIDENCE:- when a statement made a party will amount to an admission against interest- whether pleadings constitutes evidence- net effect of the failure to file pleadings or to lead evidence

JUDGMENT AND ORDER – EQUITY:-Specific performance- when court will exercise its discretionary power to order specific performance- whether a person involved in any form of immoral or illegal act or transaction shall be allowed to enjoy the protection of the court

WORDS AND PHRASES- "possession" – Meaning of

**MAIN JUDGMENT**

HABEEB ADEWALE OLUMUYIWA ABIRU, J.C.A. (DELIVERING THE LEADING JUDGMENT):

This is an appeal against the judgment of the High Court of Kaduna State in Suit No KDH/KAD/214/2000 delivered by Honorable Justice M. Ladan on the 28th of November, 2006. By a writ of summons dated the 10th of April, 2000, the first Respondent, as plaintiff, commenced an action in Suit No KDH/KAD/214/2000 against the second Respondent, as defendant. Mr. Joash Taiwo Oshafunmi was joined as the second defendant in the suit on his own application and consequent on which the first Respondent filed an amended statement of claim dated the 12th of Match, 2001, and her claims were for:

i. A declaration of title to a house lying being and situate at Plot No. G4 Ja'afaru Road Barnawa New Extension, Kaduna covered by Certificate of Occupancy No. 008027 of 16th of December, 1972.

ii. An order for specific performance of the agreement for sale of the said house entered into by the parties hereto on the 3rd day of July, 1998 and for delivery of possession and Certificate of Occupancy No. 008027 of 16th of December, 1972 of Plot No. G4 Ja'afaru Road Barnawa New Extension, Kaduna.

iii. An order of perpetual injunction restraining the defendants, their agents, assignees and all other persons whosoever claiming through them from exercising any right of ownership, control, occupation and the right to collect rents on Plot No. G4 Ja'afaru Road Barnawa New Extension, Kaduna.

iv. An order compelling the defendants to render account of all rents collected on the said house from the 3rd of July, 1998 to date for the purpose of payment of same to the plaintiff.

v. An order directing all tenants in the said house to be paying all rents on the said house to the Registrar of this Honorable Court.

vi. IN THE ALTERNATIVE, the plaintiff claims the sum of N585,000.00 paid by the plaintiff to the first defendant for the purchase of Plot No. G4 Ja'afaru Road Barnawa New Extension, Kaduna for failure of consideration, interest thereon at the rate of 21% per annum from 3rd July, 1998 until judgment is given and thereafter interest at the rate of 10% per annum until total liquidation of the judgment debt.

The case of the first Respondent, as plaintiff, on the pleadings was that the second Respondent, as first defendant, was the owner of the house lying and being at Plot No. G4 Ja'afaru Road Barnawa New Extension, Kaduna covered by Certificate of Occupancy No. 008027 of 166 of December 1972 and that she inherited it from her father, one late Mr. James Jamo. It was her case that on the 3rd of July, 1998, the second Respondent offered to sell the house to her for the sum of N800,000.00 and she accepted the offer and made a part-payment of the sum of N585,000.00, which was duly acknowledged by the second Respondent, and that it was agreed that the balance sum of N215,000.00 would be paid when the second Respondent produces the certificate of occupancy and other documents of title. It was her case that she demanded on several occasions for the production of the Certificate of Occupancy so that she could pay the balance sum but that the second Respondent was not forthcoming with it despite the repeated demands. It was her case that the second Respondent failed and/or refused to surrender the certificate of occupancy as well as possession of the house and was still collecting rents thereon and that she was willing and ready to pay the balance sum for the purchase of the house.

The second Respondent, as first defendant, did not file a statement of defence in the suit and her motion dated the 30th of April, 2007 praying for extension of time to file the statement of defence was struck out by the lower Court on the 10th of May, 2002 for want of diligent prosecution. Mr. Joash Taiwo Oshafunmi, the second defendant, filed a statement of defence and counterclaim on the 3rd of July, 2002 and his claims by the counter claim were for:

i. A declaration that the second defendant purchased the subject property bona fide and therefore he is entitled to the grant of the interest in and over the property

ii. A declaration that the second defendant is the person entitled to the interests in the property situate and known as G. 4 Barnawa New Extension, Kaduna.

The case of the Mr. Joash Taiwo Oshafunmi on the pleadings was that the property in dispute belonged to one late Mr. James Jamo who died intestate and was survived by and the house devolved on the second Respondent and seven other family members and that it was correct that the second Respondent offered to sell the property to the first Respondent and that the first Respondent only paid the sum of N10,000.00 as first payment. It was his case that the other family members of late Mr. James Jamo, on being aware of the transaction, sued the first Respondent before the Upper Area Court, Kakuri contesting her power to dispose of the property and consequent on which the first Respondent declined to conclude the purchase of the house and demanded for a refund of the sum paid. It was his case that the entire family thereafter entrusted the sale of the property to one Alhaji Maidoya and that the property was introduced to him for purchase by some local land agents and that he met the members of the first Respondent's family on the issue and they directed him to Alhaji Maidoya. It was his case that he confirmed the availability of the property for purchase from Alhaji Maidoya and he sighted the original certificate of occupancy and that he thereafter negotiated for and paid the sum of N850,000.00 through the said Alhaji Maidoya for the purchase of the property and that Alhaji Maidoya acknowledged the receipt of the money, gave him the original title documents and promised to assist him to register his interest in the land. It was his case that he purchased the property in the absence of any prior or existing interest therein and he took immediate possession of the property through one of his sons upon the payment and he moved into the property personally in the year 2000.

The first Respondent filed a defence to the counterclaim. The matter proceeded to trial and during which the first Respondent called two witnesses and tendered exhibits while neither the second Respondent nor the said Mr. Joash Taiwo Oshafunmi called any witness or tendered any exhibit. At the conclusion of trial, the lower Court found in favour of the first Respondent and it entered judgment granting the first five prayers of the first Respondent and it dismissed the counterclaim of Mr. Joash Taiwo Oshafunmi. Mr. Joash Taiwo Oshafunmi was dissatisfied with the judgment and he caused his Counsel to file a notice of appeal dated the 25th of November, 2006 against it. The notice of appeal contained four grounds of appeal. Mr. Joash Taiwo Oshafunmi died subsequent to the filing of the appeal and he was duly substituted with the two Appellants in this appeal.

In arguing the appeal before this Court, the Appellants presented a brief of arguments dated the 11th of December, 2008 but filed on the 29th of January, 2009. The first Respondent filed a brief of arguments in response on the 20th of November, 2009 and this was sequel to an order of extension of time granted in her favour by this Court on the 2nd of November, 2009. The Appellants filed a reply brief of arguments to the first Respondent's brief and it was dated the 21st of December, 2009 and was deemed proper by this Court on the 16th of January, 2014. The second Respondent did not file a brief of argument. At the hearing of the appeal, Counsel to the parties relied on and adopted their respective briefs of arguments.

Counsel to the Appellant formulated three issues for determination in the Appellant's brief of arguments and these were:

i. Whether or not the first Respondent was entitled to a decree of specific performance granted in her favour by the learned trial Judge or to a refund of the purchase price paid by her.

ii. Whether the learned trial Judge was right in his failure to make any specific finding regarding the change of ownership of the property in dispute and giving value to it.

iii. Whether the learned trial Judge's refusal to accede to the request by the Appellant for an adjournment and thereafter closing his defence without giving him an opportunity to testify in the suit has not breached the principles of natural justice.

Counsel to the first Respondent was of the view that there were two issues for determination in this appeal and he formulated the issues thus:

i. Whether the first Respondent discharged the burden of proof required to obtain an order of specific performance of the contract of sale of the house in dispute.

ii. Whether a refusal of the trial Court to grant an adjournment to the Appellants on the 6th of June, 2006 constituted a breach of their right of fair hearing.

