

# IN THE SUPREME COURT OF NIGERIA

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Suit No: SC231/1994

**Petitioner:** Lewis Opara

And

**Respondent:** Dowel Schlumberger (Nigeria) Limited , Attorney General of Rivers State

Date Delivered: 2006-07-14

**Judge(s):** Idris Legbo Kutigi , Niki Tobi , George Adesola Oguntade , Mahmud Mohammed , Walter Samuel Nkanu Onnoghen

## Judgment Delivered

By his fourth Amended Statement of Claim and Defence to Counter-claim, the Appellant claimed against the Respondents in suit No PHC/61/85, the following reliefs: -

'30. Accordingly, the Plaintiff claims: -

1. A Declaration against the 1st and 2nd defendants that the Certificate of Occupancy granted to Dowell Schlumberger (Nigeria) Limited by His Excellency, the Governor of Rivers State dated the 25th day of April, 1980 in respect of Plot 167, Trans - Amadi Industrial Layout and registered as No 18 at page 18 in volume 1 of the Lands Registry at Port Harcourt is void.
2. An order of specific performance against the 2nd Defendant in respect of Plots 161 and 167 Trans-Amadi Industrial Layout, Port Harcourt of duly registered deeds of lease in compliance with the agreement in writing between the Plaintiff and 2nd Defendant as reflected in paragraphs 5, 6, 7, 11, 12 and 13 herein.
3. A Declaration against the 2nd Defendant that
  - (a) Pursuant to the Land Use Decree No 6 of 1978 the Plaintiff is deemed to be the holder of Statutory Rights of Occupancy over Plots 161 and Plot 167 Trans-Amadi Industrial Layout, Port Harcourt; or alternatively,
  - (b) Pursuant to the Land Use Decree N'o 6 of 1978, the Plaintiff is entitled to be issued by His Excellency the Military Governor of the Rivers State, with Certificate of Occupancy as the person in whom the said Plots 161 and 167 Trans-Amadi Industrial Layout, Port Harcourt are vested.
4. Further in the alternative, a Declaration against the 2nd Defendant that pursuant to the Land Use Decree No 6 of 1978 the Plaintiff: -
  - (a) In respect of Plot 161 Trans-Amadi Industrial Layout, Port Harcourt is deemed to be the holder of a Statutory Right of Occupancy; and/or alternatively is entitled to be issued by His Excellency the Military Governor of Rivers State, with a Certificate of Occupancy.
  - (b) In respect of Plot 167 Trans-Amadi Industrial Layout, Port Harcourt, as vested, shall continue to hold one plot or portion of the land not exceeding half hectare in area.
5.
  - (a) An order against the 1st Defendant that the Plaintiff is entitled to special damages being unpaid rents in respect of Plot 161, Trans-Amadi Industrial Layout, Port Harcourt for the period 1st day of September, 1980 up to 31st day of August, 1985 or alternatively,
  - (b) An order against the 1st Defendant that the Plaintiff is entitled to special damages being mense profit in respect of Plot 161 Trans-Amadi Industrial Estate, Port Harcourt for the period of 1st day of September, 1980 up to 31st day of

August, 1985.

Particulars

(See schedule below)

6. An order that the Plaintiff is entitled, as against the 1st Defendant, to 10% interest per annum on the unpaid rents or alternatively, the mense profit specified in paragraph 30(4) above as from the 1st day of September, 1980 until the total sum outstanding is finally paid.

7. General Damages of N1, 000,000.00 (One Million Naira) against the 1st Defendant for its trespass on plot 167 Trans-Amadi Industrial Layout, Port Harcourt from the 2nd day of March, 1978 or alternatively the 22nd day of May, 1980, or in the further alternative, such large sum as the Court may award upon the ascertainment of any earlier and/or other date when the trespass commenced.

8. Special damages for the consequential loss caused to the Plaintiff by the 1st Defendant's trespass on Plot 167 Trans-Amadi Industrial Layout, Port Harcourt and being unpaid rent or alternatively, rent due from the Defendant for their use and occupation of the said Plot 167 for the period from the 22nd day of May, 1980 or alternatively the 2nd day of March, 1978 or in the further alternative, such larger sum as the Court may award upon the ascertain'ment of any earlier and/or other date when the trespass commenced.

Particulars

(See schedule below)

9. Alternatively to paragraph 30(7) above, special Damages for the consequential loss caused to the Plaintiff by the 1st Defendant's trespass on Plot 167 Trans-Amadi Industrial Layout, Port Harcourt and being mense profit, for the period of 22nd day of May, 1980 or alternatively the 2nd day of March, 1978 or, in the further alternative, such larger sum as the Court may award upon the ascertainment of any earlier and/or other date when the trespass commenced.

Particulars

(See schedule below)

10. An order that the Plaintiff is entitled as against the 1st Defendant to 10% interest per annum on the special damages being consequential loss caused to the Plaintiff and being unpaid rent or alternatively, mense profit on Plot 167, Trans-Amadi Industrial Layout, Port Harcourt (as specified in paragraphs 30(7) or 30(8) above).

11. In lieu of and/or in addition to the foregoing claims, an award of N15 000,000.00 (Fifteen Million Naira) as damages against the 2nd Defendant for breach of contract.

