IN THE SUPREME COURT OF NIGERIA

Suit No: SC160/1997

Petitioner: Robert Enajite Ughutevbe [Substituted with leave of Court for Dick Ughutevbe (Dead)]
And
Respondent: Dr. Owodiran Olushola Shonowo The Registrar of Titles

Date Delivered: 2004-06-04

Judge(s): Muhammadu Lawal Uwais, Anthony Ikechukwu Iguh, Akintola Olufemi Ejiwunmi, Dahiru Musdapher, Dennis Onyeji

Judgment Delivered

One of the issues for determination in this appeal is, whether the court below was right to have held that the trial court was wrong to have struck out the reply of the 1st respondent to the Amended Statement of Defence filed by the appellant in the trial court. The other question that also falls for determination among other issues raised in this appeal is, whether the court below was right to have held the view that the property in dispute which was bought in the name of the 1st respondent by his father, was meant to be a gift for the future advancement of the 1st respondent.

The facts leading to this appeal arose when the 1st respondent, Dr. Owodiran Shonowo, as plaintiff commenced this action against the appellant\'s father as the 1st defendant and the 2nd respondent-(2nd defendant) the Registrar of Titles of the Lands Registry in the Lagos State High Court.

Following the order for pleadings, the 1st respondent with the leave of court filed an Amended Statement of Claim. Similarly, the appellant filed an Amended Statement of Defence. The 1st respondent upon being served with the Amended Statement of Defence filed a Reply thereto. At the trial, the 1st respondent gave evidence in his own behalf and the appellant also called witnesses in support of his defence against the action.

Briefly, the case for the appellant is that his late father, Dick Ughutevbe bought residue of the leasehold interest held by Chief M. A. K. Shonowo, the father of the 1st respondent in respect of a piece or parcel of land with Registered Title No. MO. 1050 at No.l Omode Lane, Apapa. Appellant acknowledged that it was the name of the 1st respondent that the father of the 1st respondent, Chief M. A. K. Shonowo, wrote in the document of purchase when appellant\'s father bought the property. The deed of lease in respect of the property, MO.1050 was executed on 20th November, 1969 following the payment of the sum of '10,000 to Chief M. A. K. Shonowo for the property which he had bought from one Abdulahi Mohammed for N4,000 and was executed on September 3,1959. Following the purchase of the property and with a registered title deed dated 7th January, 1970, Dick Ughutevbe was put in effective possession of the land. From then on he claimed that he exercised maximum rights of ownership over the property, which he claimed was sold to him by the father of the 1st respondent who told him at the time that the property was his and he was therefore free to deal with it as he wanted. It was in that belief that appellant bought the property which was clearly registered in the name of O. O. Shonowo and which he subsequently knew to be the 1st respondent, the son of Chief M. A. K. Shonowo.

On the other hand, the case of the 1st respondent may be put thus. It is not in dispute that the 1st respondent is the son of Chief M. A. K. Shonowo now deceased. The 1st respondent stated that when he was about the age of 14 years, and was still at school, his father, Chief M. A. K. Shonowo bought the property in dispute for him. His father paid for the property and he signed the document relating to its purchase. This document he identified as Exhibit A and it was signed in the presence of his ate father. At the time of the purchase, 1st respondent claimed that his father told him that he bought the property for him because he was his first child to go to secondary school at the time. And his father added that he was very happy with him because he was doing well. His father also told him that the rent that would be collected from the property would be used for the maintenance and education of the 1st respondent. And when he finished his education, the property would be there for him to live in as his residence.

1st respondent claimed that that was how matters stood until he went to the U.S.A. for his further education at the

Harvard Medical School in Washington. He did not return to Nigeria until 1971 when his father died. He stayed for only a month for the burial. He denied that he signed Exhibit B, with which the property was purportedly transferred to the appellant. He added that he did not execute the transfer of the document nor did he authorise anyone to execute same on his behalf. Following enquiries he made at the Lands Registry in Lagos, he commenced this action against the appellant and the 1st respondent. At the conclusion of the trial, the learned trial Judge found against the 1st respondent in respect of his claims. But before then, he had struck out paragraphs 4-7 of the Amended Reply. This is because the court formed the view that they offended against Order 16 rule 25 of Lagos State High Court (Civil Procedure) Rules 1972 in that they raised a new ground of claim inconsistent with the appellant\'s previous pleadings.

However, I think it is desirable to refer to that portion of the judgment of the trial court where the learned trial Judge stated what would have been his decision if the aforesaid paragraphs 4, 5, 6, and 7 of the Amended Reply had not been struck out by him. It reads:-

'The conclusion I reached above results from the finding I had earlier made on the Amended Reply whereof I struck out its paragraphs 4, 5, 6 and 7. If therefore I was wrong on that finding, the presumption of advancement canvassed by the learned Senior Advocate for the plaintiff would be upheld by me of acts or declarations before or at the time of the father\'s purchase of the property by virtue Of Exhibit A in 1959 in the name of the Plaintiff or immediately after it, to constitute a part of the transaction which is admissible to show that the plaintiff\'s father intended a resulting trust. Subsequent declarations and acts of which evidence abounds from the defence are inadmissible in evidence to rebut the presumption of advancement. Again, similar dealings or the course of business practice that the plaintiffs father collected rents on the property are irrelevant I would therefore have found in favour of the plaintiff and would have given judgment in terms of his reliefs.\"

As the plaintiff was clearly dismayed with the judgment and the orders of the trial court, he appealed to the court below. The court below in a well considered judgment overturned the judgment of the trial court, and restored as the judgment of the court the judgment which the trial court stated that it would have given, had it not struck out paragraphs 4, 5, 6 and 7 of the Amended Reply filed by the plaintiff. The 1st respondent, having lost in the court below, has now appealed to this court. He shall from henceforth be referred to as the appellant, while Dr. Owodiran Olushola Shoriowo shall be referred to as the 1st respondent and the Registrar of Titles as the 2nd respondent.