It is the view of this Court that, from the records of appeal and the other processes filed in this appeal, there are indeed two issues for determination and these are:

i. Whether, on the strength of the evidence led at the trail, the lower Court was justified in granting the reliefs sought by the first Respondent.

ii. Whether the proceedings before the lower Court on the 1st of June, 2006 were conducted in a manner that violated the right of the Appellants to a fair hearing.

The issues shall be dealt with seriatim and this Court shall commence its deliberations from the second issue for determination touching on fair hearing. This is because a finding that the lower Court breached the right of fair hearing of the Appellants means that the entire proceedings before the lower Court are null and void and the law is that where such a conclusion is arrived at by an appellate Court in the course of considering a matter, to proceed thereafter to consider the merits of the decision arrived at by such a proceeding is a futile exercise. Thus, a resolution of the second issue for determination in favour of the Appellants will render a consideration of the first issue for determination unnecessary. The point was succinctly made by Tobi, JSC in Orugbo V. Una (2002) 16 NWLR (pt 792) 175 at 199 A-D thus:

"The fair hearing principle entrenched in the Constitution is so fundamental in the judicial process or the administration of justice that breach of it will vitiate or nullify the whole proceedings, and a party cannot be heard to say that the proceedings were properly conducted and should be saved because of such proper conduction. Once an appellate court comes to the conclusion that there is a breach of the principle of fair hearing, the proceedings cannot be salvaged as they are null and void ab initio. After all, fair hearing lies in the procedure followed in the determination of the case, not in the correctness of the decision. Accordingly, where a court arrives at a correct decision in breach of the principle of fair hearing, an appellate court will throw out the correct decision in favour of the breach of fair hearing."

Similarly, in Idakwo V. Ejiga (2002) 13 NWLR (pt 783) 156, Ayoola, JSC at page 165 E-H stated thus:

"The question of fairness of a proceeding is quite separate from the question of the merit of the trial court's decision. When a question of fairness of hearing arises in a case the only purpose that could have been served by the appellate court considering, albeit in a restricted manner, issue of the merits of the case, in my opinion, is to see whether the result of the case would have been the same even if the breach of the principle of fair hearing had not occurred. Whether that exercise will serve any useful purpose will normally depend on the nature of the breach. In my opinion, where it will be a matter of speculation whether the same decision would have been arrived at had a hearing not tainted by unfairness taken place, an enquiry into the merits is a futile exercise. I would even go as far as saying that an unfair method cannot produce a fair result."

Similar statements were made by the Supreme Court in Olufeagba V. Abdul-Raheem (2009) 18 NWLR (Pt 1173) 384 and in Torri V. National Park Service of Nigeria (2011) 13 NWLR (pt 1264) 365. In First Bank of Nigeria Plc V. TSA Industries Ltd (2010) 15 NWLR (pt 1216) 247, the Supreme Court opined that any judgment or ruling reached in breach of the right of fair hearing will not be allowed to stand on appeal irrespective of the merits of the case.

On the second issue for determination, Counsel to the Appellants traced the developments in the proceedings before the lower Court up and until the 1st of June, 2006 and stated that on the 1st of June 2006, when the matter was defence of the Appellant, as second defendant, to open, the Appellant's Counsel informed the lower Court that they wanted the matter transferred from that Court and had applied for transfer of the matter, but that the lower Court declined the request for a transfer of the matter and called on the Appellant to open his case. Counsel stated that the Counsel to the Appellant then applied for an adjournment of the matter to another and that the application was opposed by Counsel to the first Respondent and that the lower Court refused the request for adjournment and thereafter closed the case of the Appellant. Counsel stated that although a trial Judge has the discretion to grant or refuse an application for adjournment, he must consider the application carefully and deal with it judicially and judiciously on the merit and he referred to the cases of Odusote V. Odusote (1971) All NLR 221, and University of Lagos V. Aigoro (1985) All NLR 64. Counsel stated that the lower Court did not act judicially and judiciously in refusing the application of the Appellant for an adjournment and he traversed through the reasons for saying so.

Counsel stated further that having refused the request for an adjournment, the lower Court ought to have called on the Appellant to go on with his defence before closing his case and that the omission to do so amounted to a wrong and arbitrary exercise of discretion and amounted to a denial of fair hearing; he referred to the cases of Odusote V. Odusote supra and Fawehinmi Construction V. OAU (1998) 5 SCNJ 44.

In response, Counsel to the first Respondent prefaced his arguments with a reference to the provisions of section 36 (1) of the 1999 Constitution on fair hearing and he referred to several cases where the provisions have been pronounced upon by the Supreme Court. Counsel stated the general principles that guide the Courts in considering applications for adjournment and that where an application for adjournment is refused, the party applying must be called upon by the trial Court to proceed with the case before an order of striking out or dismissal can be made by the Court and he referred to the case of Ceekay Trade Ltd V. General Motors (1992) 2 NWLR (pt 222) 32. Counsel stated that the right to fair hearing conceives of correlated duty on the court to hear the case within a reasonable time and it also entails that justice be done to a defendant by affording him the opportunity to proffer his defence in time without the Court and the machinery of justice being held to ransom by the whims and caprices of the parties and their Counsel. Counsel stated that where a party is availed the opportunity of being heard but declines to take advantage of it, he cannot be heard to complain and he referred to several cases including Okeke V. Petmag (Nig) Ltd (2005) 4 NWLR (pt 915) 245 and Alsthom V. Saraki (2005) 3 NWLR (pt 911) 208. Counsel also traced the developments in the proceedings from when the first Respondent closed her case 25th of May, 2005 to the 1st of June 2006 when the lower Court closed the defence of the Appellants and stated that it was obvious that the lower Court afforded the Appellants an opportunity to present their case but that the Appellants chose not to utilize same and that they cannot be heard to complain on this appeal. Counsel urged this Court to resolve the issue in favour of the first Respondent.

The records of appeal show that the first Respondent closed her case on the 25th of May, 2005 and that the matter was thereafter adjourned to the 26th and 27th of July, 2005 for defence to open, in the presence of the parties and with the consent of their Counsel. On the 26th of July, 2005, the second Respondent, as the first defendant, and her Counsel were absent from Court without any explanation and Counsel to the first Respondent applied that her case be closed and Counsel to the Appellants, as second defendant, concurred with the application. The lower Court granted the application as prayed and it closed the defence of the second Respondent and it adjourned the matter to the 27th of July, 2005 for the defence of the Appellants to open. On the 27th of July, 2005, the Appellants and their Counsel were also absent from Court without any explanation and Counsel to the first Respondent applied that the defence of the Appellants be closed and the lower Court granted the application as prayed and it closed the case of the Appellants and adjourned the matter to the 18th of October, 2005 for address.

The records show that the Appellants filed a motion dated the 2nd of August, 2005 seeking for leave to re-open their defence and that the motion was taken and granted by the lower Court on the 27th of January, 2006 without objection from Counsel to the first Respondent and the matter was adjourned to the 13th of April, 2006 for defence to open with the consent of Counsel to the parties. On the 13th of April, 2006, the lower Court called on the Appellants to proceed and call their witnesses but the Counsel to the Appellants sought for an adjournment on the ground that his principal in chambers who was handling the matter personally was not in town.