Schedule of Particulars of Special Damage

i. Plot 167

(a) For the period 1/9/80 - 31/8/83 (3 years) at the annual rental value of N98, 600.00 (plus an additional 10% of N98, 000.00)

(b) For the period of 1/9/83 - 31/8/86 (3 years) at the annual rental value of N98, 000.00.

(c) For the period 2/5/78 and 22/5/80 up to 31/8/80 at the annual rental value of N98.000.00.

ii. Plot 161

(a) For the period 1/9/80 - 31/8/83 (3 years) at the annual rental value of N175, 600.00 (plus an additional 10% of N175, 600)

(b) For the period 1/9/83 - 3/8/86 (3 years) up to 31/8/80 at the annual rental value of N175.600.00

(c) For the period 2/3/78 and 22/5/80 up to 31/8/80 at the annual rental value of N175.600.00.'

On the other hand, the 1st Defendant/Respondent by its third Amended Statement of Defence and Counter Claim claimed as follows:

'In the premises, the 1st Defendant claims the sum of N105, 000.00 being money payable by Plaintiff to the 1st defendant together with interest and costs.'

The facts giving rise to the claims and counter claim include the following:

The Appellant was granted letters of allocation of two plots of land in Port Harcourt in the defunct Eastern Nigeria and was put into possession with no formal deed executed before the outbreak of the Nigerian Civil war. After the war and creation of States, the land fell within Rivers State and is identified as Plots 161 and 167 Trans Amadi Industrial Layout. Appellant subsequently granted a sub-lease of the plots to the 1st Respondent without the consent of the Government of Rivers State. The Rivers State Government represented by the 2nd Respondent as a result, cancelled the Appellant's lease in respect of the plots and granted the 1st Respondent, who was Appellant's tenant, Certificates of Occupancy on the two disputed plots resulting in the institution of the action, which the trial Court dismissed. An appeal by the Appellant to the Court of Appeal was also dismissed by the Port Harcourt Division of the Court giving rise to the instant appeal.

In the amended Appellant's Brief of argument filed on 24/1/05 by learned Counsel for the Appellant E.O. Akpata Etomi (Mrs.), the following issues have been identified for the determination of the appeal: -

- '1. What was the legal relationship created between the Rivers State Government as the successor of the Eastern Nigerian Government and the Plaintiff/Appellant by the letter of allocation, its acceptance and subsequent events'
2. What was the relationship between the Plaintiff/Appellant and the 1st Respondent'
3. Is the actual payment of rent as opposed to an agreement to pay rent essential ingredient in a valid lease, or an agreement for a lease'
4. In whom was the property in the plots in question vested before the commencement of the Land Use Act'
5. Can a purchaser who has notice of the interest by virtue of an unregistered lease of his predecessor in title and landlord claim against him' Or obtain title to the property to the detriment of such landlord as to extinguish the said unregistered interest''

At this stage, it is important to note that learned Counsel for the 1st Respondent, Babatunde Fagbohunlu Esq. on the 15/3/05 filed a Notice of Preliminary Objection on the competence of the appeal which objection is argued by Counsel in the 1st Respondent's Amended Brief of Argument filed on 15/3/05. The objection is that:

'..... The grounds of appeal contained in the Appellant's Amended Notice of Appeal dated the 24th day of January 2005 are incompetent, by reason whereof this Honourable Court lacks jurisdiction to hear this appeal as it is constituted'

and grounds on which the objection is based are stated as follows: -

'The aforesaid grounds invite the Supreme Court to review binding and conclusive findings/decisions made by the High Court of Rivers State, which binding and conclusive findings/decisions were not challenged by the Appellant at the Court of Appeal. Accordingly, those grounds effectively invite the Supreme Court to exercise appellate jurisdiction over the decision of the High Court of Rivers State.'

In arguing the objection, learned Counsel referred to the Amended Notice of Appeal filed on 24/1/05 and submitted that all the seven grounds of appeal are incompetent with the result that the appeal ought to be dismissed in limine, that the grounds invite the Supreme Court to overturn a decision of the High Court that was not challenged at the Court of Appeal, to wit the finding by that Court at pages 421 to 424 of the record that whatever equitable interest the Appellant may have had in plots 161 and 167 was not one that equity would enforce by granting an order of specific performance. Learned Counsel then submitted that the said finding was fatal to the entirety of the Plaintiff's claim since the claim was founded on the existence of an enforceable equitable right, meaning an equitable right in respect of which equity will order specific performance, that Appellant did not challenge that finding at the Court of Appeal but now wants this Court to hold that he has an enforceable equitable interest and to enforce same by granting an order of specific performance, that by virtue of section 213(1) of the Constitution of the Federal Republic of Nigeria 1979, hereinafter referred to as the 1979 Constitution, this Court has jurisdiction to hear appeals from the Court of Appeal and can therefore not be urged to overturn a subsisting finding/decision of the High Court that was never challenged at the Court of Appeal.