Pursuant thereto, the appellant filed two briefs, namely an Appellant\'s Brief which was followed by a reply upon the receipt of the 1st respondent\'s brief. The 2nd respondent did not file any brief. In the said appellant\'s brief, four issues were identified for the determination of the appeal. The 1st respondent in the brief filed on his behalf adopted these issues as proper for the determination of the appeal. The issues as settled though prolix, read thus:-

\"(1) Whether the learned Justices of the Court of Appeal were right when they held that Order 16 rule 12 of the Lagos State High Court (Civil Procedure) Rules on \'Reply\' was not offended by paragraphs 4, 5, 6 & 7 of the Plaintiff/Respondent\'s Amended Reply and that the learned trial Judge was not entitled to raise suo rnotu and without hearing the parties on the propriety or otherwise of those paragraphs before striking out those paragraphs from the Amended Reply.

(2) Whether the Court of Appeal was not in error in allowing the Plaintiff/Respondent\'s appeal by departing completely from the issues canvassed by the parties on appeal and framing completely new issues and claims for the Plaintiff/Respondent.

(3) Whether the Court of Appeal did not misconceive and in the process did violence to the issue of presumption of advancement having held that \"It was manifest that.... the appellant sold the property to the 1st respondent and that the deed was not executed by the appellant. In addition to these, the learned trial Judge made a finding of fact not contested on this appeal, that it was the appellant\'s father who had signed the appellant\'s name in the deed of transfer Exhibit B made in favour of the 1st respondent.....The applicable law is free from doubt even though its application from case to case has not been free from complexity .....\"

(4) Whether the learned Justices of the Court of Appeal were right when they held that the issue of estoppel did not

arise for argument in the appeal.

As the Registrar of Titles did not file a brief and did not take any part in-this appeal, I will not refer to him as a party in this judgment.

In respect of the first issue, which is, whether the court below was light when it held that Order l6 rule 12 on the Amended Reply filed by the 1st respondent was not offended by its paragraphs 4, 5, 6 & 7, embedded also in this issue is the question as to, whether the learned trial Judge was right to have considered suo motu. the validity of the said paragraphs of the Amended Reply of the 1st respondent.

Now, on the first part of the question, it is argued for the appellant, that the court below came to the wrong conclusion when it held that paragraphs 4, 5, 6 & 7 of the Amended Reply did not offend the provisions of Order 16 Rule 12 of the Lagos State High Court (Civil Procedure) Rules, 1972. The learned counsel for the appellant therefore urged the court to hold that as the basis of the respondent\'s case had been fraud/forgery; it is not permissible for him under the Rules to allege in his Reply that the property in dispute was meant as a gift by his father to him when it was bought in his own name, and that he also signed the documents with which it was bought. In support of his contention, learned counsel cited L.U.T.H. v. Adewole (1998) 5 NWLR (Pt. 550) 406 at420.

With regard to whether the court below was right to have held that it was wrong for the trial court to have considered suo motu the validity of paragraphs 4, 5, 6 & 7 of the respondent\'s Reply Brief, learned counsel for the appellant submitted that it was the court below that wrongly reversed the decision of the trial court. The premise, apparently from what can be gathered from his brief, is that as parties were bound by their pleadings, the trial court was right to have excluded pleadings which raised fresh matters from the proceedings, it is also his view that the question before the trial court was procedural in the sense of whether a party such as the respondent should be allowed to prove what he has not pleaded. Hence, he submitted that the trial court did not need to hear counsel on whether to strike out what he considered as the offending pleadings contained in the paragraphs. In a Reply Brief filed on behalf of the appellant, the argument that the trial Judge properly struck out the offending paragraphs was further advanced in the said brief. In support of this contention, he cited the following cases: Emegokwue v. Okadigbo (1973) 4 S.C. 113; Njoku v. Eme (1973) 5 S.C. 293; Qdumosu v. A. C. B. Ltd. (1976) 11 S. C. 55: Aderemi v. Adedire (1966) NMLR 398.

For the respondent in respect of this issue, the contention made for him by his learned counsel is basically that the justification of the suo motu nature of the learned trial judge\'s finding is a hurdle- which must be crossed before there can be any examination of the question of whether or not the pleading in fact offended against Order 16 Rule 12 of the High Court of Lagos State (Civil Procedure) Rules. It appears then that the crux of the submission of learned counsel for the respondent appears to be that in striking out suo motu paragraphs 4, 5, 6 & 7 of the respondent\'s Amended Reply, the trial court denied the right of the respondent to be heard before the ruling, which was concerned with the meaning and effect of the affected pleadings. Thus, the emphasis of the respondent is on the failure of the trial court to observe the procedural rules of fair hearing with regard to the validity of the said paragraphs of the Amended Reply. He therefore submitted that the court below was right to have overruled that decision of the trial court striking out paragraphs4, 5, 6 & 7 of the Amended Reply of the respondent. It is further submitted for the respondent that the court below was right to have held that the said paragraphs of the respondent\'s Amended Reply did not offend against the provisions of Order 16 Rule 12 of the High Court of Lagos (Civil Procedure) Rules, 1972.

Learned counsel for the respondent further submitted in his brief that there is no dispute between the parties that the respondent was the registered owner of the property in dispute from 1959 to 1970. And then argued that the question of how he became such registered owner did not come into issue until the appellant attempted to plead facts establishing a resulting trust. It was the appellant, he further argued who pleaded himself that the property in dispute had been purchased by the respondent\'s father in the name of the respondent. Learned counsel for the respondent then urged the court to hold that the respondent necessarily had to file the reply. And submitted that the reply while confirming what had been said in the Statement of Defence, only went on to plead facts to show that his father had purchased the property for him as a gift. That plea, he argued was not contrary to his original statement that he was the owner of the property; an existing fact by virtue of Exhibit A. It was further argued by learned counsel for the respondent that Chief M. A. K. Shonowo was in fact not the beneficial owner of, the property in dispute, because as a father purchasing a

property in the name of his minor son the law presumed that he intended to pass the beneficial ownership of the property to that son. It is further contended for the respondent that therefore as the property remained in the respondent, as he had not transferred it to the appellant, the pleadings of the respondent in his Amended Reply cannot and ought not to be regarded as a new head of claim to constitute a breach of Order 16 Rule 12.