Counsel to the first Respondent opposed the application and prayed in the alternative for costs of N10,000.00. The lower Court granted the request for adjournment "in the interest of justice" and it awarded costs of N5,000.00 in favour of the first Respondent and the matter was set down for the 1st of June, 2006 for defence. On the 1st of June, 2006, Counsel to the Appellants declined to open the defence on the ground that they had applied that the matter be transferred to another Court as the Appellants were apprehensive that they will not get justice before the lower Court at the end of the day. The lower Court traced the occurrences in the matter from when the first Respondent closed its case until the 1st of June 2006 and it stated thus:

"I consider the application by Mr. Godwin Iyoke learned Counsel to the 2nd defendant as a ploy to delay this matter unnecessarily.  
I will not be intimidated in discharging my duty. This matter started on the 3rd of May, 2000, 5 years back. If the 2nd defendant and his Counsel are not ready to go on with the case let them say so instead of going into frivolities. The application by the learned Counsel for the 2nd defendant is hereby refused. They shall open their defence." (See pages 158 to 159 of the records)

The records show that rather than proceeding to opening the defence, Counsel to the Appellants applied for an adjournment of the matter to another day and Counsel to the first Respondent opposed the application and applied that the defence of the Appellants be closed since they were not ready to proceed. The lower Court refused the application for an adjournment and it closed the case of the Appellants since they were not ready to enter their defence.

The Appellants did not appeal against the ruling of the lower Court refusing to grant the adjournment sought and as such all the arguments of Counsel to the parties on whether the refusal to grant the adjournment was appropriate or not go to no issue in this appeal and will be discountenanced. It is trite that a Court of Appeal cannot question a judgment or ruling of a lower Court against which there is no notice and grounds of appeal legally filed before it - Anah V. Anah (2008) 9 NWLR (Pt 1091) 75. In the absence of an appeal against a judgment or decision of a court, it remains inviolate for all time - Olawepo V. Security and Exchange Commission (2011) 16 NWLR (pt 1272) 122, Emeka V. Okadigbo (2012) 18 NWLR (Pt 1331) 55, Duru V. Federal Republic of Nigeria (2013) 6 NWLR (pt 1351) 441.

The question before this Court on this issue for determination is whether there has been a breach of the right of the Appellant to fair hearing in the circumstances of this case. Speaking on the doctrine of fair hearing, this Court in its unreported decision in Suit No CA/K/267/2011 - Dr. Harry Oranezi V. Dr Chris Nwabueze Ngige & Anor delivered on the 28th of November, 2013 said thus:

"The concept of fair hearing ... is the same as fair trial and it entails so much in the judicial process. As a matter of law, it is the pivot upon which the entire judicial process or the administration of justice revolves. It is the keystone of the trial process as no trial can be sustained unless it accords with the principles of fair hearing, which also involves the twin common law rules of natural justice rules, audi alteram partem and nemo judex in causa sua - Emerah V. Chiekwe (1996) 7 NWLR (Pt 462) 536, Okeke v. Nwokoye (1999) 13 NWLR (Pt 635) 495.

Fair hearing postulates that where a person's legal rights or obligations are called into question, he should be accorded full opportunity to be heard before any adverse decision is taken against him with regard to such rights or obligations. It is an indispensable requirement of justice that an adjudicating authority, to be fair and just, shall hear both sides, giving them ample opportunity to present their case.

Accordingly, a hearing can only be said to be fair when, inter alia, all the parties to the dispute are given a hearing or an opportunity of a hearing. If one of the parties is refused or denied a hearing or is not given an opportunity to be heard, such hearing cannot qualify as a fair hearing under the audi alteram partem rule - Otapo V. Sunmonu (1987) 2 NWLR (Pt 58) 587, Gakus V. Jos International Breweries Ltd (1991) 5 NWLR (Pt 199) 614, Olumesan V. Ogundepo (1996) 2 NWLR (Pt 433) 628.

The rule of fair hearing is not a technical doctrine. It is one of substance. The question is not whether injustice has been done because of lack of hearing. It is whether a party entitled to be heard before deciding had in fact been given an opportunity of being heard. Once an appellate Court comes to the conclusion that the party was entitled to be heard before a decision was reached but was not given the opportunity of a hearing, the judgment entered is bound to be set aside - Kotoye V. Central Bank of Nigeria (1989) 1 NWLR (Pt 98) 419, Olumesan V. Ogundepo supra, Ogundoyin V. Adeyemi (2001) 13 NWLR (Pt 730) 403, Olufeagba v. Abdul-Raheem (2009) 18 NWLR (pt. 1173) 384.

This right to be heard is so fundamental a principle of our adjudicatory process that it cannot be compromised on any ground - Nwokoro v. Onuma (1990) 3 NWLR (Pt 136) 22 at 35, Iwuoha V. Okoroike (1996) 2 NWLR (Pt 429) 231, Olufeagba V. Abdul-Raheem supra. It is perhaps to underscore the inviolability of this right of a party to a dispute to fair hearing that a provision guaranteeing the right to every citizen of this country is firmly ensconced in section 35 of the Constitution of the Federal Republic of Nigeria 1999. Hence, fair hearing is not only a common law right but also a constitutional right - Bamgboye v. University of Ilorin (1999) 10 NWLR (Pt 622) 290, Agip (Nig) Ltd V. Agip Petroli International & Ors (2010) 5 NWLR (Pt 1187) 348, Agbiti V. Nigerian Navy (2011) 4 NWLR (Pt 1236) 175.

The right to fair hearing does not, however, exist in absolute terms. The concept of fair hearing postulates that it is the duty of a Court to create a conducive environment and atmosphere for a party to enjoy his right to fair hearing, but it does not say that it is part of the duty of the Court to make sure that the party takes advantage of the atmosphere or environment so created to exercise his right to fair hearing. It is not part of the business of a Court to compel a party to exercise his right to fair hearing. Where a party fails, refuses or neglects to take advantage of or utilize the environment created by a Court to exercise his right of fair hearing, he cannot turn around to complain of lack of fair hearing - Independent National Electoral Commission V. Musa (2003) 3 NWLR (Pt 805) 72, Dantata V. Mohammed (2012) 8 NWLR (Pt 1302) 366, National Films & Video Censors Board V. Adegboyega (2012) 10 NWLR (Pt 1307) 45.

The question whether a party has been afforded an opportunity to exercise his right of fair hearing depends upon a careful consideration of the facts and circumstances of each case and the test to be applied in each case is an objective one based on the impression of a reasonable and fair minded observer at the trial - Action Congress of Nigeria V. Lamido (2012) 8 NWLR (Pt 1303) 560 and Eastern Breweries Plc, Awo Omamma V. Nwokoro (2012) 14 NWLR (Pt 1321) 488."

This Court adopts these principles in this present appeal. Applying these principles to the facts of this case as stated above, it is crystal clear that the Appellants were given every opportunity by the lower Court to present their defence in this matter, but they consciously refused to do so. Even when the lower Court called upon them to present their defence, they were defiant and they ignored the directive of the learned trial Judge. The suggestion of the Counsel to the Appellants that after refusing the application for adjournment on the 1st of June, 2006, the lower Court ought to have called on the Appellant to present their defence before going ahead to close same cannot hold water in the circumstances of this case. The events of the day showed that the Counsel to the Appellants made two applications on that day. The first was an indirect application for an adjournment when Counsel told the lower Court that he had applied for a transfer of the matter and the lower Court refused the application and it directed the Appellants to open their defence. By refusing to follow the directive and in asking for another adjournment, Counsel to the Appellants conveyed that they were not ready to proceed with the defence and this was why Counsel to the first Respondent prayed that the defence be closed since the Appellants were not ready to proceed. The lower Court was thus correct when in refusing the second application for adjournment, it went ahead to close the defence of the Appellants on the ground that they were not ready to enter their defence. To hold that the lower Court ought to have called on the Appellants a second time to enter their defence will amount to subjecting the proceedings of the lower Court to the whims and caprices of the Appellants. No Court of law should subject itself to such ridicule.