Learned Counsel further submitted that Appellant's claim of entitlement to Rights of Occupancy in respect of the plots of land was predicated on the argument that on the coming into force of the Land Use Act, he possessed an equitable interest in the plots by virtue of a subsisting agreement for a lease between himself and the 2nd Respondent which argument is further predicated on the argument that such equitable interest was one that a Court of equity will enforce, that the High Court however found that in the circumstances of the case, whatever equitable interest the Appellant may have had was unenforceable in equity and therefore refused the order of specific performance as prayed by the Plaintiff as can be verified at page 424 of the record, that the above finding amounts in effect to saying that the unenforceable equitable right is to be considered as having never existed, relying on the English case of *Swain vs. Ayres* (1888) 21 QBD 289 at 293 per Lord Esher, MR. Learned Counsel stated that Appellant ought to have appealed against the finding of the trial Court refusing specific performance if he desired to continue to rely on the equitable right asserted by him, but he did not. Turning to the grounds of appeal before the Court of Appeal, learned Counsel submitted that the grounds of appeal were confined to only that aspect of the trial Court's judgment which found that Appellant was not entitled to a Right of Occupancy over the plots because he was not in possession of the said plots at the time the Land Use Act came into force, but that this was not the only ground upon which the trial Court dismissed the claim of the Appellant as regards his entitlement to Rights of occupancy, that the other ground relied upon was the finding that the equitable interest asserted by the Appellant was not one that a Court of equity would enforce, but was not appealed against, that the Court of Appeal at page 527 of the record specifically found that the decision of the trial Court dismissing Appellant's prayer for specific performance was not subject of the appeal before that Court.

Learned Counsel further submitted that the failure to appeal against that finding means that decision/finding remains binding and conclusive between the parties relying on *Alakija vs. Abdullah* (1998) 6 NWLR (Pt. 552) 1 at 4, and urged the Court to hold that the grounds of appeal are incompetent and consequently strike out the appeal in limine.

In the Appellant's Reply Brief deemed filed on 25/4/06, learned Counsel for the Appellant, this time T.E Williams Esq. SAN, submitted that since the first ground of appeal in the appeal before the Court of Appeal was that the judgment was against the weight of evidence a.k.a omnibus ground of appeal, it means that the trial Judge wrongly reached the conclusion that a Court of equity would not have ordered specific performance based on evidence before the Court, that the Court of Appeal thereby invited to review the totality of the decision of the trial Court. Learned senior Counsel further submitted that when the issues for determination before that Court are viewed, it becomes obvious that the argument and answers to the said issues pressed on the Court by the Appellant amount to effective challenge to the refusal of the trial Court to grant an order of specific performance. Learned Counsel then reproduced the two issues before the lower Court and submitted that there is evidence before the Court that Appellant was the person in possession of the plots of land and that Appellant was never properly divested of his interest in the disputed plots and that on the authority of *Ogunlaji vs. A-G Rivers State and Anor.* (1997) 6 NWLR (Pt. 508) 209 at 234 once a person lawfully takes possession of

State land, the possession can only be recovered from him in the manner prescribed by law. Finally learned senior Counsel submitted that under the Land Use Act, section 34(2) and (3) the Appellant as a deemed holder of a statutory Right of Occupancy is entitled to be issued with a Certificate of Occupancy on the application made to the Governor and urged the Court to overrule the Preliminary Objection.

Both parties agree that the main claim of the Appellant is as averred in paragraph 30(3) of the Fourth Amended Statement of Claim and Defence to Counter Claim, which relief is again, for the purpose of emphasis reproduced hereunder.

'A Declaration against the 2nd Defendant that: -

1 (a) Pursuant to the Land Use Decree No. 6 of 1978, the Plaintiff is deemed to be the holder of Statutory Rights of Occupancy over plot 161 and plot 167, Trans-Amadi Industrial Layout, Port Harcourt; or alternatively,

(b) Pursuant to the Land Use Decree No. 6 of 1978, the Plaintiff is entitled to be issued by His Excellency, the Military Governor of Rivers State, with Certificates of Occupancy as the person in whom the said plots 161 and 167, Trans-Amadi Industrial Layout, Port Harcourt are vested.'

Also not disputed is the fact that Appellant claimed, in addition to the above relief and others, the following relief listed in paragraph 30(2) of the said Fourth Amended Statement of Claim and Defence to Counter Claim:

'2. An order of specific performance against the 2nd Defendant in respect of plots 161 and 167 Trans-Amadi Industrial Layout, Port Harcourt of duly registered deeds of lease in compliance with the agreement in writing between the Plaintiff and the 2nd Defendant as reflected in paragraphs 5,6, 7, 11, 12 and 13 herein.'

From the briefs of argument of learned Counsel for the 1st Respondent and the Appellant in reply, there is no dispute as to the fact that the learned trial Judge though found as a fact that Appellant has equitable interest in the plots in dispute, he also found that that interest is unenforceable. It should be noted also that the relief of specific performance came before the declaration for Right of Occupancy meaning clearly that the said declaration is based on the order of specific performance.