There can be mo doubt that the resolution of the question raised by this issue revolves round the meaning and effect of Order 16 Rule 12 (supra). In order to appreciate what I need to say on it, it is, I think, desirable to set down this Rule. It reads:-

\"No pleading, not being a petition or summons, shall, except by may of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same'

By this rule, it is clear that a plaintiff may file a reply to the Statement of Defence but such a pleading, not being a petition or summons, shall except by way of amendment, raise no new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same. It seems also clear that the crucial question that falls to be considered where plaintiff files a reply is, whether the reply so filed is consistent or not with his earlier pleading in his Statement of Claim. In order to assist in the determination of this question, I would refer to what the learned authors of Bullen & Leake & Jacobs Precedents of Pleadings 12th Edition stated at pages 107-108

'The plaintiff must not set up in his reply a new cause of action which is not raised either on the writ or in the statement of claim, since the plaintiff must not in his reply make any allegation of fact, or raise any new ground of claim inconsistent with his statement of claim. Inconsistent for this purpose does not mean \"mutually exclusive' but merely new or different. In other words the reply must not contradict or \"depart\" from the statement of claim or it will be ground for an application to strike out the reply in which the defect occurs. For example, if a plaintiff claims rent on his writ he cannot claim the same sum in his reply as damages for unlawfully \"holding over\". Or, if the statement of claim alleges merely a negligent breach of trust, the reply must not assert that such breach of trust, was fraudulent. So again, if the statement of claim alleges undue influence exercised on the deceased by the defendant, the reply must not allege that in the alternative it was exercised by the deceased\'s husband. Such inconsistent claims should be pleaded, if at all, alternatively in the statement of claim; and the plaintiff may amend or apply to amend his statement of claim in order to plead such allegations or claims in the alternative. Although the plaintiff is not allowed to make a \"departure\" in his reply, yet he may make a 'new assignment.\" A new assignment was a pleading in the nature of a special reply, which explained the declaration in such a manner as to point out the real or supposed mistake of the defendant, and to show that the defence pleaded was either wholly inapplicable to the causes of action replied upon by the plaintiff, or was applicable only to a part of them. Such a reply is very seldom necessary under the present system of pleading owing to the greater particularity now required in a statement of claim; but it is still sometimes used. As a rule, however, if there be any mistake or possible ambiguity as to the precise nature or extent of the acts complained of or of the right which the defendant relies on as justifying those acts, the pleadings already served should be amended or further particulars ordered.\"

See also Herbert v. Vaughan, (1972) 3 All ER 122; (1972) 1WLR 1122; Renton Gibbs & Co. v. Neville (1900) 2 QB. 181.

After carefully reading the judgment of the court below, per Ayoola, JCA. (as he then was), I am quite satisfied that he caught the essence of the principle enunciated above when he said thus at page 507 of the printed record-

\"Where, as in this case, the plaintiff relies on documents of title which adequately and unequivocally vest title in him, it is not a material fact essential to his cause of action and which he should allege by his statement of claim that he does, not hold the property, as a trustee when he does not claim as a trustee, moreso when the action is against a defendant who claimed title originating from an instrument purportedly executed by the plaintiff. The plaintiff is also not required to allege circumstances in which the legal and beneficial interests converge in him. The appellant did not in his amended statement of claim plead facts from which the doctrine of presumption of advancement arose. He did not need to. It was the defence which by facts pleaded raised that presumption. All that the reply did was to setup an affirmative case by the appellant to show that the intention imputed by law to his father coincided with his father\'s actual intention.\"

The question that now falls to be considered is, whether there is merit in the contention of the appellant that the court below was wrong to have held that paragraphs 4, 5, 6 & 7 of the respondent\'s Amended Reply are not in breach of the provisions of Order 16 Rule 12 (supra). I think not. It is common ground in this appeal that the respondent, as plaintiff, by his pleadings, was primarily concerned as part of his ownership of the property in dispute and therefore pleaded inter alia in his Further Amended Reply thus:-

\"Par 4. By virtue of a Deed of Transfer dated the 3rd day of September, 1959 the plaintiff became the proprietor of the residue of the term of the lease in respect of the land known as parcel No. 136 at 1, Omode Lane, Apapa (thereinafter called \"the property\") Registered under Title No. MO 1050.

5. The said Deed of Transfer dated 3rd September, 1959 was registered on 1st October, 1959 at the Lands Registry under Title No. MO 1050.

6. By an instrument dated 7th January, 1970 and wrongfully registered under Title No. MO 1050 by the 2nd defendant on the 5th day of February 1970, the 1st defendant purported to take the residue of the term granted by the registered lease under Title No. MO 1050.

7. The plaintiff avers that he neither sold nor authorised anybody to sell on his behalf, his interest under Title No. MO 1050.

8. The plaintiff did not sign or execute, nor did he authorise anybody to sign or execute the said instrument of transfer dated 1st January, 1970 which bears his handwritten name and initials and avers that insofar as the same purports to be his signature, it is a forgery.

9. The plaintiff avers that the said instrument dated 7th January, 1979 is null and void and of no effect in law for fraud through forgery.

10. The plaintiff avers that the entry of the 1st defendant as the proprietor of the residue of the term of the lease registered under Title No. MO 1050 in the Register kept by the 2nd defendant at the Lands Registry, Lagos was obtained by fraud namely through forgery.

11. The plaintiff avers that after the 1st defendant fraudulently procured the wrongful registration of the purported transfer of the property to himself, he wrongfully entered upon the property and commenced to enjoy the same whether by occupying the same or by letting the same out to tenants.

