

IN THE HIGH COURT OF EDO STATE - NIGERIA
IN THE BENIN JUDICIAL DIVISION
HOLDEN AT BENIN CITY
BEFORE HIS LORDSHIP:HON. JUSTICE J.O. OKEAYA-INNEH, (JUDGE)
DELIVERED ON MONDAY THE 23RD DAY DAY OF MARCH, 2016

SUIT NO. B/527/2012

BETWEEN:

MRS.PATIENCE IDEMUDIA ..

CLAIMANT/RESPONDENT

AND

MR. KENNETH OSAYANDE

DEFENDANT/APPLICANT

J U D G M E N T

The Claimant filed this Amended Writ of Summons dated 19th day of June, 2013 and by the Statement of Claim dated 19th day June 2013, whereof the Claimant claims as follows:

1. **A DECLARATION** that Claimant is the owner of the house situate/lying at No. 19 Idahosa Street, behind Uselu Market, Uselu-Lagos Road, Benin City where the Defendant presently resides.
2. **AN ORDER** directing the Defendant for specific performance for paying the sum of N2,500,000.00 being the balance sum agreed for selling the property.

Or in the alternative

3. **AN ORDER** permitting the Claimant to sell the house and refund to the Defendant the amount he has paid so far.

4. **AN ORDER** directing the Defendant to pay the sum of N30,000.00 monthly being the collective sum from the tenant living in the house pending when transfer is completely perfected.
5. **AN ORDER** directing the Defendant to pay 10% interest on the monies owed (Both balance payment and rents) from July 2009 till Judgment is delivered in this case and another 10% from when judgment is delivered till when the sum is finally liquidated.
6. **AN ORDER** directing the Defendant to pay the N250,000.00 as general damages.
7. **N500,000.00** being cost of litigation.

The Defendant entered appearance on the 7/11/12 and filed a Statement of Defence and Counter-Claim dated 14/1/2013.

The Claimant opened her case by testifying. She stated that her name is Patience Idemudia. She lives in No. 4, Grace Abosede Street, Obawole Estate, Ogba, Lagos State. Claimant was shown a copy of her Written Statement on Oath which she identifies and further states that she wants to adopt the statement on oath as her evidence in chief before the Court in respect of this case. She also further stated that she wish to adopt the list of documents attached to her statement on oath. In the course of her testifying, the following documents were tendered and admitted as Exhibits before Court:-

- 1) Exhibit "**A**": Letter of Application for Re-approval of land allocation.
- 2) Affidavit of missing valuable land document Exhibit A2.

- 3) Letter from Claimant's Counsel dated 18/4/12 to Defendant Exhibit **B**.
- 4) Letter dated 29/5/2012 from Defendants Counsel Exhibit **C**.
- 5) Letter dated 11/6/2012 from Claimants Counsel to Defendant Exhibit **D**.

Claimant further stated that there was a meeting held in her Lawyer office and since the agreement reached was not complied with by the Defendant, that is why she has come to Court.

Claimant wants the Court to order that the Defendant pay the balance amount from 2009 . date and if the Defendant cannot pay, the Defendant should allow her sell the house and refund his money to him.

UNDER CROSS-EXAMINATION:

Claimant stated that it was the information she gave her Lawyer that he used to prepare her claim.

She denied ever receiving N60,000 from the Defendant. She stated that N60,000 was from the rent. She stated that the arrangement between herself and the Defendant was not credit sale arrangement. There was never any agreement that the Defendant will pay instalmentally. She stated that the original price is N5 million and that she has been paid N2.5 million in 2009. She stated that the agreed amount is not N3 million. She insisted that the Defendant is owing N2.5

million plus rent to date. She does not know Kingsley Ehigiator and does not know Mrs. Salami but she knows the wife of the tenant.

RE-EXAMINATION.

Under Re-Examination she stated that improvement to the house was never part of the negotiation.

CWI testified by stating that his name is Mr. Pullen Ekhuorutomwen Idehen. He lives at No. 53, Eheneden Street, Uselu Quarters, Benin City.

He stated that he knows the Claimant and that she is a wife to his uncle.

He also knows the Defendant and is fully aware of the case before the Court. He stated that he made a Written Statement on Oath in respect of this case and wishes to adopt the Written Statement on Oath as his evidence in Chief before the Court in respect of this matter.

UNDER CROSS- EXAMINATION:

CWI stated that he was present when the arrangement was made to buy the house. CW1 stated that he visited the house before it was sold and that there was no wall fence and no gate. CWI further stated that after the house was sold he did not visit the house and is not aware of any improvement done on the house. CW1 stated that he is aware that defendant paid some money in three instalments and he paid N2.5 million. CWI further stated that he was told to

come to Court to say how they came to his house to inform him about the transaction.

UNDER RE-EXAMINATION.

CW1 stated that during the negotiation he was not a party to the transaction. He became a party to the transaction when there was no document to sell the property. It was at that point he CW1 came in and the Claimant and Defendant came to him.