I have carefully gone through the briefs of argument and the record. It is very clear from the record that Appellant's claim to be entitled to Rights of Occupancy or Certificates of Occupancy in respect of the disputed plots, was based on the argument that prior to the Land Use Act, he had an equitable interest therein by virtue of the subsisting agreement for a lease between Appellant and the 2nd Respondent and that the equitable interest is one which a Court of equity will enforce, relying on the principle stated in *Wash (Walsh) vs. Lonsdale (1882) 21 Ch. D at 9*; see page 361 of the record, because '(i) equity looks on that as done which ought to be done' and (ii) 'he who comes to equity must do equity.' The claim of the Appellant as being entitled to the Rights of Occupancy/Certificates of Occupancy is therefore based, on the facts and circumstances of this case, on the assertion that Appellant had an enforceable equitable interest in the disputed plots that, clearly makes the reliefs for specific performance and declaration that Appellant is deemed to be a holder of Statutory Rights of Occupancy over the disputed plots interrelated and dependant. In other words, for one to 'have a declaration as sought in claim 30(3) supra, one must be entitled, prior to the coming into force of the Land Use Act, inter alia, to an enforceable equitable interest in the property in respect of which declaration is sought.

In the instant case, the trial Court found at page 424 of the record, inter alia:

'I have given due and anxious consideration to the above guideline as is applied to this case in hand and I do not think having regard to the lapse of time and the conduct of the Plaintiff for the order of specific performance to issue in the non payment of the rents since the offer to allocate these plots was made to the Plaintiff -----

I hold that it will be hard on the defendants particularly the 2nd Defendant for me to order specific performance against them. In the circumstances I use my discretion in the matter to refuse issuing the order .....

The principle in *Walsh vs. Lonsdale (supra)* is that an agreement for a lease, as in this case, is as good as a legal lease

though the agreement confers only an equitable interest in the property in issue. Therefore the finding by the learned trial Judge as reproduced supra hits at the substratum of the claim of the Appellant particularly as the learned trial Judge found that the equitable interest of the Appellant in the plots in dispute is unenforceable by an order of specific performance.

It is the case of the 1st Respondent that in view of the above finding, which learned Counsel considers to be fatal to the case of the Appellant, Appellant ought to have appealed against same to the Court of Appeal and that Appellant failed to so appeal. The reply of the Appellant's Counsel is to the effect that though there was no direct or specific ground of appeal before the Court of Appeal on the specific finding by the trial Court, the issue is covered by the general ground of appeal a.k.a, the omnibus ground to wit: judgment is against weight of evidence. The question that follows is whether that is correct having regard to the law relevant to the issue. I am of the view that to properly deal with the question one has to take a look at the grounds of appeal and the issues formulated therefrom before the lower Court.

At page 437 of the record, one finds the Notice of Appeal, it contains only one ground of appeal, which is: -

'(1) That the decision is against the weight of evidence.'

At page 444, we have the additional grounds of appeal which complain thus:

'1. The Court below erred in law in failing to observe that when the Land Use Act came into force in March, 1978, the person in possession of the two plots in dispute in this action was the Plaintiff. Accordingly, the said Plaintiff was the person who became a deemed holder of the statutory right of occupancy in or over the said plots of land.

2. The Court below erred in law in failing to observe that the 1st Defendant having gone into occupation under the authority and licence of the Plaintiff, cannot rightly be the deemed holder of a right of occupancy under section 32 (sic: section 34) of the Land Use Act and that in any event he was not claiming as a deemed holder of a right of occupancy under that section in this action.

3. The Court below erred in law in failing to uphold the contention of the Plaintiff that the Certificate of Occupancy issued to the 1st Defendant herein was void.'

#### Particulars of Error

(a) The Plaintiff had become a person deemed to be the holder of a right of occupancy since March, 1978, when the Land Use Act came into possession (sic: force).

(b) The 1st Defendant applied for a grant after that date i.e. when the Military Governor was, by law, deemed to have parted with the right of occupancy over the land.

(c) In the premises, the Certificate of Occupancy issued to the 1st Defendant must be void.'

The issues formulated by learned Counsel for the Appellant as arising from the grounds are as follows: -

(i) Whether the Court below was correct in deciding, in effect, that as between the Plaintiff and the 1st Defendant, the latter was the person in possession of the two plots and the person entitled to be issued with a Certificate of Occupancy pursuant to section 34(2) of the Land Use Act.

(ii) What order should the Court below have made in the light of the answers to the foregoing question'

It is clear from the grounds of appeal and the issues formulated therefrom that the complaints were limited to the aspect of the trial Court's finding that Appellant was not entitled to a Right of Occupancy over the plots in dispute because he was not in possession of the said plots at the time the Land Use Act came into operation. The findings of that Court on

the issue is at page 420 of the record where it is stated thus:

'I have shown that the Plaintiff has never been in possession of any of the plots. He has only had an equitable interest in these two plots. The 1st defendant has been in possession of those two plots and has been granted rightly in my view and in accordance with the Decree .....

The above is one of the two basis on which the learned trial Judge dismissed the case of the Appellant, the other one relied upon being the finding that the equitable interest asserted by the Appellant was not one that a Court of Equity would enforce, earlier reproduced in this judgment. There is no ground of appeal directly attacking the finding, on the claim for specific performance. The lower Court therefore found in its judgment at page 527 of the record as follows: -

'The claim for specific performance was dismissed by the learned trial Judge. The appeal against the dismissal was abandoned during the argument. No further comment shall be made on this issue in this judgment.'