12. The plaintiff did not become aware of the existence of the said instrument dated 7th January, 1970 of the entry of the 1st defendant upon the property until after he had completed his studies in the United States of America and returned to Nigeria in July, 1975.

13. By reason of the said fraud, namely forgery, the plaintiff has suffered loss and damage in that he has been deprived of the benefit of the rents and profits which would otherwise have accrued to him since 7th January, 1970.'

Whereupon the Plaintiff claims:-

i. A declaration that the instrument dated 7th January, 1970 and purportedly made between the plaintiff of the one part and the 1st defendant of the other part and registered under Title No, MO 1050 is null and void.
ii. An order that the Register kept at the lands Registry under the control of the 2nd defendant pursuant to the Registration of Titles Act be rectified by deleting therefrom the entry therein relating to any estate, right or interest purported to be vested in the 1st defendant.

iii. A declaration that the plaintiff is, the rightful owner of the residue of the term of the lease registered, under

Title No. MO 1050

iv. Delivery of the leasehold Land Certificate Title No. MO 1050 now in, the custody of the 1st defendant to the plaintiff

v. N300.000.00 as against the 1st defendant being mesne profit in respect of the plaintiff\'s registered interest under Title No. MO 1050 or in the alternative N300.000.00 as against the 1st defendant being damage for fraud.
Dated this 2nd day of June 1980.\"

It is not also in dispute that when the appellant as defendant was confronted with those reliefs, it must have been clear to him that he needed to challenge the facts so pleaded and claimed by the respondent. Apparently, in order to secure the title which he thought he had properly obtained he pleaded in his Amended Statement of Defence at paragraphs 5, 6, 7, 8, 9, 13,14,15 & 19. These paragraphs read thus:-

\"5. With further reference to paragraph 7 of the Amended Statement of Claim, the 1st defendant states that it was the plaintiff\'s father, Chief M.A.K. Shonowo, who sold the interest under Title No. MO 1050 to him for valuable consideration.

6. With further reference to paragraph 8 of the Amended Statement of Claim, the 1st defendant states that it was the said plaintiff\'s father, Chief M.A.K. Shonowo, who signed and executed the deed of transfer dated 1st January 1970.

7. The landed property which forms the subject matter of this action was originally leased to one Yesufu Kasunmu Babalola by the then Lagos Executive Development Board for a term of 90 years under terms and conditions contained in the said Deed of Lease.

8. That after subsequent transactions, the said landed property was assigned to the said Chief M.A.K. Shonowo for '4,000 (now N8.000) on or about 1st October, 1959 and he paid the purchase price but he bought the same in the name of his son, the plaintiff herein, who was at the material time a minor. The Deed of Assignment was executed to the said Chief M. A. K. Shonowo at the (sic) request in the name of his said son.

9. At all times relevant to the transaction pleaded in paragraph 8 herein, the said Chief M.A.K. Shonowo intended to have and use the said property for his own benefit absolutely and not as a gift for his said son, the plaintiff herein and that the plaintiff very well knew this or is deemed to have known it.

13. That the 1st defendant together with Chief. M.A.K. Shonowo went to the Lands Registry Lagos to conduct the necessary searches in respect of the said property.

14. That in answer to the 1st defendant\'s query as to why the property was not in Chief M A.K. Shonowo\'s name, he was told by the said Chief M. A. K. Shonowo and he believed him that the property was in the name of Chief Shonowo\'s son as a matter of convenience at the time but that the property was and remained his, Chief Shonowo\'s, at all times.

15. The said Chief M.A.K. Shonowo told the 1st defendant that he was the true owner of the said landed property and that it was he who paid the full purchase price at the time it was sold to him and, at all times material, he intended to have the property as his own for use and benefit absolutely and not otherwise.

19. All the various documents executed as pleaded herein were executed consistently in the name of the said son, the plaintiff herein, throughout the various stages of the transaction by the said Chief M.A.K. Shonowo.\"

By the sequence of the order of pleading in this matter, it is obvious that the Amended Reply of the respondent in this appeal was filed upon the receipt of the Amended Statement of Defence of the appellant in this proceeding. The relevant paragraphs of the Amended Reply and which form the crux of the issue under consideratio deserve to be set down They

read thus:-

\"Par 4. The plaintiff was a school boy aged 14 years at the time of the said transfer in 1959.

Par 5. The plaintiff's father, Chief M.A.K.Shonowo bought the property in dispute for the plaintiff as gift in order that the plaintiff would have something to secure the financing of his education and afterwards have a home in which to live and he informed the plaintiff of this at the time of the purchase.

Par. 6 The Plaintiff's father bought the property in dispute for the plaintiff because of his pride in the plaintiff's educational achievements, and the plaintiff avers that it was the funds from his said property which paid for his education and enabled him to train as a medical practitioner in the United States.

Par. 7 The plaintiff's father, Chief M.A.K. Shonowo had many properties during his lifetime and of these he settled several upon his children as gifts, either jointly or individually while retaining others in his own right, and he always referred to the property in dispute as being the plaintiff's nor did he at any time signify to the plaintiff any desire to have the property for himself.\"

Bearing in mind the principles to which I inferred to earlier in this judgment with regard to when a Reply to a Statement of Defence may be filed by a plaintiff, I will now consider whether the Reply was justifiable in the circumstances. It would be recalled that the focus of the claim of the plaintiff and which he believed was that the property in dispute was bought by his father for him and that at the time of its purchase, his father told him to sign the documents of purchase. That he did. Throughout the proceedings, the fact that the property was signed by the respondent has not been disputed. When, therefore, the appellant claimed ownership of the property in dispute by purchase from the father of the respondent, the respondent quite properly filed a reply to challenge that assertion of the appellant. Where as in this case, a defendant sought to justify himself or his action by pleading that a set of facts existed different from that pleaded by the plaintiff, it is not only right but proper for the plaintiff to set up such facts as would show the lie in the claim of the defendant. It follows that I must hold that the court below was right, having regard to all I have said above that the Amended Reply, particularly paragraphs 4, 5, 6 & 7 thereof filed by the respondent in no way breached the, provisions of Order 16 Rule 12 of the High Court of Lagos State (Civil Procedure) Rules 1972.