This Court finds and holds that the right of fair hearing of the Appellants was not breached in any manner by the lower Court. The issue of fair hearing is thus resolved against the Appellants.

This takes us back to the first issue for determination - whether, on the strength of the evidence led at the trial, the lower Court was justified in granting the reliefs sought by the first Respondent. Counsel to the Appellants stated that specific performance was an equitable remedy and does not enure to a party as of right and that it applies where the Court is satisfied on the evidence before it that a party has adduced sufficient and credible evidence establishing some specific right or contract which the Court can enforce and he referred to the cases of Ngwu V. Nnaji (1991) 5 NWLR (Pt 189) 18, Innih V. Ferado Agro Consortium Ltd (1990) 5 NWLR (pt 152) 604, Help Nigeria Ltd V. Silver Anchor (Nig) Ltd (2006) 2 SCNJ 178. Counsel stated that the evidence before the Court from the first Respondent was that she had only paid the sum of N584,500.00 out of the purchase price of N800,000.00 and that this meant that the first Respondent who was asking the Court to enforce by a mandatory order in his favour some stipulation of an agreement cannot succeed in obtaining such relief as she was at the time in breach of her own obligation and he referred to the cases of Balogun V. Alli-Owe (2000) FWLR (pt 14) 2335 and Lawal V. Ejidike (1997) 2 NWLR (pt 487) 319.

Counsel further stated that there was evidence from the first plaintiff witness under cross examination to the effect the property in dispute was transferred to Joash Taiwo Oshafunmi and that the first Respondent as the second plaintiff witness also testified under cross examination that by the document tendered as Exhibit 18 the property had been transferred to Joash Taiwo Oshafunmi. Counsel said that this evidence of the first Respondent amounted to an admission against interest and was on a material fact and was harmful to her position in the matter and he referred to the cases of Okin Biscuits Ltd V. Oshe (2004) FWLR (Pt 188) 1094 and Owie V. Ighiwi (2005) All FWLR (pt 248) 1762. Counsel stated that the first Respondent also admitted under cross examination that on her recent visit to the property she was aware that the said Joash Taiwo Oshafunmi was in the property. Counsel stated that a court would not order specific performance of a contract where some intervening circumstances have made it impossible or impracticable or very unjust to a third party for the party against whom the order is sought to implement the order. In other words, that a decree of specific performance will not be granted where it will cause hardship to a third party and he referred to the cases of Taylor V. Arthur 12 WACA 179 and ITT V. Aderemi (1999) 6 SCNJ 46. Counsel stated that the first Respondent did not plead fraud and there was no evidence to show that the Appellants entered the property fraudulently and that the lower Court ought not to have made an order of specific performance in the circumstances.

Counsel also stated that where there is an alternative claim for refund of the part payment made by a party, as in the instant case, it negates the claim for an order of specific performance and he referred to the case of Help Nigeria Ltd V. Silver Anchor (Nig) Ltd supra. Counsel urged this Court to resolve this issue for determination in favour of the Appellants.

In response, Counsel to the first Respondent stated that specific performance is a decree issued by the Court which constrains a contracting party to do that which he has promised to do and that it is a remedy for breach of contract provided by equity to meet those cases where the common law remedy of damages is inadequate. Counsel stated that it is an equitable doctrine and it is discretionary because the dominant principle has always been that equity will only grant specific performance if, under all circumstances, it is just and equitable to do so and that the remedy is available in a variety of relationship and whether or not it will be granted depends on the nature of the contract but it is pertinent that there must be a valid contract. Counsel said that the doctrine is based on the principle that the plaintiff, having altered his position on the faith of a contract acquires an equity against the defendant and that as such a plaintiff desiring to canvass for the doctrine must show part-performance.

Counsel stated that in the instant case, the first Respondent led credible evidence to show that there was a valid contract between herself and the second Respondent for the purchase of the house in dispute and that she altered her position for the worst by making a part-payment of N584,500.00 to the second Respondent in fulfillment of her part of the contract and that it was the second Respondent that has deliberately frustrated the completion of the contract and that she was willing to pay the balance sum. Counsel stated that these pieces of evidence showed that the first Respondent established a specific right in respect of which the lower Court rightly ordered a decree of specific performance and that the cases of Ngwu V. Nnaji supra, Innih V. Ferado Agro Consortium Ltd supra referred to by Counsel to the Appellants were irrelevant and inapplicable as their facts were not similar to those of the instant case. Counsel stated that the burden of proving the existence of some intervening circumstances which would have made it impossible or impracticable or very unjust for the lower Court to decree the order of specific performance was on the Appellants but that the Appellants did not lead any evidence in support of the averments in their pleadings and that net effect is that the pleadings are deemed abandoned; he referred to the cases of Olorunfemi V. Asho (2000) 2 NWLR (pt 643) 743 and Remalo Ltd V. NPN Ltd (2003) 16 NWLR (pt 846) 235.

Counsel referred to the document tendered as Exhibit 18 and stated that from the contents of the document and the testimonies of the plaintiff witnesses thereon, it was incapable of qualifying as an instrument of transfer of tide to the house in dispute to the Appellants and that the Appellants tendered no document of ownership of the house. Counsel stated that the failure of the Appellants to lead evidence in the matter clearly tilted the scale of justice in favour of the first Respondent and the lower Court was correct in relying on the unchallenged evidence of finding in favour of the first Respondent and he referred to the case of Nzeribe V. Dave Engineering Co Ltd (1994) 8 NWLR (pt 361) 124. Counsel urged this Court to resolve the issue in favour of the first Respondent.

Specific performance is the rendering, as nearly as practicable, of a promised performance through a judgment or decree. It is a decree issued by the court which constrains a contracting party to do that which he has promised to do. Specific performance is a court-ordered remedy that requires fulfillment of a legal or contractual obligation when monetary damages are inappropriate or inadequate. It is a remedy provided by equity to meet those cases where the common law remedy of damages is inadequate. The equitable doctrine of specific performance is discretionary and the dominant principle has always been that equity will grant specific performance if, under all the circumstances, it is just and equitable to do so.

The remedy is available in a variety of contractual relationships but whether or not it will be granted depends on the nature of the contract - Governor of Ekiti State V. Ojo (2006) 17 NWLR (Pt 1007) 95 at 126F, Mustapha V. Abubakar (2011) 3 NWLR (pt 1233) 123, Best (Nig) Limited V. Blackwood Hodge (Nig) Ltd (2011) 5 NWLR (Pt 1239) 95, Ibekwe V. Nwosu (2011) 9 NWLR (pt 1251) 1. The point was put by Kay, L.J., in Ryan V. Mutual Tontine Association (1893) 1 Ch 116 at 126 thus:

"This remedy by specific performance was invented, and has been cautiously applied, in order to meet cases where the ordinary remedy by action in damages is not an adequate compensation for breach of contract. The jurisdiction to compel specific performance has always been treated as discretionary, and confined within well known rules."

The onus on a party seeking to enforce his right under a contractual agreement is to show that a valid contract exists and that he has fulfilled all the conditions precedent. He must show that he has performed all those terms which ought to have been performed by him. He must show that he has been vigilant and has done all that is required of him to have a clean hand to enforce the contract - Lagos State Development & Property Corp V. Nigerian Land and Sea Foods Ltd (1992) 5 NWLR (pt 244) 653, Nlewedim V. Uduma (1995) 6 NWLR (pt 402) 383, Universal Insurance Co Ltd Vs T. A. Hammond (Nig) Ltd (1998) 9 NWLR (Pt 565) 340, Saka V. Ijuh (2010) 4 NWLR (pt 1184) 405.