CW2 testified by stating that his name is Pius Idemudia. He is a Businessman and made a Written Statement on Oath in respect of this case. A copy of the statement was shown to CW2. He identifies same and further states he wants to adopt the written Statement on Oath as his evidence in Chief before Court in respect of this case.

UNDER CROSS-EXAMINATION:

CW2 stated that he was not a party at the beginning and that his wife the Claimant briefed him and he met the buyer. CW2 stated that there was sale of the property and that there were about 8 tenants in the house but does not remember how much they were paying. CW2 stated that after negotiations Defendant did not pay any rent. CW2 stated that Defendant made various payments to the Claimant for the property. CW2 is not aware that the Claimant introduced the Defendant to the other tenants. CW2 stated that the Defendant

begged that we should not introduce him to the other tenants and that he will complete payment to him. CW2 stated that he was informed by his wife that the property was sold for N5 million. CW2 admitted receiving the sum of N10,000 from the Defendant but that the N10,000 was for his transport. CW2 stated that the amount outstanding is N2.5 million. CW2 stated that he is not aware if Defendant made any improvements on the house. CW2 stated that he visited the property in 2012 and saw a fence there.

UNDER Re-EXAMINATION:

CW2 stated that there was negotiation until he came in before any payment was made. CW2 confirmed that the Defendant has only paid N2.5 million.

Defence opens case

DW1 testifies by stating that his name is Kingsley Ehigiator. He knows the parties and remembers making a Written Statement on Oath in respect of this matter. A copy of the Written Statement on oath was shown to him. He identifies the statement on Oath and states that he wants to adopt the written statement on Oath as his evidence in chief in respect of this matter.

UNDER CROSS-EXAMINATION:

DW1 stated that he agrees with all that is stated in his Written Statement on Oath. DW1 stated that his level of education is primary six and admits that he can read and write a little bit. DW1 confirmed his signature and specimen

signature signed by DW1 in open Court was tendered and admitted in evidence and marked as Exhibit “D”. DW1 stated that negotiation started between 10am- 11 am when the Defendant asked his son to call him. Upon the arrival in the house he met 4 people: Mrs. Salami, Claimant, Defendant’s wife and Defendant. DW1 stated that he is not a member of Evboyare Multi-purpose society. DW1 stated that he was present when the Defendant gave a cheque for N900,000 and N100,000 to the Claimant.

There was no re-examination.

DW2 testified by stating that her name is Regina Salami. She is a Civil Servant and the Secretary to Evboyare farmers Multi-purpose Co-operative society. She knows both the Claimant and Defendant. She remembers making a written statement on Oath in respect of this case. A copy of the Written Statement on Oath was shown to her, she identifies same and states that she wants to adopt the written statement on Oath as her evidence in Chief before the Court.

UNDER CROSS-EXAMINATION

DW2 stated that she works with Egor Local Government as ward Assistant. DW2 stated that the President, Secretary Treasurer are signatories to Evboyare farmers Multipurpose Co-operative. Any two can sign. The name of the treasurer is Mr. Udafeme. He is a farmer. The purpose of the society is to promote farming.

DW2 stated that if there is money in the Society, they can use it to assist members. DW2 stated that it is her and the Defendant that sign cheques and went further to state that in this transaction it was both herself and the Defendant that signed but Udafeme had knowledge of same.

DW2 stated the name of the Claimant is Mrs Patience Idemudia Eraruyi. DW2 stated that she was present during the negotiation and that the Defendant had sent for her between 10.00am -11.30am. There were four people when she arrived there. The Claimant agreed on N3,000,000.00 on 9/4/2009. Two cheques where issued because they checked to see if there was sufficient funds in the account before issuing the other cheque for N100,000. DW2 stated that there was no agreement on instalmental payment and was aware when 2nd N1 million was paid and that she also signed the cheque.

THERE WAS NO RE-EXAMINATION.

DW3 testified by stating that her name is Evelyn Osayande. She remembers making a Written Statement on Oath in respect of this matter. A copy of the written statement on oath was shown to her. She identifies the statement.

She further states she wants to adopt the statement as her evidence in chief before Court in respect of this matter.

Under cross-examination, she stated that she witnessed the sales between the Claimant and Defendant. DW3 stated that the renovation was done by her husband and it was part of the sales negotiation. There were 3 tenants in the house. The Claimant inherited the house from her mother. DW3 stated that the amount agreed upon by the Claimant and Defendant was N3million and not N5million. There was no receipt issued. The Defendant has paid the Claimant 4 times. There was no written agreement. DW3 stated that she is telling the truth and that the Claimant sold the house because the house was an old house and the roof was bad. DW3 further stated that she did not sign any document to the transaction.

THERE WAS NO RE - EXAMINATION.