The second part of the question as to whether the court below was right to have held that the trial court should have given the parties the opportunity of being heard before deciding to strike out what was considered to be the offending paragraphs of the respondent\'s Amended Reply, in my humble view, the court below was right to have held that before the alleged offending paragraphs of the Amended Reply were struck out, the parties should have been heard by the trial court. It must be borne in mind that the pleadings in an action determine and control the way and manner the trial of an action will succeed or fail. Being the threshold that determines the facts of an action, it makes for Justice and fair play for their validity and relevance to be tested at the beginning of an action or as soon as possible thereafter. In any event, in a matter as crucial as the determination of the rights and wrongs of an action, the parties ought to be given an opportunity of being heard before the court takes its decision. It follows from all I have said above that issue (1) is resolved against the appellant.

The question raised under the 2nd issue is, whether the Court of Appeal did not fall into error in allowing the respondent\'s appeal by departing completely front the issue canvassed by the parties on appeal and framing completely new issues and claims for the plaintiff/respondent. As part of this argument, learned counsel for the appellant referred to that portion of the judgment of the court below, per Ayoola, JCA., where he discussed the 5th relief for N300.000 against the appellant being mesne profits and damages for fraud. In the course of his judgment, he duly observed that though the learned trial Judge awarded the sum of N117,000 as damages, it was not specified whether that sum was for fraud or as mesne profits. It is clear from that passage of the judgment of the court below that the trial court did not specifically rule out fraud as the reason for awarding the damages. But it was also noted that the sum awarded to the respondent was on the basis of the rents received by the respondent up to 1984. The court below after making the above observations then held thus:-

\"I agree with the 1st respondent (appellant) that nothing has been proved to justify an award of damages for fraud, or, to put it more exactly, for the tort of deceit,... In this case, no such fraud as to ground a cause of action has been proved.

However, mesne profit is only another form for damages (See Bramwell v. Bramwell (1942) 1 AER 137 at p. 138). Viewed that way, there is sufficient evidence to justify the conclusion aimed at by the learned Judge. The amount he was prepared to award follows from the 1st respondent\'s (appellant) own reply to interrogatories. In the result, I would uphold the award of Nl 17,000 but would rather describe the award as mesne profits rather than damages for avoidance of confusion.\"

It is clear from a careful reading of the brief for the appellant that the complaint of the appellant is based on the above conclusion of the court below. This is to the effect that having found that fraud was not established, the court below was wrong to have upheld the sum awarded in favour of the respondent as mesne profit. It is therefore submitted for the appellant that except upon error of law, appellate court will not reverse the exercise of discretion by a trial court merely because it would have exercised the discretion differently. In support of this submission- Isagunnimaa v. Uchendu (1996) 2 NWLR (pt.428) 30 at 53; Williams v. Johnson (1937) 2 WACA 253; Ogbero Egri v. Ededho Uperi (1974)1 NMLR 22; A. M. Akinloye &. Anor. v. Bello Eyivola & Ors, 1968 NMLR 92 at 95; Woluchem & Ors v. Gudi & Ors (1981) 5 S. C. 319, 326-330; Kofo v. Bonsie (1957) 1 WLR 1223 PC were also cited for the proposition that this court has the power to review the evidence on record to raise its own inferences on the evidence. And upon such a review, the learned counsel for the appellant urged the court to hold that the court below was wrong to have affirmed the damages against the appellant by the trial court.

The respondent\'s reply to all the above submissions made for the appellant is short and to the point. The contention made for. the respondent being that the court below was right to have upheld the award of damages made in favour of the respondent by the trial court. This argument is based on the premise that in so far as the respondent had made a claim in mesne profits, the trial court could have made the award based on mesne profits as claimed. The court below was therefore right in awarding damages as ordered in favour of the respondent. As I have before set out the reliefs sought by the appellant in its Amended Statement of Claim, I do not need to reproduce it here. But what remains clear is that the appellant claimed the sum of N300,000 as mesne profits and claimed in the alternative the same sum for fraud. I do not think that upon the claim as pleaded there is merit in the argument urged for the appellant This 2nd issue is therefore resolved against the appellant.
I now will turn to consider what merits, if any, there are in the third issue raised in this appeal. The main question raised by the appellant in respect of this issue was put thus, in the appellant\'s brief:-

\"Whether the Court of Appeal did not misconceive and in the process did violence to the issue of presumption of advancement.....\"

In my humble view, the above quoted portion of the question is the only pertinent portion of the issue. The following portion which reads:-

\"as to the onus on the plaintiff/respondent to establish that the father had made absolute and unqualified gift to him of the property in question\"

ought to be regarded and I so regard it as part of the argument in support of the question raised by the appellant.

With that understanding, the other arguments offered in respect of the question may be put thus: - The learned counsel for the appellant in order to show that the court below misconceived the onus on the plaintiff/respondent, with regard to the presumption of advancement that it found in favour of the plaintiff/respondent quoted the following passage from the judgment of the court below. It reads:-

\"It was manifest that.... the appellant\'s (respondent\'s) father sold the property to the 1st respondent (appellant) and that the\' deed was not executed by the appellant(respondent). In addition to these, the learned trial Judge made a finding of fact not contested on this appeal, that it was the appellant\'s (respondent\'s) father who had signed the appellant\'s respondent\'s name in the deed of transfer Exhibit B made in favour of the 1st respondent (appellant)... The applicable law is free from doubt even though its application from case to case has not been free from some complexity ....'