In the instant case, the first Respondent, as the second plaintiff witness, testified in her examination in chief at the trial thus:

"I know Isyaku James Jamo. He is deceased and was a brother of the 1st defendant. I know the relationship between Isyaku James Jamo and the 1st defendant, they are the owners of No G.4, Ja'afaru Road, Barnawa Kaduna. They inherited that property from their late father, James Jamo.

On 3rd July, 1998 the 1st defendant with Isyaku James Jamo told me that they have a property at No G.4, Ja'afaru Road, Barnawa New Extension which they wanted to sell. I told them that I was interested in buying the property. They took me to the property which I inspected. They told me the price was N800,000.00.

They offered the house at N800,000.00. I asked them to reduce the price but they refused. I then raised the N800,000.00. Out of that money I deposited N584,500.00, we then reduced everything in writing. I signed and they all signed... I was given a duplicate of the C of O with a promise that the original would be given to me after the payment of the balance.... After I made the first payment all efforts to make her come and collect the remaining balance proved abortive. The former house she was staying, I went there and could not meet her. Finally, I got her and she promised to come and collect the balance which she did not up till now.

“... I am now willing to pay the balance and collect the original certificate from the 1st defendant." (See pages 143 to 145 of the records)

The document of sale of the house executed between the first Respondent and the second Respondent and the photocopy of the certificate of occupancy that the first Respondent said was given to her by the second Respondent and her brother were admitted in evidence and marked as Exhibits 2 and 3. The testimony of the first Respondent was not disparaged or discredited under cross-examination by Counsel to the Appellants and to the second Respondent and her evidence was in the terms of her case on the pleadings and her case was directed strictly at the second Respondent. As stated earlier, the second Respondent neither filed pleadings to countermand the case of the first Respondent and neither did she lead evidence to challenge or contradict the testimony of the first Respondent. The net effect of the failure to file pleadings or to lead evidence is that the case of the first Respondent in her pleadings and in her testimony stand unchallenged and are deemed admitted and established - Consolidated Resources Ltd V. Abofar Ventures (Nig) Ltd (2007) 6 NWLR (pt 1030) 221, Oladipo V. Moba Local Government Area (2010) 5 NWLR (Pt 1186) 177, Salzgitter Stahl GMBH V. Tunji Dosunmu Industries Ltd (2010) 11 NWLR (pt 1206) 589, Lagos State Water Corporation V. Sakamori Construction (Nig) Ltd (2011) 12 NWLR (pt 1262) 569. In Okoebor V. Police Council (2003) 12 NWLR (Pt 834) 444, the Supreme Court stated that "the basic principle of law is that where a defendant fails to file a defence, he will be deemed to have admitted the claim or relief in the statement of claim" except, of course, a paragraph of the statement of claim is notoriously false to the common knowledge of the court, like 10th of July is Nigeria's independence anniversary, such a paragraph is inadmissible because of the obvious untruth.

The document of sale of land, Exhibit 2, confirmed the story of the first Respondent on the sale of the house and the payment of part of the purchase price. These show that there was indeed a valid contract of sale of the property in dispute between the first Respondent and second Respondent and for which the first Respondent had part-fulfilled her own side of the bargain. Counsel to the Appellants argued that the first Respondent was not entitled to an order of specific performance because she had not fully paid the purchase price. Counsel obviously overlooked the decision of the Supreme Court in Mini Lodge Ltd V. Ngei (2009) 18 NWLR (Pt 1173) 254 where Adekeye, JSC opined that in a contract for sale of property, where part-payment was made, the contract has been concluded and is final, leaving only the balance outstanding to be paid and that the contract for the sale and purchase is absolute and complete for which each party can be in breach for non-performance and for which an action can be maintained for specific performance. Counsel was also not aware of the principle of law that says that where, in a contract for sale of land, a purchaser, after making a part-payment, is willing and ready to pay the balance of the purchase price and indeed offered it to the seller, as in the instant case, the seller cannot reject the money and then proceed to treat the contract as discharged or rescind it and the purchaser is entitled to an order of specific performance to enforce the contract - Biyo V. Aku (1996) 1 NWLR (pt 422) 1 and Mustapha V. Abubakar (2011) 3 NWLR (pt 1233) 123.

Counsel to the Appellants also submitted that the lower Court ought not to have made a decree of specific performance because there was an alternative claim for refund of the part-payment made plus interest and that this showed that damages was adequate compensation to the first Respondent for the breach of contract committed by the second Respondent. Counsel, again, obviously overlooked the recognized principle in property law that while damages might be adequate remedy in other contracts, in contracts for sale or purchase of land, the general rule is that damages are not an adequate remedy for a breach of contract. In the book, Spry on Equitable Remedies 2nd Ed, the learned authors stated at pages 58-59 thus:

"Whether remedies at law are adequate is determined upon principles, whether realty or personality such as a chattel, is involved. But land is property which has a fixed location and special value, and ordinarily damages are not regarded as an adequate substitute for the right either to acquire or dispose of an interest in it. Even indeed if the purchaser intends to purchase the land in question merely in order to be able to sell it later at a profit, damages will not be regarded as adequate remedy for him."

This principle has been accepted by our courts and they have consistently held that in a case involving sale of land, damages cannot adequately compensate a party for breach of a contract for sale of an interest in a particular piece of land or in a particular house - Gaji V. Paye (2003) 8 NWLR (pt 823) 583, Ohiwerei V. Okosun (2003) 11 NWLR (Pt 832) 463, Best (Nig) Limited V. Blackwood Hodge (Nig) Ltd (2011) 5 NWLR (pt 1239) 95. Each piece of land is unique, therefore, an award of damages is not adequate compensation for the purchaser - Mustapha V. Abubakar (2011) 3 NWLR (pt 1233) 123. The preference is for an order of specific performance - Olowu V. Building Stock Ltd (2010) 2 NWLR (pt 1178) 31. In Ezenwa V. Oko (2008) 3 NWLR (Pt 1075) 610 at 628, the Supreme Court per Onnoghen, JSC stated thus:

"...where there is a subsisting contract or agreement for the sale or lease of land, the court, being also a court of equity, is always inclined to grant specific performance, because the land being sold or leased may have a peculiar value or significance to the purchaser or lessee, particularly where it is a choice land in a busy commercial center of the town ..."

Thus, where there is an existing valid agreement in relation to sale of property coupled with facts and circumstances on which the court can exercise its discretionary powers in equity to order specific performance of same, particularly where the agreement is ex facie not illegal or does not offend public policy, the court will enforce same by an order of specific performance - Ohiaeri V. Yussuf (2009) 6 NWLR (pt 1137) 207.

Moreover, the claim for refund was an alternative claim and the law is that it will not come up for consideration unless and until a trial Court had considered and refused the principal claim - Agidigbi V. Agidigbi (1996) 6 NWLR (pt 454) 300, Lamurde Local Government V. Karka (2010) 10 NWLR (pt 1203) 574 and Goldmark (Nig) Ltd V. Ibafon Co, Ltd (2012) 10 NWLR (Pt 1308) 297. The lower Court thus had no business granting the alternative claim when it found that there was sufficient evidence to sustain the grant of the main claims.

The Court finds that the first Respondent made out a case both on her pleadings and on the evidence led to support the reliefs she sought before the lower Court.

The case of the Appellants before the lower Court was that they had acquired an interest in the property in dispute and had purchased same for the sum of N850,000.00 in July 1999 and had been in possession of the property since then and that as such it was impracticable, impossible and very unjust for the lower Court to grant the order of specific performance. It is settled law that where a third party had acquired interest in the subject matter of a suit which calls for the exercise of discretion of the court, such a court would not exercise its discretion to impair the rights of that third party in any manner - Ikpeazu V. African Continental Bank Ltd (1965) NMLR 374 at 379, Negbenebor V. Negbenebor (1971-72) 7 NSCC 200 at 205, Lagos State Property & Development Corporation V. Nigerian Land and Sea Foods Ltd (1992) 5 NWLR (pt 244) 653 at 670.