Defendant testified by stating that his name is Kenneth Osayande. He is a Civil Servant with Egor Local Government Council. He stated that he knows Kingsley Ehigiator, Regina Salami and Evelyn Osayande. The Defendant further stated that he remembers making a written statement on the 15/1/13. A copy of the Written Statement on Oath was shown to him. He identifies the Written Statement on Oath and stated that he wants to adopt the statement as his evidence in chief before the Court in respect of this present case. Defendant also stated that he made a further Statement on Oath on 24/4/14

and states that he wants to adopt the statement as his further evidence before the Court. He stated that he has evidence of payment as he stated in his paragraph 2 of his Statement on Oath. The Statement of Account from UBA Bank dated 28/8/2009 showing payment made to Claimant's account was tendered and admitted in evidence and marked as Exhibit **F**. He also stated that he has a rent receipt. The rent receipts was tendered and marked as Exhibit **G – G3**.

Defendant further stated that he also paid another N1million to the Claimant and tendered the statement of account from UBA dated 28/8/2009 admitted and marked Exhibit **H**. Defendant's attention was drawn to paragraphs 14, 15 and 18 of his Statement on Oath. Defendant stated that he has proof of payment. Statement of Account from Access Bank showing payment made to Claimant was tendered in evidence and marked as Exhibit **J**. Letter dated 18/4/2012 written by Claimant's Counsel to the Defendant admitted in evidence and marked Exhibit **K**; letter dated 29/5/2012 written by Defendant's Counsel to the Claimant admitted in evidence and marked Exhibit **L**. Letter dated 11/6/2012 admitted in evidence and marked Exhibit **M**. Receipts for renovation work of property admitted in evidence and marked Exhibits **N, N1 – N43**. Receipt from Evboyare Farmers Co-operative Society is admitted in evidence and marked Exhibit **O**. Resolution of the

children of Claimants mother (**LATE MRS. GRACE ASEMOTA**) dated 22/4/2002 admitted in evidence and marked Exhibit **P**.

Defendant stated that he has been a tenant in the property since the year 2000. The desire to transfer property took place in 2009. There were 10 rooms in the property. Defendant stated there was no agreement between himself and Claimant but they both agreed on the amount to be paid which he paid part and that the Claimant refused to give him any receipt. The transaction took place on 9th April, 2009 and 1st payment was made. There was no agreement that I will finish paying in 3 months. Defendant further confirmed Exhibits **B1 and C**. The Defendant further stated that upon the further instruction from the claimant, he went ahead to carry out the renovation work on the property. Defendant stated that he is not owing the claimant N2.5 million and that he was not ready to sell his property. Defendants attention was drawn to his counter claim 1, 2, 3 and 4 and Defendant stated that all that is stated is true and that is what he is asking the Court to enforce.

THERE WAS NO RE -EXAMINATION.

DW4 testified by stating that his name is A. N Onyegose Esq. He stated that he is under a subpoena. Subpoena issued on Andy N. Onyegose admitted in

evidence and marked as Exhibit **O**. DW4 stated that Exhibit **K** was addressed to Kenneth Osayande and stated he was briefed in the chambers to respond to it on professional ground. In the course of this he responded by writing Exhibit **L**. DW4 further stated that he received a phone call from Barrister Agbonwanegbe that there is need for them to call all the parties to settle the matter and he saw reasons with him and discussed with his client and they now agreed on a particular day and time to meet in his chambers (Claimant's Counsel). DW4 went with the Defendant, his client as he then was. In that meeting they met a woman who defendant said was his landlady. Another man was introduced as the landlady's husband and another elderly man. The Claimant Counsel juniors in chambers were in attendance. The subject matter was introduced. The Defendant agreed with the landlady to buy the house and they agreed that Defendant will pay on instalmental bases. Defendant has paid part of the agreed sum and stopped. The terms of settlement was served on me. The meeting did not end on any resolution. The Defendant stated that he will not pay the amount as stated in the Terms of Settlement.

The terms of settlement admitted in evidence and marked as Exhibit **R**.

Under cross-examination: - DW4 stated that he was not called by the Claimant. DW4 stated that he was in the meeting. There was no agreement.

DW4 reconfirmed Exhibit **R**. He did not sign the document.

THERE WAS NO RE – EXAMINATION.

Defendant's Counsel filed their final written address and formulated 4 issues for determination to wit:-

1. Whether the title to the property known as no 19 Idahosa street, off Mela Motel Road, Benin City has passed to the defendant at the payment of part payment of credit sales.
2. Whether the purchase price for the property from the evidence adduced was not N3,000,000.00 (Three MillionNaira) and the remaining balance put at N420,000.00.
3. Whether the claimant proved the reliefs sought.
4. Whether the defendant's counter claim would not succeed.

Arguing issue one above, Counsel submitted that in proof of her claim, the Claimant testified for herself and called three other witnesses and tendered exhibits A-D and R. Counsel further submitted that in her testimony in court the claimant said that she transacted a business of transfer with the Defendant. Further in paragraph 2 of the Claimant's reply to the Defendant statement of defence and counter claim, Claimant also admitted that she entered into sales agreement with defendant. Counsel stated that in paragraph 17 of Claimant's Statement on Oath, the Claimant said that defendant made four instalmental payments which she accepted. Counsel stated that from these statements, it is true that there was credit sale

arrangement between the Claimant and the Defendant. Counsel also noted that the evidence of CW4, Barr. Andrew Onyejose confirmed that the Claimant and the Defendant agreed that payment for the house shall be on instalmental basis and evidence was also led that the defendant was put in possession after the payment of the first installment.