Now, though the appellant was not prepared to concede that the case for the respondent was not based on presumption of advancement having regard to the accepted fact that the property was bought in the name of the respondent by his father, it is however argued for the appellant that that presumption was rebutted by the evidence that the appellant enjoyed quiet possession of the property in dispute, and exercised acts of ownership while the respondent\'s father was alive. For this proposition, learned counsel for the appellant referred to Shephard v. Cartwright (1953) 3 WLR 378, a decision of the Court of Appeal in England. The attraction of this case lies in the fact that in that case, like in the instant case, a father with an associate promoted a number of small companies, caused the shares to which he was entitled to be allotted in varying proportions to his three children, one of whom being then an infant. The father later dealt with these shares bought in the names of the children on his own and as he wished. The various assignments and documents needed to effect these various transactions were caused to be signed by the children as deemed appropriate by their father. They were also totally unaware of the nature of the dealings by their father in respect of the shares, which were allotted to them. Their father later died but left a will where after making certain legacies left his residuary estate to his three children. It was then that they learnt of the original allotment of shares to them and of the subsequent dealings with the proceeds of sale. In these proceedings two of the children claimed as creditors against the executors the balance of the moneys representing the proceeds of sale of the shares allotted to them on the footing that the allotments were advancements and accounts.

In dismissing the action, the trial court, per Harman, J., held, first that the subsequent conduct of the father in dealing with the shares and the proceeds of sale was admissible in evidence to negate any intention of advancement when the shares were allotted to the plaintiffs. Secondly, that the father did not intend either by the allotments or subsequent transactions to make out-and-out gifts to the children.

On appeal to the Court of Appeal, the English Court of Appeal dismissed the appeal as that court held that the onus was on the plaintiffs to establish the making of absolute and unqualified gifts by the father, and that they had failed to discharge it. There was a further appeal to the House of Lords in England, where the question as to whether the Court of Appeal was right as to the question of onus which it placed on the appellants to establish the making of absolute and unqualified gifts by the father. The House of Lords upheld their appeal, and I find instructive the judgment of Viscount Simmonds, who said inter alia:-

\"I think the Master of the Rolls fell into an error and, moreover, into an error which largely influenced him in the conclusion to which he came. For he treated the appellants\' claim merely as a claim against a dead man\'s estate, and therefore (as he says and reiterates) as a claim in which a heavy onus lay on the claimants. But that is not, in my opinion, the way in which the claim should be regarded. It starts with the fact that in 1929 certain shares were placed by their father in the names of the appellants, and, that fact being admitted or proved, a presumption at once arises which it is for the respondents to rebut. They as executors are in no stronger position than their testator would be in if he were alive.

My Lords, at the outset of this opinion I said that there must often be room for argument whether subsequent events can be regarded as forming part of the original transaction so as to be admissible evidence of intention, and in this case it has certainly been vigorously argued that they can. But, though I know of no universal criterion by which a link can for this purpose be established between one event and another, here I see insuperable difficulty in finding any link at all. The time factor alone of nearly five years is almost decisive, but, apart from that, the events of 1934 and 1935, whether taken singly or in their sum, appear to me to be wholly independent of the original transaction. It is in fact fair to say that, so far from flowing naturally and inevitably from it, they probably never would have happened but for the phenomenal success of the enterprise. Nor can I give any weight to the argument much pressed upon us that the deceased was an honourable man and therefore could not have acted as he did, if he had in 1929 intended to give the shares outright to his children. I assume that he was an honourable man as well in the directions in regard to income tax that he gave to Mr. Dunk as otherwise but I thick that he may well have deemed it consistent with honourable conduct and paternal benevolence to take back part of what he had given when the magnitude of the gift so far surpassed his expectation.\"

His Lordship continued,

\"If, then, these events cannot be admitted in evidence as part of the original transaction, can they be admitted to rebut

the presumption on the ground that they are admissions by the appellants against interest' I conceive it possible, and this view is supported by authority, that there might be such a course of conduct by a child after a presumed advancement as to constitute an admission by him of his parent\'s original intention, though such evidence should be regarded jealously, but it appears to me to be an indispensable condition of such conduct being admissible that it should be performed with knowledge to the material facts. In the present case the undisputed fact that the appellants under their father guidance did what they were told without inquiry or knowledge precludes the admission in Evidence of their conduct and, if it were admitted, would deprive it of all probative value. It is otherwise, however. with the conduct of the deceased. I have already made it clear that the respondents have failed to discharge the burden which rests on them of rebutting the presumption of advancement. The appellants, therefore, in my opinion. Need no reinforcement from subsequent events . But, since inevitably in a complex case like this, either upon the footing of being examined de bene esse or because they have been admitted for some other purpose than the proof of intention, all the facts relevant or irrelevant have been reviewed I do not hesitate to say that the only conclusion which I can form about the deceased's original intention is that he meant the provision he then made for his children to be for their permanent advancement. He may well have changed his mind at a later date, but it was too late. He may have thought that having made an absolute gift, he could revoke it. This is something that no one will ever know. The presumption which the law makes is not to be thus rebutted. If it were my duty to speculate upon these matters, my final question would be why the deceased .should have put these several parcels of shares in six different companies into the names of his wife and three children unless he meant to make provision for them, and since counsel have not been able to suggest any, much less any plausible reason why he should have done so. I shall conclude that the intention which the law imputes to him was in fact his intention. The reasoning which made so strong an appeal to Mellish, LJ., in Fowkes v. Pascoe has in this case also particular weight.\"

Reverting to the instant case, it is manifest from Exhibit A, that the respondent\'s father caused the respondent to sign the document for the purchase of the property and the father, Chief M.A.K. Shonowo caused the property to be registered in the Lands Registry in Lagos. There is of course no doubt on the evidence that Chief M.A.K. Shonowo later dealt with the property by purporting to sell it to the appellant. But, as in the Shephard v. Cartwright case (supra), the son, that is the respondent, knew nothing of this transaction. Indeed, unlike the Shephard y. Cartwright case (supra), rather than have the respondent sign the transfer documents, the father of the respondent without the knowledge of the respondent caused the signature of the respondent to be on the document of the sale to the appellant. While it is true that the appellant went into possession after the sale, and in the lifetime of the respondent\'s father, it seems to me that the argument cannot be available against the right of the respondent to the property, when he had no knowledge of the transaction that occurred with regard to the property between his father and the respondent. In any event, it is idle to now argue that a presumption of advancement was not pleaded by the respondent having regard to the earlier decision of the court below on this point, and confirmed earlier in this judgment.