A court will not order specific performance of a contract for sale of land where a third party had acquired the subject matter of the contract. Specific performance will, in such circumstances, be defeated by the concept of impossibility of performance - International Textile Industries (Nig) Ltd v. Aderemi (1999) 8 NWLR (pt 614) 268.

This position of the law is, however, not absolute. For a third party to enjoy this attitude of non-interference by the court with its acquired rights, it must be shown that it acted in good faith in acquiring the rights. He must be shown to have come to equity with clean hands and, a clear conscience. This is predicated on the principle that no person involved in any form of immoral or illegal act or transaction shall be allowed to enjoy the protection of the court; no polluted hand shall touch the pure foundation of justice - Seriki V. Are (1999) 3 NWLR (Pt 595) 469 and Anuruba V. Ebenator Community Bank Ltd (2005) 10 NWLR (Pt 933) 321. The third party must have acquired the rights in the subject matter of the suit fair and square and must not have been guilty of any visible and provable complicity. Thus, the courts have held that where there is a contract for the sale or demise of property and the property is thereafter transferred to a third party, the general principle is that specific performance may be had against the transferee if he (a) is a volunteer, that is, if the third party obtained the property without valuable consideration; (b) takes with notice of the prior contract; or (c) acquired only an equitable title and has no better equity than the purchaser or intended lessee - Obijuru V. Ozims (1985) 2 NWLR (pt 6) 167 at 179, Ezenwa V. Oko (2008) 3 NWLR (Pt 1075) 610 at 630.

The Appellants thus had a duty to lead evidence in support of their case on the pleading to show that they indeed acquired an interest in the property in dispute and that the acquisition was for valuable consideration and it was without notice of the prior agreement between the first Respondent and the second Respondent and that the interest that they acquired was better and stronger than the interest acquired by the first Respondent. Regrettably, the Appellants did not lead any evidence at the trial.

It is a firmly established principle of judicial adjudication that pleadings do not amount and cannot constitute evidence and for averments in pleadings to be useful, evidence must be led on them. Where a party fails to adduce evidence in support of his pleadings, he is deemed to have abandoned the pleadings - Oguejiofor V. Siemens Ltd (2008) 2 NWLR (pt 1071) 283, Nika Shipping Co. Ltd v. Lavina Corporation (2008) 16 NWLR (pt 1114) 509, Dingyadi V. Wamako (2008) 17 NWLR (pt 1116) 395. Thus any pleading not backed by evidence goes to no issue and should be disregarded by the court - Olusanya V. Osinleye (2013) 7 NWLR (Pt 1367) 148. The only exception being in respect of averments in pleadings which are admitted by the other party as what is admitted needs no further proof.

In the instant case the first Respondent made no admission of the material facts in the pleadings of the Appellants.

Counsel to the Appellants sought to rely in this appeal on the pieces of evidence elicited from the two plaintiff witnesses under cross-examination. Counsel stated that both plaintiff witnesses gave evidence under cross-examination that by the document tendered as Exhibit 18 the property in dispute had been transferred to the Appellants and that this amounted to admission against interest by the first Respondent and that this supported the case of the Appellants. It is trite that law that whether a statement made a party either in the course of a trial or otherwise will amount to an admission against interest depends on the circumstances and the context in which it was made and whether the truth of that statement is established by other pieces of evidence - Ogbu V. State (1992) 8 NWLR (Pt 259) 255, Ananson Farms Ltd V. NAL Merchant Bank (1994) 3 NWLR (Pt 331) 241, and Nwankwo V. Nwankwo (1995) 5 SCNJ 44.

Reading through the testimonies of the two witnesses both under examination-in chief and under cross-examination, it is clear that the Counsel to the Appellants did not consider the totality of the evidence given by the witnesses. Speaking of the said Exhibit 1B, the first plaintiff witness, a staff of Kaduna South Local Government, stated that it was a form titled "Application for Transfer of Certificate of Occupancy" and that the typed portion of the document bore the name of Mr. James Jamo as the holder and did not contain the name of the applicant. He testified that "it was true that every application for change of ownership is initiated by way of Exhibit 1B" and that "from the facts in Exhibit 1B, the property was transferred to Joash Taiwo Oshafunmi" and that "Exhibit 1B was not approved" because the word "approved" was cancelled on the form and he could not say whether it was the Chairman of the Council or someone else who did it. In other words, that the application for Transfer of Certificate of. Occupancy for the property in favour of the Appellants was not approved. How then can Exhibit 1B constitute an instrument evidencing transfer of ownership of the property in dispute in favour of the Appellants? So even if the witnesses made the statements attributed to them, the document itself, Exhibit 1B, did not represent what they stated.

Further, Counsel to the Appellants referred to a statement made by the first Respondent as the second plaintiff witness under cross-examination that when she visited the property recently she saw the Appellants there and he concluded therefrom that the first Respondent admitted that the Appellants were in possession of the property. Now, the first Respondent testified that when she was taken to view the property by the second Respondent and her brother, she saw tenants in the building.

It is elementary that a person found in a property in not necessarily regarded in law to be in possession of that property. The term "possession", in its full significance, connotes dominion or supremacy of authority. It implies a right and a fact. The right to enjoy, annexed to the right or property, and the fact of the real detention of a thing which would be in the hands of a master or another for him. It also implies a right to deal with the property at pleasure and to exclude other persons from meddling with it.

It involves power of control and intent to control. The element of custody and control is involved in the term possession - Akinsanya V. Ajeri (1997) 12 NWLR (Pt 531) 99.

It is essential to distinguish between occupation and possession. "Occupation" of land as used in relation to land entails mere physical control of the land for the time being.

It is a matter of fact and such a control may have originated from permission from the true owner or it may have been by stealth or it may be a tortuous trespass.

Possession of land, on the other hand, may sometimes entail or even coincide with occupation of it but it is not synonymous or co-terminus with it. Thus, for instance, a man such as a landlord who collects rents from his tenants may be in legal possession of the land even though he does not set foot on it. There is, therefore, a distinction between de facto possession, which is mere occupation, and de lure possession which entails possession animo possidendi or the intention with which such control is exercised with that amount of occupation, control or even sometimes the right to occupy at will, sufficient to exclude other persons from interfering. Within the meaning of this concept of possession, a man ordinarily living in Maiduguri may be in possession of a vacant house in Lagos if he is in possession of the keys - Buraimoh V. Bamgbose (1989) 3 NWLR (Pt 109) 352, Udeze V. Chidebe (1990) 1 NWLR (pt 125) 141, Anyanbusi V. Ugwunze (1995) 6 NWLR (Pt 401) 255, Ezukwu V. Ukachukwu (2004) 17 NWLR (pt 902) 227.

Thus, without more, the statement of the first Respondent that she saw the Appellants in the property on her recent visit there cannot be equalled to her saying that the Appellants were in legal possession of the property. It is possession of a property, strictly so called, by a third party, as distinguished from mere occupation, that is relevant for consideration in a claim for specific performance. Therefore, the statement of the first Respondent did not help or progress the case of the Appellants in any way.

Even if it is assumed that the statements of the two plaintiff witnesses showed that the Appellants had acquired an interest in the property in dispute, the statements did not show that the acquisition was for valuable consideration and that it was without notice of the prior agreement between the first Respondent and the second Respondent and/or that the interest they acquired was better and stronger than the interest acquired by the first Respondent. By refusing to lead evidence, the Appellants woefully failed to show any intervening interest which made it impracticable, impossible and very unjust for the lower Court to have granted the order of specific performance. This Court cannot thus fault the decision of the lower Court on the point. This issue for determination is also resolved against the Appellants.