It must be noted that Appellant has not appealed against the above finding by the Court of Appeal granted that the Court erred by so finding which would have been the case if the argument of learned senior Counsel for the Appellant to the effect that the issue of non enforceability of the equitable interest in the plots was covered by the omnibus ground of appeal before that Court. I hold the view that by Appellant not objecting to that finding by way of an appeal before this Court, Appellant is deemed not to contest that finding and cannot now contend that the finding was contrary to the issues before that Court allegedly arising from the omnibus ground, in any event the lower Court and this Court deal with issues formulated from the grounds of appeal and in the instant case there is nothing in the two issues reproduced supra to indicate that the finding of the trial Court on the claim of specific performance was being called to question.

The above notwithstanding, it is settled law that an Appellant challenging a specific finding of Court, as in the instant case, must raise a specific ground of appeal thereon, see *Otuedon vs. Olughor* (1997) 9 NWLR (Pt. 521) 355. In the instant case, Appellant failed to raise a specific ground of appeal on the dismissal of the claim for specific performance by the trial Court and I hold that that issue cannot be covered by the omnibus ground of appeal. It is also settled law that where a party fails to appeal against a finding of the trial Court or the Court of Appeal, he cannot be heard to question that finding on appeal to the Supreme Court, the essence of an appeal being to have an opportunity to have one's suit re-examined before a higher Court. In effect, the failure of the Appellant to appeal against the decision of the trial Court refusing an order of specific performance is that that decision remains binding and conclusive between the parties - see *Alakija vs. Abdullahi* (1998) 6 NWLR (Pt. 552) 1 at 4. In *Ndiwe vs. Okocha* (1992) 7 NWLR (Pt. 252) 129 at 139-140 it was held by this Court that where the trial Court makes a finding of fact on a specific issue before it, such an issue should be raised as a substantive ground of appeal by the Appellant who is challenging the finding of fact and it cannot be covered under the omnibus ground of appeal. In the English case of *Warmington vs. Miller* (1973) All ER 372, the Plaintiffs sought a declaration that they were in possession of certain premises under the terms of an agreement for a sub-lease. The declaration sought was based on the principle of equity laid down in *Walsh vs. Lonsdale* supra, as in the instant case. However, the agreement for a sub-lease which the Plaintiffs relied on was in breach of a covenant in the head lease not to underlet, in the circumstances the English Court of Appeal held that the Plaintiffs were not entitled to an order of specific performance and refused to grant the declaration sought, since the equitable doctrine that an intended lessee was to be treated as having the same rights as if a lease had in fact been granted to him only applied where the intended lessee was entitled to specific performance of the agreement. Lord Justice Stamp, at page 377 stated the law as follows: -

'..... Counsel for the Defendant submitted, as I think correctly, that the *Walsh vs. Lonsdale* situation, where the intended lessee is treated as having the same rights as if a lease had in fact been granted to him, only applies if the lessee is entitled to specific performance (see the judgment of Sir George Jessel MR in *Walsh vs. Lonsdale*). The equitable interests which the intended lessee has under an agreement for a lease do not exist in vacuo but arise because the lessee has an equitable right to specific performance of the agreement. In such a situation, that which is agreed to be done and ought to be done is treated as having been done and carrying with it in equity the attendant rights. But the intended lessee's equitable rights do not in general arise when that which is agreed to be done would not be ordered to be done. The suggested declaration would thus not be justified.'

Therefore the finding by the trial Court that Appellant had an unenforceable equitable interest in the plots in dispute is very fatal to the case of the Appellant because it strikes at the very substance of his claim. The effect of that finding is the same as saying that a party has a cause of action, which he cannot enforce due to, for instance, the provisions of the statute of limitation. In the two situations, the equitable interest or cause of action is regarded in effect as not having existed since they are unenforceable interest or cause of action.

The next and final question for determination is whether the grounds of appeal before this Court are competent having regards to the complaints therein. The grounds of appeal are contained in the Amended Notice of Appeal filed on 24/1/05 by leave of Court are as follows: -

#### Grounds of Appeal

(1) The lower Court erred in law when it held, contrary to the finding of the High Court that Appellant 'has only an equitable interest in these two plots' that Appellant had no right, title or interest with regard to both disputed plots.

#### Particulars of Error

(a) It is an undisputed fact that the Appellant was allocated the land in question by the 2nd Respondent.

(b) On the strength of the allocation, the Appellant took possession of the land, made all requisite payment to the 2nd Respondent same (sic) for the rent reserved.

(c) The Appellant proceeded to exercise acts of ownership over the land by putting the 1st Respondent on the land as his tenant.

(d) The foregoing facts sufficiently supports the trial Court's finding that the Appellant has at least an equitable interest in the land the subject matter of this suit.

(e) The attempt by the 2nd Respondent to cancel the Appellant lease in July, 1980 which cancellation was declared null and void by the Court of law amounts to issue estoppel in so far as the issue whether the Appellant has an interest in the said land is concerned.

(2) The specific use and application to which the learned Court of Appeal put suit No ID/522/80 Foreign Finance Corporation Ltd. vs. LSDPC & Ors. and LSDPC & Ors. vs. Foreign Finance Corporation Ltd. (1987) 1 NWLR (Pt. 50) 413 was irrelevant to a proper and just consideration of the actual basis of Appellant's claim, founding in Equity, before both lower Courts and thus the manner of the use of both legal authorities to isolate and consider only the requirements of a formal legal estate occasioned a substantial miscarriage of justice.