It is pertinent to remark having regard to the state of the authorities that where as in this case, any specie of property was allotted to and signed for by the children of a father who of his own volition caused the property to be so assigned to his children, it must be presumed that such property was given as a gift of advancement to the children by their father. It is for the father, or those who wished to challenge that presumption that have the onus of providing credible evidence to prove that the property was not meant as a gift or advancement to the children. With this conclusion, I must reject the contention made for the appellant and resolve this issue against the appellant.

The fourth issue is that which questions whether the court below was right when it held that the issue of estoppel did not arise for argument in this appeal. The attack of the appellant by his counsel against the decision of the court below concerning this issue is two-pronged. First, it is argued for the appellant that the court below was wrong to have held that estoppel was not raised as a ground of appeal to that court. In support, of that contention, reference was made to ground 1 (d) of the appellant\'s Cross-Appeal contained in his Notice of Appeal dated 20th August, 1987, where the appellant allegedly averred facts raising issue of estoppel by conduct. It is the submission of the appellant that the court below was in error not to have considered that ground of appeal in its judgment. And secondly, that the failure of the respondent to visit the property for three years amounted to conduct indicating an admission against interest by conduct. In support of this submission, reference was made to Section 151 of the Evidence Act. Cap. 112 of the Laws of Nigeria 1990, and to the following cases: Nigeria Engineering Works Ltd. v. Denap Ltd & Anor (2001) 12 S.C. (Pt. II) 136; (1997) 10 NWLR (pt. 525) 481; Humphrey N. Ude v. Harding Osuji (1998) 13 NWLR (pt. 580) 1; Lasupo Akanni v. Adedeji

Makani (1978) 11 & 12 S.C. 13 at pages 26-27 and Morayo v. Qkiade & Qrs 8 WACA 46 at 47.

Responding, learned counsel for the respondent urged this court to uphold the finding of the Court of Appeal that not only was the issue of estoppel not raised in the grounds of appeal before the court, there was in any case insufficient evidence to support such a plea. In the consideration of this issue, I took the opportunity to read again the grounds of appeal filed in support of the cross-appeal of the appellant to the court below. After a careful appraisal of the said grounds, I find no merit in the contention made for the appellant that grounds of appeal dealing with estoppel was raised in the appeal before the court below. Although I have decided above that no ground of estoppel formed part of the grounds of appeal filed by the appellant in the appeal before the court below, I will briefly examine in any event, whether estoppel was established in this case. What then should be considered in arriving at the conclusion that estoppel was raised as argued by counsel for the appellant' For that question, to, be properly determined, I will make reference to the following pronouncement:

\".....The law is clear and well settled on the point It may be stated thus: if a man by his words or conduct wilfully endeavours to cause another to believe in a certain state of things which the first knows, to be false and the second believes in such state of things and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things, does not exist at the time: If a man either in express terms or by conduct, makes a representation to another of the existence, of a state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts:

.....Thirdly, if a man whatever his real meaning may be, so conducts himself that reasonable man would take his conduct to mean a certain representation of facts and that it was intended to act upon it in a particular way, and he with such belief, does act in that way to his damage, the first is estopped from denying the facts as represented.\" See Iga v. Amakiri (1976) 11 S. C. 1

In my respectful view, it seems to me that having regard to the admitted facts in this case, it is not open to the appellant to argue that the respondent was estopped from pursuing his right to the ownership of the property in dispute when he did. There was no scintilla of evidence to prove that the respondent was aware that his father had sold the property to the appellant. Nor is there any evidence that the respondent was aware that in that period the appellant was in possession of the property in dispute. In the result as it is required that such evidence as stated above must be established to show that the respondent led the appellant to believe that he was not going to dispute the ownership and possession of the property in dispute by the appellant, I must hold that appellant has failed to establish estoppel against the respondent. This issue must therefore be resolved against the appellant.

Finally, as all the issues raised in this appeal have been resolved against the appellant, this appeal must be dismissed jn toto. It follows that the judgment and orders of the court below are hereby confirmed. The respondent is accordingly awarded costs in the sum of N 10,000.00 only.

Judgement delivered by
Muhammadu Lawal Uwais, C.J.N

I have had the opportunity of reading in draft the judgment read by my learned brother Ejiwunmi, JSC. I entirely agree that the appeal has no merit and that it should be dismissed.

Accordingly, I too hereby dismiss the appeal in its entirety, with N10,000.00 costs against the appellant in favour of the respondents.

Judgement delivered by
Anthony Ikechukwu Iguh, J.S.C.

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Ejiwunmi, JSC, and I agree entirely that this appeal is without substance and should be dismissed.

Accordingly, I, too, dismiss it and affirm the decision of the court below with N10,000.00 costs to the respondents.

Judgement delivered by
Dahiru Musdapher, J.S.C.

I have had the honour to have read in advance the judgment of my Lord, Ejiwunmi, JSC, just delivered with which I entirely agree. For the same reasons so lucidly set out which I respectfully adopt as mine, I too dismiss this appeal and confirm the decision of the court below. I abide by the order for costs contained in the aforesaid judgment.

Judgement delivered by
Dennis Onyejife Edozie, J.S.C.