In conclusion, this Court finds that this appeal is devoid of merit and it is hereby dismissed. The judgment of the High Court of Kaduna State in Suit No KDH/KAD/214/2000 delivered by Honorable Justice M. Ladan on the 28th of November, 2006 is hereby affirmed. The first Respondent is awarded the costs of this appeal assessed at N30,000.00. These shall be the orders of this Court.

**THERESA NGOLIKA ORJI-ABADUA, J.C.A.:**

I agree with my learned brother Abiru J.C.A. that this appeal lacks merit and should be dismissed. The same is hereby dismissed by me. I abide by the consequential orders made therein.

**ITA G. MBABA, J.C.A.:**

I had the privilege of reading the lead judgment just delivered by my learned brother ABIRU JCA, and I agree with his reasoning and conclusions completely, that Appellant cannot complain of being denied fair hearing by a party who has been given opportunity to present his case to the Court and he failed to utilize it cannot complain of not being heard or of being denied fair hearing. INEC V. MUSA (2003) 3 NWLR [PT. 806] 72; DANTATA V. MOHAMMED (2012) 8 NWLR (PT. 1302) 366; GTB PCC VS. FADCO INDUSTRIES LTD. [2013] LPELR, 21411 [CA].

Appellants had always shown reluctance to defend the suit and even when the court gave the Appellant a second change to open his defence (after it had been closed because Appellant and his counsel absented themselves from court), Appellant blew the chance and openly indicted the court by expressing doubt that he would have justice in the court! He sought adjournment saying he had applied for a transfer of the case to another Court.

Of course, the court's ruling on the application, that it was a ploy to delay the case unnecessarily, should have warned the Appellant to enter his defence; that the Court was not ready to take the delaying gimmicks. The Court, specifically, ordered the Appellant to open his defence, but Appellant's Counsel decided to test the will of the Court, again, by praying for adjournment a second time (immediately, after the Ruling refusing the earlier application for adjournment)!

That was no longer an application for adjournment, but an affront, daring the Court or asserting Appellant's resolve not to proceed with the case on that day, that is, to open his case. Of course, the court cannot be held to ransom by parties and no party or Counsel should be allowed to take over initiative from the court and dictate proceedings in court. It was therefore for the trial judge to move on with the case, and so on the application of the Respondent's Counsel, he closed the case of the Appellant. Appellant had forfeited his opportunity to state his case!

In the case of GUARANTY TRUST BANK PLC. V. FADCO INDUSTRIES NIG. LTD. AND ANOTHER: CA/K/324/2001, a recent decision of this Court, reported in (2013) LPELR - 21411 CA, Appellant had shown manifest unwillingness to continue with his defence, even when the case was fixed at his instance to continue with his defence and there was application to close the defence, if appellant failed to take up the opportunity. Appellant stood his grounds, insisting on adjournment, which the court refused and ordered the case of the appellant closed. It was held:

"I believe in deciding whether to grant Appellant's application for adjournment, the trial judge had a duty to consider, not only the reason posed by the applying counsel for the adjournment, but also the attitude of the Appellant/Counsel in the prosecution of the case, right from when the PW1 (Plaintiff) concluded his evidence ... it is obvious that appellant's counsel was determined to frustrate the case of the respondent, by arrogantly refusing to take the cross-examination ... I think the Appellant's counsel was only out to undermine the authority and integrity of the trial court, with that affront and the court would have greatly ridiculed itself and its earlier position ... if it had yielded to the Appellant's antic, to adjourn the case on their terms. I cannot, therefore fault the exercise of discretion of the trial court to refuse the application for adjournment, in the circumstances. Adjournment is not given as a matter of course. Applicant must adduce tangible reason(s) to persuade the Court to exercise the discretion in his favour!

It was further held in that case of GTB PLC VS. FADCO INDUSTRRIES LTD (supra) that

"A party who fails to utilize opportunity of prosecuting his case, cannot turn round to blame the Court for not being given fair hearing”.

See the case of FHA VS. KELEJAIYE (2011) ALL FWLR (PT. 562) 1633, ratio 8:

"The role of the Court in adjudication is to maintain a level playing field for the parties, by offering them equal opportunity to present their cases or grievances, if they so wish. Once the opportunity is offered, it is the duty of a party to litigation or his counsel to utilize same, in accordance with the rules of procedure and substantive law. Where, however, he or his counsel fails of neglects to utilize the opportunity so offered, he cannot turn round to blame the Court for the loss ... as the court will not allow a party to hold the opponent or the court to ransom under the guise of the desire to protest the principles of fair hearing..."

On the issue of the order for specific performance, the law permits the invocation of the order, the moment there is establishment of contract and a party failed to fulfill his own side of obligation to the contract. It is ordered when monetary compensation will not be sufficient compensation for the damages caused by the default. There must, however, be agreement on the essential terms of a contract of sale. It does not matter that only part payment was made, leaving the balance outstanding. See the case of Minilodge Ltd. V. NGEI (2009) 7 NWLR (PT.1173) 254 at 284-285 where the Supreme Court held:

"A contract of sale exists where there is final and complete agreement of the parties on essential terms of the contract namely, the parties to the contract, the property to be sold, the consideration for sale and the nature of the interest to be granted. Once there is agreement on these essential terms, a contract of sale of land or property is made and concluded. In contract for sale of property, where part payment was paid, the law is that the contract for purchase has been concluded and is final, leaving the payment of the balance outstanding to be paid. The contract for the sale and purchase is absolute and complete for which each party can be in breach for non performance and for which an action can be maintained for specific performance..." See also OGABEIDO vs. OSIFO (2007) 3 NWLR (PT. 1022) 423 at 442-223.

Also see GEGE VS. NANDE [2006] 10 NWLR [PT. 988] 256 at 286, where TSAMIYA JCA said

"In a contract of sale of property of land where part payment was paid, the law is that the contract for the purchase had been concluded and is final, leaving the balance of the purchase price outstanding to be paid. The contract for the sale and purchase is absolute and complete for which each party can be in breach for non-performance and for which action can lie for specific performance the instant case, the vendor and the respondent having entered into an agreement since February 1987 and the sum of N400.00 paid which was in fact and in law a part-payment, the 1st Respondent was the first to purchase the land in dispute and therefore, his title takes precedence over that of the appellant. A contract of sale exists where there is a final and complete agreement of the parties on essential terms of the contract namely: the Parties to the contract, the property to be sold; the consideration for the sale and the nature of the interest to be granted".

See the case of MUSTAPHA V. ABUBAKAR & ANOR. (2010) LPELR 4567 (CA). Per Orji-Abadua JCA

"... Where there is an agreement for sale of land either under native law and custom or any other mode of sale and for which the purchaser, acting within the terms of agreement, makes full or part payment of the purchase price to the vendor and is in furtherance thereof put in possession, he has acquired an equitable interest in the property and which interest ranks as high as a legal estate and cannot therefore be created by the same vendor or his legal representative in favour of another person".

In the case of OHIAERI V. YUSUF [2009] 6 NWLR (pt. 1137) 207. it was held that:

"Order for specific performance, being an equitable remedy, would always be granted in respect of a contract relating to land where there has been performance of the contract by the plaintiff. This is more so because the law takes the view that damages cannot adequately compensate a party for the breach of a contract for the sale of an interest in a particular piece of land".

And in the case of HELP (NIG) LTD. V. SILVER ANCHOR NIG. LTD. [2006] 5 NWLR (Pt. 972) 196 at 203, it was held:

"where a plaintiff has wholly or in part executed his own part of the parole agreement or has paid the purchase money and been let into possession even though no deed of sale or assignment has been executed, a court of equity will order specific performance on the ground that it would be a fraud on the defendant's part not to carry out his own part of the contract".