#### Particulars of Error

A proper consideration and application of the said case could only lead to one conclusion that the Appellant herein has a valid lease over the land the subject matter of this suit.

(3) The learned Court of Appeal erred in law when it held that the Appellant did not discharge the evidential onus to prove valid leases over and possession of both disputed plots so as to take benefit under the Land Use Act Cap. 202 Federal Laws (sic) 1990.

#### Particulars of Error

(i) The Court of Appeal's analysis of the point erroneously centred on the constituents and essentials of a valid legal estate arising ordinarily out of a formal instrument, regarding land.

(ii) In truth, however, it was always common ground that after allocation and physical occupation/possession by the Appellant, no formal lease or instrument was ever executed in this case although required fees were paid and the pivot of Appellant's case was this reliance on an equitable estate founded on an existing agreement for a lease.

(iii) The documentary and oral evidence produced at the trial supported the existence of an agreement for a lease as claimed by the Appellant.

(iv) The Court of Appeal was in error to assert that an inability or failure to pay annual ground rent (being at worst, a breach of contract) could retrospectively and, without more, vitiate the existing agreement for a lease so as to invalidate Appellant's equitable interest both in disputed plots.

(4) The Lower Court erred in law when it held that the payment of rent is a condition precedent to the formation of a lease.

#### Particulars of Error

(i) A valid agreement for a lease comes into existence once the parties, the property, the term, the rent and the commencement date have been agreed upon or becomes ascertainable. All these ingredients were present in the instant case.

(ii) Agreement on the rent payable and not actual payment of the agreed rent is a condition precedent for a valid lease.

(iii) Non-payment of rent at worst amounts to a breach of Covenant.

(iv) The land, the subject matter of this suit is State land and the law treats arrears of rent as a debt to the State.

(5) The lower Court erred in law when it held that the 1st Respondent's title is superior to that of the Appellant herein.

#### Particulars of Error

(i) The evidence before the Court clearly showed that it was the Appellant that put the 1st Respondent in possession of the land.

(ii) The 1st Respondent at all material times, treated the Appellant as its landlord.

(iii) In so doing, the Appellant was exercising its right under its lease with the 2nd Respondent.

(iv) The tenancy or lease agreement between the Appellant and 2nd Respondent precludes the 2nd Respondent from making an effective grant in favour of the 1st Respondent.

(6) The lower Court erred in law when it failed to hold that the 1st Respondent is a purchaser with notice of the Appellant's interest.

#### Particulars of Error

(i) The 1st Respondent was put into possession of the land by the Appellant whom it considered as its landlord.

(ii) With the notice of the Appellant's interest, the 1st Respondent connived with the 2nd Respondent to have a lease granted to it adverse to the Appellant's interest.

(7) The lower Court erred in law when it failed to hold that the 1st Respondent had forfeited its interest.

#### Particulars of Error

(i) The evidence as per Exhibit 'L' shows that the 1st Respondent not only denied the Appellant's entitlement to rent from it, but also claimed title to the property, the subject matter of this suit adverse to the Appellant.

(ii) The law is that an act amounting to forfeiture of a lease for a Lessee to resist or deny the Lessor's title.'

I had earlier in this judgment reproduced the issues formulated by learned Counsel for the Appellant as arising from the above grounds of appeal and which this Court is called upon to resolve. I have also gone through the Amended Appellant's brief, which contain arguments thereon. It is very clear from these that the Appellant, having not appealed against the decision of the trial Court refusing the claim for specific performance of his equitable interest in the plots in dispute, is now urging this Court to uphold the very equitable interest asserted at the trial Court and to enforce same by an order of specific performance as can be seen from the conclusion reached at pages 16 to 18 of the Amended Appellant's Brief, thus: -

'From the foregoing it is respectfully submitted that the finding of the Court of Appeal that the Plaintiff/Appellant 'had no right, title, or interest with regard to both disputed plots' is manifestly wrong in law. The letters of allocation of the disputed plots of land with evidence of the Plaintiff/Appellant's possession are evidence of the Plaintiff/Appellant's equitable interest in the plots.

Having had notice of the Plaintiff/Appellant's equitable interest and indeed having entered into possession on the basis of this interest, the 1st Respondent could not successfully acquire the legal title to the disputed plots. The 2nd Respondent never took steps to repossess the land from the Plaintiff/Appellant or otherwise terminate the tenancy, afortiori, the tenancy between the Plaintiff/Appellant and the 2nd Respondent still exists. It was rightly found by the trial Court that the Abandoned Property Custody and Management Edict did not apply in this case and that the property was not abandoned.

In the premises, the disputed plots were vested in the Plaintiff/Appellant before the Commencement of the Land Use Act. By virtue of Section 34 (2) of the Land Use Act the disputed plots continued to be vested in the Plaintiff/Appellant as if he is a holder of a statutory right of occupancy issued by the 2nd Respondent.

The 2nd Respondent could therefore not validly grant a statutory right of occupancy of either plot to the 1st Respondent because the Plaintiff/Appellant is the person entitled to be issued the Certificate.