This appeal touches on an aspect of the law, which seldom comes before our courts. The subject-matter falls within the province of the law of trust and in particular the doctrine of resulting trust. The general proposition is that where on a purchase, property is conveyed in the name of someone other than the purchaser, the presumption is that the trust of the legal estate results to the man who advances the purchase money. If the advance of the purchase money by the real purchaser does not appear on the face of the deed, and even if it is stated to have been made by the nominal purchaser, parol evidence is admissible to prove by whom it was actually made.

But as this doctrine of resulting trusts is based upon the unexpressed but presumed intention of the true purchaser, it will not arise where the relation existing between the true and the nominal purchaser is such as to raise a presumption that a gift was intended. This presumption of advancement, as it is called, applies to all cases in which the person providing the purchase-money is under an equitable obligation to support, or make provision for, the person to whom the property is conveyed, that is where the former is the husband or father of, or stands in loco parentis to, the latter.

Both the presumption of a resulting trust and the presumption of advancement can be rebutted by evidence of the actual intention of the purchaser. In these cases the court puts itself in the position of a jury and considers all the circumstances of the case, so as to arrive at the purchaser\'s real intention; it is only where there is no evidence to contradict it that the presumption of a resulting trust or of advancement, as the case may be, will prevail: Fowfres v. Pascoe (1875) 10 Ch App 343.

An appreciation of the principles of law enunciated above is relevant in the determination of the central issue germane in the determination of this appeal, the salient facts of which may be summarised thus - The 1st respondent, Dr. Owodiran Shonowo, a medical practitioner, was the plaintiff at the trial High Court while the appellant\'s late father, and 2nd respondent, the Registrar of Titles were respectively the 1st and 2nd defendants. In 1959, when the 1st respondent was a schoolboy of about 15 years of age, his father, Chief M.A.K. Shonowo bought the property at No, 1 Omode Lane Apapa, hereinafter referred to as the property in dispute. It was bought at the price of '4,000 in the name of the 1st respondent who it was alleged signed the Deed of Transfer Exhibit A in favour of himself. Ten years later, that is, in 1969, the 1st respondent\'s father, Chief M.A.K. Shonowo using the name of the 1st respondent, as per, the Deed of Transfer dated 7/1/70 Exhibit B sold the property in dispute for '10,000 to the appellant\'s late father who thereupon started to put tenants therein. Meanwhile, the 1st respondent proceeded to the United States of America where he qualified as a medical practitioner. In 1971, his father Chief M. A.K. Shonowo died but although the 1st respondent returned briefly for the burial, upon his final return from U.S.A., he discovered that the property in dispute had been purportedly sold. By reason of the foregoing premises, the 1st respondent commenced an action against the appellant\'s father and the 2nd respondent as defendants seeking inter alia a declaration that the Deed of Transfer Exhibit B was null and void contending that his father had indeed purchased the property as a gift for him because he was the first member of die family to be admitted into a secondary school and that the property was purchased to finance his further education and to serve as a residence for him in future.

The main question that called for determination before this court was the ascertainment of the intention of Chief M. A. K. Shonowo at the time in 1959 when he bought the property in dispute in the name of his son the 1st respondent. Did he intend a gift to him in which case, he would have no right to alienate the property or did he intend to retain the beneficial

ownership of the property such as to entitle him to dispose of it at his pleasure' In the resolution of the resolution of the issue, the applicable principle of law was restated by the House of Lords in the case of Shepherd v. Cartwright (1954) 2 WLR 967 where Viscount Simonds at p. 970 had this to say '

".I think that the law is clear that on the one hand where a man purchases shares and they are registered in the name of a stranger there is a resulting trust in favour of a purchaser; on the other hand, if they are registered in the name of a child or one to whom the purchaser then stood in loco parentis, there is no such thing as resulting trust but a presumption of advancement. Equally it is clear that the presumption may be rebutted but should not, as Lord Eldon said, give way to slight circumstances. '

Applying the above principles to the facts of this case, it seems to me plain that since it is common ground that the property in dispute was purchased by Chief M. A. K. Shonowo in the name of the 1st respondent, his son, there is a presumption of advancement or gift in favour of the latter. But the presumption is rebuttable by the appellant who alleges the contrary. As to the nature of the evidence necessary to rebut such a presumption, Viscount Simonds, in the Shepherd\'s case supra at p.970, continued, thus:-

\"It must then be asked by what evidence can the presumption be rebutted.....It is, 1 think, correctly stated in substantially the same terms in every textbook that I have consulted and supported by authority extending over a long period of time. I will take, as an example, a passage from Snell\'s Equity 84 at p. 153 which is as follows:-

\'The acts and declarations of the parties before or so immediately after it as to constitute a part of the transaction are admissible in evidence either for or against the party who did the act or made the declaration.....But subsequent declarations are admissible as evidence only against the party who made them, and not in his favour.\'

In the case in hand, the court below examined critically whether there was credible evidence of rebuttal of the presumption of advancement and at p.395 Ayoola, JCA., as he then was, in the leading judgment had this to say:-

\"There was no evidence before me of acts of declarations before or at the time of the father\'s purchase of the property by virtue of exhibit A in 1959 in the name of the plaintiff or immediately after it, to constitute a part of the transaction which is admissible to show that the plaintiff\'s father intended a resulting trust. Subsequent declarations and acts of which evidence abounds from the defence are inadmissible in evidence to rebut the presumption of advancement. Again, similar dealings or the course of business practice that the plaintiff\'s father collected rents on the property are irrelevant.\"

The above conclusions cannot be faulted as they are in accordance with the correct statement of the law. Since the appellant led no credible evidence to dislodge the presumption of advancement that the father of the 1st respondent intended that the property in dispute was a gift to the 1st respondent, that presumption enures in his favour. The implication is that the father of the 1st respondent lacked the legal capacity to sell the property in dispute to the appellant\'s father. Consequently, the Deed of Transfer made in that regard was null and void.

For the foregoing, in addition to the comprehensive reasons articulated in the leading judgment of my learned brother, Ejiwunmi, JSC., I also dismiss the appeal with the order as to costs made therein.