See also the case of ADENIRAN V. OLAGUNJU [2001] 17 NWLR (Pt. 741) 169; AGROVET SINCHO PHARM LTD. V. ESTATE OF ENGR. DAHIRU [2013] LPELR 20364 (CA).

I therefore resolve the issues in favour of the 1st respondent and hold that the appeal is devoid of merit and also dismiss it. I abide by the consequential orders in the lead judgment.

**Cases referred to-**

Orugbo V. Una (2002) 16 NWLR (pt 792) 175

Idakwo V. Ejiga (2002) 13 NWLR (pt 783) 156

Olufeagba V. Abdul-Raheem (2009) 18 NWLR (Pt 1173) 384

Torri V. National Park Service of Nigeria (2011) 13 NWLR (pt 1264) 365

First Bank of Nigeria Plc V. TSA Industries Ltd (2010) 15 NWLR (pt 1216) 247

Odusote V. Odusote (1971) All NLR 221

University of Lagos V. Aigoro (1985) All NLR 64

Fawehinmi Construction V. OAU (1998) 5 SCNJ 44

Ceekay Trade Ltd V. General Motors (1992) 2 NWLR (pt 222) 32

Okeke V. Petmag (Nig) Ltd (2005) 4 NWLR (pt 915) 245

Alsthom V. Saraki (2005) 3 NWLR (pt 911) 208

Anah V. Anah (2008) 9 NWLR (Pt 1091) 75

Olawepo V. Security and Exchange Commission (2011) 16 NWLR (pt 1272) 122

Emeka V. Okadigbo (2012) 18 NWLR (Pt 1331) 55

Duru V. Federal Republic of Nigeria (2013) 6 NWLR (pt 1351) 441

Dr. Harry Oranezi V. Dr Chris Nwabueze Ngige & Anor

Ngwu V. Nnaji (1991) 5 NWLR (Pt 189) 18

Innih V. Ferado Agro Consortium Ltd (1990) 5 NWLR (pt 152) 604

Help Nigeria Ltd V. Silver Anchor (Nig) Ltd (2006) 2 SCNJ 178

Balogun V. Alli-Owe (2000) FWLR (pt 14) 2335

Lawal V. Ejidike (1997) 2 NWLR (pt 487) 319

Okin Biscuits Ltd V. Oshe (2004) FWLR (Pt 188) 1094

Owie V. Ighiwi (2005) All FWLR (pt 248) 1762

Taylor V. Arthur 12 WACA 179 and ITT V. Aderemi (1999) 6 SCNJ 46

Olorunfemi V. Asho (2000) 2 NWLR (pt 643) 743

Remalo Ltd V. NPN Ltd (2003) 16 NWLR (pt 846) 235

Nzeribe V. Dave Engineering Co Ltd (1994) 8 NWLR (pt 361) 124

Governor of Ekiti State V. Ojo (2006) 17 NWLR (Pt 1007) 95

Mustapha V. Abubakar (2011) 3 NWLR (pt 1233) 123

Best (Nig) Limited V. Blackwood Hodge (Nig) Ltd (2011) 5 NWLR (Pt 1239) 95

Ibekwe V. Nwosu (2011) 9 NWLR (pt 1251) 1

Ryan V. Mutual Tontine Association (1893) 1 Ch 116

Lagos State Development & Property Corp V. Nigerian Land and Sea Foods Ltd (1992) 5 NWLR (pt 244) 653

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Saka V. Ijuh (2010) 4 NWLR (pt 1184) 405

Consolidated Resources Ltd V. Abofar Ventures (Nig) Ltd (2007) 6 NWLR (pt 1030) 221

Oladipo V. Moba Local Government Area (2010) 5 NWLR (Pt 1186) 177

Salzgitter Stahl GMBH V. Tunji Dosunmu Industries Ltd (2010) 11 NWLR (pt 1206) 589

Lagos State Water Corporation V. Sakamori Construction (Nig) Ltd (2011) 12 NWLR (pt 1262) 569

Okoebor V. Police Council (2003) 12 NWLR (Pt 834) 444

Mini Lodge Ltd V. Ngei (2009) 18 NWLR (Pt 1173) 254

Biyo V. Aku (1996) 1 NWLR (pt 422) 1

Mustapha V. Abubakar (2011) 3 NWLR (pt 1233) 123

Gaji V. Paye (2003) 8 NWLR (pt 823) 583

Ohiwerei V. Okosun (2003) 11 NWLR (Pt 832) 463

Olowu V. Building Stock Ltd (2010) 2 NWLR (pt 1178) 31

Ezenwa V. Oko (2008) 3 NWLR (Pt 1075) 610

Ohiaeri V. Yussuf (2009) 6 NWLR (pt 1137) 207

Agidigbi V. Agidigbi (1996) 6 NWLR (pt 454) 300

Lamurde Local Government V. Karka (2010) 10 NWLR (pt 1203) 574

Goldmark (Nig) Ltd V. Ibafon Co, Ltd (2012) 10 NWLR (Pt 1308) 297

Ikpeazu V. African Continental Bank Ltd (1965) NMLR 374

Negbenebor V. Negbenebor (1971-72) 7 NSCC 200

International Textile Industries (Nig) Ltd v. Aderemi (1999) 8 NWLR (pt 614) 268

Seriki V. Are (1999) 3 NWLR (Pt 595) 469

Anuruba V. Ebenator Community Bank Ltd (2005) 10 NWLR (Pt 933) 321

Obijuru V. Ozims (1985) 2 NWLR (pt 6) 167

Ezenwa V. Oko (2008) 3 NWLR (Pt 1075) 610

Oguejiofor V. Siemens Ltd (2008) 2 NWLR (pt 1071) 283

Nika Shipping Co. Ltd V. Lavina Corporation (2008) 16 NWLR (pt 1114) 509

Dingyadi V. Wamako (2008) 17 NWLR (pt 1116) 395

Olusanya V. Osinleye (2013) 7 NWLR (Pt 1367) 148

Ogbu V. State (1992) 8 NWLR (Pt 259) 255

Ananson Farms Ltd V. NAL Merchant Bank (1994) 3 NWLR (Pt 331) 241

Nwankwo V. Nwankwo (1995) 5 SCNJ 44

Akinsanya V. Ajeri (1997) 12 NWLR (Pt 531) 99

Buraimoh V. Bamgbose (1989) 3 NWLR (Pt 109) 352

Udeze V. Chidebe (1990) 1 NWLR (pt 125) 141

Anyanbusi V. Ugwunze (1995) 6 NWLR (Pt 401) 255

Ezukwu V. Ukachukwu (2004) 17 NWLR (pt 902) 227

INEC V. Musa (2003) 3 NWLR [PT. 806] 72

Dantata V. Mohammed (2012) 8 NWLR (PT. 1302) 366

GTB PLC V. FADCO INDUSTRIES LTD. [2013] LPELR, 21411 [CA]

FHA V. Kelejaiye (2011) ALL FWLR (PT. 562) 1633

Ogabeido V. Osifo (2007) 3 NWLR (PT. 1022) 423

Gege V. Nande [2006] 10 NWLR [PT. 988] 256

Mustapha V. Abubakar & Anor. (2010) LPELR 4567 (CA)

Ohiaeri V. Yusuf [2009] 6 NWLR (pt. 1137) 207

Help (Nig) Ltd. V. Silver Anchor Nig. Ltd. [2006] 5 NWLR (Pt. 972) 196

Adeniran V. Olagunju [2001] 17 NWLR (Pt. 741) 169

Agrovet Sincho Pharm Ltd. V. Estate Of Engr. Dahiru [2013] LPELR 20364 (CA)