There remains the issue of whether the relief of specific performance is open to the Plaintiff/Appellant in the circumstances of this case. It is submitted that the Plaintiff/Appellant is entitled to this relief. The Plaintiff/Appellant fulfilled all the conditions precedent to the agreement. As regards payment of rent, he did his best to obtain an assessment. The concurrent finding of both the trial Judge and the Court of appeal is that the efforts of the Plaintiff/Appellant to pay rent were thwarted by the officers of the 2nd Respondent. The unchallenged or uncontroverted evidence of the Plaintiff/Appellant showed that he was ready and willing to perform all the terms, which ought to have been performed by him.

See Coker vs. Ajewole (1976) (1) ALR Comm 230 or (1976) 9-10 SC 17 for the proposition of the law that a Plaintiff in an action for specific performance will succeed, if he can show that all condition precedent have been fulfilled and that he has either performed or is ready and willing to perform his part of the agreement. He may be barred from obtaining an order of specific performance by delay if time is of essence or if it can be regarded as evidence that he abandoned

the contract.

It is further submitted that in the circumstances of this case, the delay of the Plaintiff/Appellant is not sufficient to defeat his equity. The 2nd Respondent purported to cancel the lease of the Plaintiff/Appellant in 1980 and in 1984, got judgment confirming that the cancellation was illegal, null and void. He thereafter instituted the action from which this appeal has arisen in 1985.

The Appellant has not been guilty of inordinate delay.'

From the above, I agree with the submission of learned Counsel for the 1st Respondent/Objector that although the grounds of appeal before this Court are framed as complaints against the decision of the Court of Appeal, their effect is to attack the decision of the trial Court in so far as they urge this Court to overturn a decision of that Court that was never subject to the appeal before the Court of Appeal, and therefore improper.

Other than contending that the question of unenforceable equitable interest of the Appellant was covered by the omnibus ground of appeal, learned Counsel for the Appellant does not dispute in the reply brief, the contention of learned Counsel for the 1st Respondent that all the seven grounds of appeal in the Amended Notice of Appeal attack the judgment of the trial Court on a finding which Appellant never appealed against at the Court of Appeal, and that this Court has no jurisdiction to entertain the appeal on that issue. Since learned Counsel for the Appellant has preferred no argument to the contrary, I hold the view that learned Counsel for the Appellant has conceded the point being made.

In conclusion, I find merit in the Preliminary Objection and accordingly uphold same. I therefore hold that the grounds of appeal as contained in the Amended Notice of Appeal are incompetent in so far as they invite this Court to review the binding and conclusive findings/decisions made by the High Court of Rivers State, which findings/decisions were not challenged by the Appellant at the Court of Appeal and that this Court has no jurisdiction to review the judgment of a High Court directly except on appeal through the decision of the Court of Appeal.

It is further ordered that this appeal be and is hereby struck out for being incompetent with N10, 000.00 costs in favour of each set of Respondents.

Appeal struck out.

Judgement delivered by  
Idris Legbo Kutigi, J.S.C.

I read in advance the judgment just rendered by my learned brother Onnoghen, J.S.C. I agree with him that there is merit in the Preliminary Objection raised by the learned Counsel for the 1st Respondent to the effect that the Appellants' Grounds of Appeal which without leave of this Court attacked the findings and or decisions of the trial High Court and which were not challenged in the Court of Appeal, are incompetent. The Grounds of Appeal are therefore struck out. Consequently, the appeal is also struck out as incompetent. I endorse the order for costs.

Judgement delivered by  
Niki Tobi, J.S.C.

I have read in draft, the judgment delivered by my learned brother, Onnoghen, J.S.C., and I agree with him.

Learned Counsel for the 1st Respondent raised a Preliminary Objection in paragraphs 2.1 and 2.2 of the Brief as follows:

'The Appellant's Amended Notice of Appeal filed on the 24th of January 2005 contains seven grounds of appeal. The 1st Respondent submits that all seven grounds are incompetent, with the result that this appeal ought to be dismissed in limine. The ground which the 1st Respondent relies on in support of its Preliminary Objection is as follows, to wit: - Grounds Nos. 1 - 7 are incompetent in so far as they invite the Supreme Court to overturn a decision of the High Court that was not challenged at the Court of Appeal.

In summary, the 1st Respondent's complaint against the Appellant's Grounds of Appeal is that those Grounds effectively urge your Lordships to overturn, in substance and effect, a finding or decision of the High Court of Rivers State, when such finding or decision was not challenged at the Court of Appeal. Specifically, the decision in question is the learned trial Judge's finding (at pages 421 to 424 of the Records of Proceedings) that whatever equitable interest the Appellant may have had in the subject Plots 161 and 167, such equitable interest was not one that equity would enforce by granting an order of specific performance.'

The crux of the objection is that this Court has no jurisdiction to overturn the decision of a High Court.

The Constitution applicable in this appeal is the 1979 Constitution and not the 1999 Constitution. I shall therefore fall back on the relevant provisions of the 1979 Constitution. By section 231(1) of the 1979 Constitution, the Supreme Court was vested with jurisdiction to hear appeals from the Court of Appeal. By section 219 of the Constitution, the Court of Appeal was vested with jurisdiction to hear appeals from the Federal High Court, High Court of a State, Sharia Court of Appeal of a State and Customary Court of Appeal of a State.