Counsel further submitted that an equitable interest is acquired when there is payment of money coupled with possession. Counsel referred court to the case of **CHIEF D.S YARO V. AREWA CONSTRUCTION LTD & 2 ORS(2000) 4 FWLR (Pt 399) 7285 particularly at 7332 par A-F**

It is Counsel's further contention that once there is credit sales arrangement wherein the purchaser is to pay on instalmental basis as in this case, after the payment of the first installment to the vendor, the title in the chattel passes to the buyer. Counsel further argued that in a credit sale agreement for the purchase of a chattel, the buyer pays a deposit followed by instalmental payments, and that once the agreement is entered into by the parties, ownership of the property is transferred to the buyer and that if the buyer defaults or is unable to meet his financial obligation to the seller the option open to the seller is an action for specific performance to recover the balance of payment owed by the buyer. Counsel placed reliance for this

proposition on the case of **ALHAJI JIMOH AJAGBE VLAYIWOLA IDOWU**(2011) 17 NWLR (Pt1276) 422 at 450 paras E-G.

Counsel submitted that neither the seller nor the buyer can terminate the agreement and urged court to resolve issue one in favour of the defendant.

Arguing issue two, which is whether the price for the property from the evidence adduced could not be N3,000,000.00 (Three Million Naira)and the remaining balance N420,000.00 (Four Hundred and Twenty Thousand Naira) Counsel submitted that the claimant in her evidence said the property was going for N5,000,000.00 (Five Million Naira) and that the defendant was negotiating N4,500,000.00 (Four Million Five Hundred Thousand Naira) which she refused (paragraphs 14 & 15 of claimant's statement on oath). The defendant's on the other hand said that the purchase price was N3,000,000.00 (Three Million Naira) at the onset. Counsel further noted that in exhibit C which is the letter from the defendant to the claimant which was tendered by the claimant, the defendant stated categorically that the agreed purchase price was N3,000,000.00(Three Million Naira)and not N5,000,000.00(Five MillionNaira). Counsel further submitted that the Defendant in his statement on oath, stated that ~~One~~ Mr. Idemudia who claimed to be the husband of the claimant came to his house one day saying

that the Defendant bought the house too cheaply and that the house would now be sold to the Defendant for N5,000,000.00(Five MillionNaira).

Counsel argued further that in paragraph 2 of Claimant's Reply to Defendant's Statement of Defence and Defence to Counter Claim, the Claimant said "what was agreed initially was N4,000,000,00 (Four Million Naira).

It is Counsel's argument that the evidence that would resolve the differences is the evidence of the parties and the witnesses who witnessed the transaction. Counsel submitted that the Claimant said that the arrangement to sell the house was made in the parlour of the defendant and it was only herself and the defendant who were present at the time the arrangement was made and that Claimant admitted that she knows the wife of the Defendant who was at home on the day. Counsel further stated that Claimant's witnesses admitted on oath that they were not present when the arrangement was made.

Counsel submitted further that on the other hand, the defendant stated that himself, DW1, DW2 & DW3 were present and witnessed the agreement and that DW1, DW2 & DW3 testified to the same. Counsel further contended that the Defendant's witnesses who claimed to have witnessed the

negotiations admitted that the purchase price was N3,000,000.00 and that in the absence of any contradictory evidence to the defendant's witness testimonies, this court should accept that from the evidence led, the purchase price was N3,000,000.00.

Counsel further noted that the Claimant was inconsistent as to the purchase price all through in her evidence, stating in one breath the sum of N5,000,000.00 (Five Million Naira) and in another, she said what was initially agreed on was four N4,000,000.00 (Four million Naira)

It is Counsel's further contention that where a party contradicts itself in evidence the court will not choose which to believe and which not to believe in the inconsistent evidence, rather the court shall treat the evidence in whole with circumspect since it is not credible. Counsel relied on the case of **ALHAJI JAWANDO & ANOR V. MADAM FALILAT LAWAL BAKARE & 2 ORS (2006) 4 FWLR (PART 345) 7445; AT 7462 PARAS E-R, F-FJ**

Counsel urged court to accept the evidence of the defendant in regards to the purchase price as credible and hold that the purchase price was N3,000,000.00 (Three Million Naira).

Counsel submitted that the Claimant admitted that she received the sum of N2.5 million naira from the defendant. The Claimant and the Defendant are adidem on this and that it is trite that facts admitted required no further proof. The Defendant further said that he paid a further N60,000.00 (Sixty Thousand naira) to the Claimant (Exhibit J) which the claimant said it was for rent and for which no receipt was issued to the Defendant. Counsel further argued that the Claimant admitted that it was her lawyer that was collecting rents for her and that the Defendant tendered his rent receipts (Exhibits G-G3) which shows that he paid his rents to cover 2008 and the transaction took place on 9th April 2009. Counsel stated that from the rent receipts tendered by the defendant it is clear he was not owing the claimant rent at the time the transaction took place otherwise the claimant would not have sold the property to him.

Counsel also noted that the Claimant's husband PW 2 also admitted under cross examination that he collected the sum of N10,000.00 (The Thousand Naira) twice (i.e. N20,000.00) and when added to the sum of N60,000 earlier paid it came up to N80,000.00 (Eighty Thousand Naira) and when same is added to the N2.5m (Two Million and Five Hundred Thousand Naira) the sum total paid to the Claimant is N2580,000.00 (Two Million, Five Hundred and Eighty Thousand Naira) and when same is subtracted from the agreed

purchase price of N3,000,000.00 (Three Million Naira) the balance to be paid to the Claimant is N420,000.00 (Four Hundred and Twenty Thousand Naira) on which specific balance could be ordered.

Arguing issue three as formulated, which is whether the Claimant proved the relief sought, Counsel submitted that since there was offer and acceptance by the parties and the defendant made instalmental payments to the claimant whom the claimant accepted, the ownership of the property has passed to the Defendant. Counsel noted that the option left for the Claimant is only for an action for specific performance. Counsel urged court to accordingly refuse Relief One in Claimant's Claim.

On Relief Two in Claimant's Claim, Counsel submitted that both the Claimant and Defendant are ad idem on specific performance which is an order that compels the person against whom it is made to carry out his obligation under the contract. Counsel argued that The Claimant is only entitled to N420,000.00 (Four Hundred and Twenty Thousand Naira Only) which the claimant is entitled to which is sum the Defendant would be required to pay for specific performance.

Counsel further argued that the Claimant both in her Claim, Statement on Oath and the exhibits she tendered, was not consistent on the agreed amount

which was to be paid for the house and she could not field any witness that witnessed the negotiations and the agreed amount to be paid and was equally unable to prove that 2.5 million was outstanding for which she wants the court to order specific performance. Counsel noted that the defendant was very consistent on the issue of price unlike the claimant and referred court to paragraph 8 of Claimant's Statement of Claim.

Counsel urged court to hold that the Claimant is entitled to specific performance in the sum of N420,000.00 (four hundred and twenty thousand naira as analyzed above and not N2.5 million (Two Million and Five Hundred Thousand Naira)

On Relief 4 of the Claimant's Claim which is an order directing the defendant to pay the sum of N30,000.00 monthly being the collective sum from the tenants living in the house pending when transfer is completely perfected, Counsel submitted that the claimant did not lead any evidence in proving how she came up with the sum of N30,000.00 monthly rent or how she was making an average N30,000.00 monthly from the property as rent. Counsel further argued that no evidence was led on how many tenants were in the house and what each tenant paid as rent to amount to the N30,000.00 rent being claimed from the defendant.

On Claimant's Relief 5 which is an order directing the Defendant to pay 10% interest on the monies owed (both balance and rents) from July 2009 till Judgment is delivered in this case and another 10% from when Judgment is delivered till when the sum is finally liquidated, Counsel submitted that no evidence was led that the defendant would pay interest in default of payment and further noted that it was not expressed in the contract neither did the defendant admit or agree in open court that he will pay interest in the event of default. It is Counsel's further submission that the court cannot draw a new contract for the parties and that it is the law that prejudgment interest is awarded where there is an agreement for the payment of interest. For this proposition, Counsel referred to the case of **UBA PLC V ORANUBA (2013) 37WRN 90 @ 127 lines 40.**

Counsel further submitted that that in any claim based on the rate of interest except where there is a concrete agreement between the parties or where there is positive and unequivocal admission by a party, the rate of interest had to be proved by admissible evidence. Counsel noted that in this case the claimant did not lead any evidence in proof of the interest she is claiming. Counsel referred Court to the case of **VEEPE INDUSTRIES LTD V COCOA INDUSTRIES LTD (2008) 7 MTSC 125 AT 140 PARAS F TO G**

Counsel urged court to reject Relief 5 of Claimant's Claim as well.

On Claimant's Relief 6, which is an order directing the defendant to pay the sum of N250,000.00(Two Hundred and Fifty Thousand Naira) as general damages, Counsel argued that the measures of damages awarded by the court flows directly from the loss sustained by the successful party/litigant and that the claimant has not shown any loss she had sustained for breach of the contract. Counsel noted that in Relief 2, the Claimant requested for an order of specific performance while in this relief, she is seeking for general damages. It is Counsel's contention that it is a settled principle of law that an order of specific performance is an equitable remedy granted to a successful litigant constraining the losing party to carry out the agreement which it had entered into with the successful litigant. Counsel further submitted that damages will not readily be granted where an order of specific performance will be adequate compensation to a successful party and referred court to the cases of **ISAAC GAJI & ORS V EMMANUEL D PAYE(2003) 107 LRCN 873 @891 KPU; ANAEZE V. ANYASO(1993) 13 LRCN (PT A) 832.**

Counsel submitted further that since the Claimant has requested for an order of specific performance, an order for damages cannot be made and urged court to hold that this relief also failed and dismiss it accordingly