It is in the exercise of the provisions of section 219 of the Constitution that the appeal from the High Court was heard and determined by the Court of Appeal. Therefore, an appeal from the Court of Appeal to the Supreme Court must attack the judgment of the Court of Appeal, not the judgment of the High Court.

Grounds of appeal, being the complaints the Appellant has on the judgment of the Court, should clearly attack the judgment. They should not give any room for speculation, conjecture or prevarication. An Appellant has no right in our adjectival law to use the appellate forum to attack the judgment of a trial Court in this Court in some apparent disguise in respect of complaints against the Court of Appeal when in reality the complaints are against the judgment of the High Court.

In such a situation, this Court will not be carried away by the traditional appellate language of: 'The Court of Appeal erred in law...' when in reality the Appellant is complaining against the judgment of the High Court. This Court will therefore carefully examine the judgment of the Court of Appeal to see whether the ground of appeal is really on the judgment of the Court of Appeal. If the result of the examination is in or to the contrary, then this Court is entitled to come to the conclusion that there is no valid ground of appeal against the decision of the Court of Appeal. That is not all. If in the course of the examination, this Court comes to the conclusion that the ground of appeal attacks the judgment of the High Court, this Court must come to the conclusion that it has no jurisdiction to hear the appeal on the ground that this Court cannot hear appeal straight from the High Court.

It does not appear to me that learned Counsel for the Appellant really responded to the Preliminary Objection. Even when he tried to do so, he seemed to agree by implication with the Preliminary Objection. Let me read paragraph 3 of page 1 of the Reply Brief:

'It is also submitted that when the issues for determination in the appeal before the Court of Appeal are viewed, it will be seen that the argument and answers to them which the Appellant pressed on the Court are an effective challenge to the refusal of the trial Court to grant an order of specific performance.'

This submission, in my view, clearly vindicates the position taken by the 1st Respondent in the Preliminary Objection. The Appellant is clear in his submission that the arguments and answers advanced in the Court of Appeal are an effective challenge to the refusal of the trial Court to grant an order of specific performance. Counsel for the Appellant took the same arguments to this Court, in challenge of the refusal of the trial Court to grant an order of specific performance. The million-naira question is why should the Appellant by-pass the decision of the Court of Appeal on the

matter, if there was a decision at all. If there was no decision on the issue, then the Appellant was free to raise a ground of appeal on that. That is what the Appellant ought to have done. The Appellant cannot, in law, attack the judgment of the High Court in the Supreme Court.

In conclusion, this appeal is incompetent and therefore struck out as this Court lacks the jurisdiction to hear appeal directly from the decision of a High Court. I award N10, 000.00 costs to each set of Respondents.

Judgment delivered by  
George Adesola Oguntade, J.S.C.

I have had the advantage of reading in draft, a copy of the lead judgment of my learned brother Onnoghen, J.S.C. I agree with the reasoning and conclusion of my learned brother leading to the conclusion that the appeal be struck out. I would also strike out the appeal with N10, 000.00 costs against the Appellant in Respondents' favour.

Judgment delivered by  
Mahmud Mohammed, J.S.C.

The dispute between the parties in this appeal is over title to two plots, Numbers 161 and 167, Trans-Amadi Industrial Layout Port Harcourt. The two plots were allocated to the Appellant by the then Eastern Nigeria Government in 1963 and 1965 respectively. Apart from the letters of allocation, which do not contain the terms of grants, the Appellant did not take any further steps to formalize the grant by accepting the same and subsequently executing a lease for each plot. Meanwhile on the creation of States in 1967, the plots in dispute fell within the territory and control of the Rivers State Government. Meanwhile in an unexecuted lease, the Appellant had reassigned his rights over the plots to the 1st Respondent, which occupied and developed the plots. The assignment of the rights of the Appellant to the 1st Respondent was done without the consent of the Governor of Rivers State, who consequently revoked the Appellant's right of occupancy for breach of Covenants to pay rents and not to reassign without the consent of the Governor. After revoking the Appellant's title in the two plots, the 1st Respondent, which was in occupation of the same, was granted title by the Governor of Rivers State. In his attempt to recover the two plots on the ground that he was a deemed holder of title in them on the coming into force of the Land Use Act in March 1978, the Appellant lost at the trial Court and his appeal at Court below was equally dismissed.

On further and final appeal to this Court, the Appellant is still insisting that he was the deemed holder of the Right of Occupancy in the two plots in dispute on the commencement of the Land Use Act in March 1978, inspite of the fact that the evidence on record is to the contrary.

However, as the Appellant's grounds of appeal and the issues arising from them in his appeal in this Court are not challenging the decision of the Court of Appeal, the fact that the appeal is clearly attacking the decision of the trial Court from which no appeal lies to this Court, the Appellant's appeal is incompetent and therefore the merit of the appeal cannot be looked into. I completely agree with my learned brother Onnoghen, J.S.C., in his lead judgment that the appeal must be struck out. The appeal is accordingly hereby struck out with N10, 000.00 costs to the Respondents.