On Relief 7 which is N500,000.00 being cost of litigation, Counsel submitted that no evidence was led to support this relief sought and that it is the law that a party cannot claim as damages professional fees paid by him to his Counsel. Counsel referred court to the case of **VARYI V COASTAL SERVICES (2004) 36 WRN@ 14 - 15 LINE 25**. Counsel further argued that in the **GUINNESS V. NWOKE (2000) 15 NWLR (PT 689) 135 R8**, the court has held that it is unethical and an affront to public policy for a litigant to pass on the burden of his Solicitor's fees to his opponent in a suit. Counsel urged court to refuse this relief accordingly

Arguing issue 4 which is whether the defendant's counter claim would not succeed, Counsel submitted that in proof of his Counter Claim, the defendant testified for himself and called three other witnesses. Counsel submitted that by credible evidence, the defendant has shown that a valid contract of sale was entered into between him and the Claimant and that at the formation of the contract, the defendant made part payment to the Claimant and he was put into possession.

Counsel further submitted that in a contract of sale of property, where part payment is made, the law is that the contract for purchase has been concluded and final, leaving the payment of the balance outstanding to be paid. The contract for the sale and purchase is absolute and complete for which each party can be in breach for nonperformance and for which an action can be maintained only in specific performance. Counsel relief on the case of **MINI LODGE LTD & ANOR V CHIEFOLUKA OLAKA NGEL (2009) I2MJSC (PT 1) 56 R 5**

Counsel submitted that from the evidence led, the claimant is only entitled to specific performance.

Counsel submitted that the Claimant both in her pleadings and statement on oath gave very conflicting purchase price. Counsel referred court to paragraphs 14,15,16 and 29 of the statement on oath, paragraph 8 of the statement of claim, Exhibit B, a letter dated 18th April 2012 written on behalf of Claimant by her Counsel and stated that the aforementioned have shown the inconsistency in the purchase price by the Claimant. Counsel urged court to hold that after the sum of N2,580,000.00 is subtracted from the N3,000,000.00, the defendant has a balance of N420,000.00 to be paid to the claimant and further urged court to order specific performance on this

sum. Furthermore Counsel urged court to expunge Exhibit R from the records on the ground that it is not admissible in law same having not been signed by any of the parties. Counsel further argued that it is well settled that unsigned document is worthless and void and is entitled to no weight at all in law. Counsel referred court to the case of **UBN PLC V T OYINBO (2009) 13 WRN 143 @ 182 lines 5-10; ABEJE V ARELE (2013) 43 WRN12 7 at 130 R2.**

Counsel submitted that assuming without conceding that the court agrees that the claimant has proved her claim, the defendant has an alternative claim which is the refund of the sum of N9,540,000.00 (nine million five hundred and forty naira) incurred by the defendant which include the purchase price, cost of renovating the house and the interest he paid for the loan taken to purchase the house.

Counsel urged court to hold that the claimant is only entitled to N420,000.00 specific performance and dismiss all other reliefs sought by claimant

Learned Counsel for Claimant formulated 4 (four) issues for determination in his final Written Address to wit:-

1. Whether or not the ownership of the property at No. 19, Idahosa Street, behind UseluMarket, UseluRoad, Benin City which is the subject matter in dispute lies on theClaimant.
2. Whether or not the claimant haven not parted with the documents and executed a deedof Transfer of the property situate at No. 19, Idahosa Street, behind Uselu Market,Uselu Road, Benin City is not entitled to the property, the complete purchase sumhaving not been paid.
3. Whether or not the Claimant is not entitled to an order directing the Defendant for specific performance for the payment of balance sum of N2,500,000.00 being the balance sum agreed for selling the property.
4. Whether or not the Claimant is not entitled to an order directing the Defendant to pay the sum of N30,000.00 monthly from April 2009, being collected sum from the tenants residing in the house pending when a complete transfer is made.

Arguing issue above as formulated, Counsel submitted that the ownership of the property known as No. 19, Idahosa Street, Uselu, Benin City which is subject-matter of this litigation is still the property of the Claimant, as no contract presently exists between the Claimant and the Defendant to suggest the contrary. Counsel referred Court to the case of **AKINYEMI VS. ODU'A INVEST. CO. LTD (2012) VOL. 210 LRCN PAGE 180 AT 186R. 3 AND 5**

Ratio 3 states thus:

“What then is a valid contract? The Black’s Law Dictionary, Eighth Edition, defines a valid or binding contract to mean an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. It is elementary to state that there are three basic essentials to the creation of contract: agreement, contractual intention and consideration. And, the normal test for determining whether the parties have reached agreement is to ask whether an offer has been made by one party and accepted by the other”

Also Ratio 5

“Where there is failure of any of the requirements of a valid contract such as intention to create legal relation and where the contract is not a unilateral or gratuitous one, then, there is a failure of contract as it is incompetent. It is not capable of any enforcement as it is not legally binding”.

Counsel also referred court to **GREEN FINGERS AGRO-IND. ENT. LTD V. YUSUFU (2004) FWLR (PT 193) PG. 202 AT 204.**

Ratio 3 states thus:

“the elementary principle of contract is subject to the presence of certain elements or ingredients which are

offer, acceptance, consideration and intention to enter into a contractual relationship, at times a fifth element which is the capacity of a party or the parties to contract comes into play. For a contract and enforceable these elements must be present; where one of the ingredients is absent there is no contract in existence.”

Counsel further submitted that if the Defendant contends that the sale is a contract of sale, in the case of **GEGE V. NANDE (2006) 10 NWLR (PT. 988) 265** it was held that:

“A contract of sale exists where there is a final and complete agreement of the parties to the contract, namely; the parties to the contract, the property to be sold, the consideration for the sale and the nature of interest granted. Once there is agreement on these essential terms, a contract of sale of land is made and concluded.”

Counsel further contended that for there to be valid sale and transfer of title, there must be payment of purchase price. Counsel stated that where the purchase price is not fully paid there can be no valid sale, notwithstanding that the purchaser is in possession and referred court to the case of **ODUSOGA V. RICKETTS(1977) 7 NWLR (Pt. 511) 1.**

Counsel urged court to grant issue 1 in favour of the Claimant.

Arguing issue two above which questions whether or not the Claimant having not parted with the documents and executed a deed of transfer of the property situate at No. 19, Idahosa Street, behind Uselu Market, Uselu Road, Benin City is not entitled to the property, the complete purchase sum having not been paid, Counsel submitted that the parties having not executed any deed of transfer between them, the property is deemed not gone yet, and still remains the bona fide property of the Claimant.

Counsel contended that the absence of a valid deed of transfer which must be preceded by payment of agreed consideration vitiate the existence of a contract and that the dialogue that took place between the parties were mere discussions of their desire to show interest of an intended legal relation.

Arguing issues 3 and 4 taken together, which is whether or not the Claimant is not entitled to an order directing the Defendant for specific performance for the payment of balance sum of N2,500,000.00 being the balance sum agreed for selling the property, and whether or not the Claimant is not entitled to an order directing the Defendant to pay the sum of N30,000.00 monthly from April 2009, being collected sum from the tenants residing in the house pending when a complete transfer is made, Counsel contended that the condition precedent for an order of specific performance of the contract

of sale of land is well spelt out in the case of **ADENIRAN VS. OLAGUNJU (2001) Vol 48 WRN pg 62 at 64** ratio 5 states thus:-

“...it is trite that in order for an action to be brought for the specific performance of a contract for the sale of land or any interest in land there must be a written memorandum of the contract signed by the defendant or by his duly authorized agent.”

Counsel submitted that looking at the evidence before this court there is no agreement as to the amount for the sale of the property. Counsel further submitted that if the court is mindful of constructing issue 2 into intention to go into legal relation, the necessary order the Claimant will be entitled is for court to direct the Defendant for specific performance deeming nonetheless that the two major issues that the Defendant is contesting are resolved in favour of the Claimant, namely the sales price and the accruable rent of N30,000 monthly from when discussion commenced to when they came to court; from when they came to court to judgment and judgment to when he eventually pays. In the alternative, Counsel argued that the Claimant be allowed to refund the sum of N2,500,000 which represents the money not controverted that was paid by the Defendant.

Arguing Reliefs 5 and 6 on the Counter Claim, Counsel submitted that the Defendant's counter-claims is misleading, vexatious and gold digging and that it smacks of fraudulent desire to deny the Claimant value for her inheritance. Counsel argued that, the absence of a contract, having not met with the mandatory basic essential ingredients of a contract, the absence or omission of one of the ingredients vitiates the existence of a contract. It is Counsel's contention that there was intention to have a legal relationship by the parties having come together to talk, a talk the Defendant has stoutly come to court to deny. Counsel maintained that this denial has robbed off the standard required of an agreement (offer and acceptance) and until such a situation is achieved, there could not have been an agreement.

Counsel submitted that the only logical thing left having regard to the continued position of denial by the Defendant is for court to direct the Claimant to refund the money paid, have her property back and nullify the intended contract.

Counsel urged court to grant the Claimant's reliefs as claimed and dismiss the Defendant's counter claim in its entirety.

I have carefully considered this suit and the written submissions of learned Counsel for both parties. I now turn to the issues for determination as

formulated by both Counsel. I find that issues 1 (one) as formulated by Learned Counsel for both are materially the same. This court has been invited to provide an answer to the question on whether title to the property known as No. 19, Idahosa Street,, Behind Uselu Market, Benin City has passed on to the Defendant or lies in the Claimant upon the part payment of certain sums to the Claimant by the Defendant. From the evidence before this court, it is apparent that the Defendant made part payment for the property in dispute with the actual balance sum unascertained by both parties. Can the furnishing of part payment be taken as passing title to the purchaser? When does title actually pass to a purchaser of landed property?

Where purchaser of land made part payment of the purchase price but defaulted in paying the balance there can be no valid sale even where the purchaser is in possession. Such possession is incapable of defeating the vendor's title. See **MANYA V. IDRIS (2000) LPELR-CA/K/29/97**. See also **ODUFUYE V. FATOKE (1977) 4 SC 11**. In the instant case at hand, the Defendant made part payment pursuant to a parole agreement. As has already been seen, the balance sum is not established by both parties. The mere fact of the part payment cannot defeat the Vendor's title. I therefore answer both Counsel issue 1 as formulated in the negative by saying that upon the furnishing of part payment, title has not passed to the purchaser.

Defendant Counsel~~s~~ issue two questions whether the purchase price of the property from the evidence adduced was not N3,000,000.00 (Three Million Naira) and the remaining balance put at N420,000.00 (Four Hundred and Twenty Thousand Naira Only)

An agreement is a mutual understanding between two or more persons, oral or documentary, about their relative rights and duties regarding past or future performances. It is a manifestation of mutual assent by two or more persons. An agreement is the parties' actual bargain as found in their language or by implication, from circumstances, including the course of their dealings. An agreement to sell land or buy land for instance is that which obligates the Vendor to sell and the purchaser to pay valuable consideration for its purchase. Such agreements often contain the purchase price, and other terms of the transaction.

The transaction between the Claimant and the Defendant is obviously one of parole agreement. In the absence of a written note or memorandum, it is the witnesses to the transaction that can point to the direction of the agreed sum for the property. Who are the witnesses to this transaction? The Record shows that Claimant, Defendant, CW1, DW1, DW2, DW3 were witnesses to this transaction and participated fully when negotiations were going on. Of all

the witnesses to the transaction, it would appear that CW1 was the only one that did not hear of any amount that was agreed on as selling price of the property under dispute. He stated in his evidence that he became a party to the transaction when there was no document to sell the property.

I find also that the parties in this dispute are ad idem on the number of persons present when the negotiations took place. None has included anyone and none has equally excluded anyone. Surely a selling price was agreed while negotiations were concluded on the sale of Claimant's property. What was the agreed price? On the preponderance of evidence of those present, I am minded and swayed to believe that the agreed selling price was N3,000,000.00 (Three Million Naira). On the whole, the testimonies of the Defendant, DW2 and DW3 has the stronger evidence, the most convincing force, superior evidentiary weight and better probative value and I am therefore sufficiently inclined to accept their testimonies as the true position concerning the issue of the agreed selling price of the property. A decision as to what represents the truth depends on the position of the party that is more probable and on the preponderance of evidence. I therefore answer Defendant's Counsel's issue 2 as formulated in the affirmative by saying that the agreed selling price for the property was N3,000,000.00 (Three Million Naira).

Defendant Counsel's Issue 3 queries whether the Claimant has proved the reliefs sought.

The resolution in Defendant Counsel's issues 1 and 2 above has the effect of resolving the question this court has been invited answer as to whether the Claimant has proved he reliefs sought in this suit. Relief one moves this court to declare that the Claimant is the owner of the house situate and lying at No. 19, Idahosa Street, behind Uselu market, Uselu . Lagos Road, Benin City where the defendant resides, By the resolution in issue one above, and by way of repetition, title has not passed from the vendor to the purchaser. Ownership still resides in the Vendor.

Relief two and three seeks an order of this court directing the Defendant for specific performance for paying the sum of N2.5m being the balance sum agreed for selling the property. By the resolution in issue 2 above, the balance sum cannot be N2.5m (Two Million and Five Hundred Thousand Naira) since the agreed selling price has been adjudged to be N3,000,000.00 (Three Million naira) and having regard to the sum already furnished as part payment by the Defendant.

Relief 4 seeks for an Order of this court directing the Defendant to pay the sum of N30,000.00 (Thirty Thousand Naira) monthly being the sum of the

collective sum from the tenants living in the house pending when transfer is completely perfected. I agree with learned Counsel for the Defendant that the Claimant did not lead any evidence to show how the sum of N30,000.00 was arrived at as rents from the tenants in the property. It is trite law that he who asserts must prove. The law is elementary that he who alleges the existence of certain facts has the burden of proving same. See **APENA & ANOR V. AILERU & ANOR (2014) LPELR-SC.173/2004.**

Relief 5 seeks for an Order directing the Defendant to pay 10% interest on the monies owed (both balance and rents) from July, 2009 till judgment is delivered in this case and another 10% from when judgment is delivered till when the sum is finally liquidated. I will restate the time honoured position that pre-judgment interest is either statutory or contractual. Pre-Judgment interest must be claimed by the Plaintiff in the writ of summons and Statement of Claim and evidence subsequently adduced in proof of it, failing which the Court will not award it. Generally, pre-judgment interest may be claimed as a right where it is contemplated by the agreement between the parties or under a mercantile custom or under a principle of equity, such as a fiduciary relationship. See **EKWUNIFE v. WAYNE WEST AFRICA LTD** (1989) 5 NWLR (PT 122) 422 at 445; **IDAKULA v. RICHARDS** (2001) 1 NWLR (PT 693) 111 at 122, 124 and **SANI ABACHA FOUNDATION vs.**

UBA PLC (2010) 1 NACLR 264 at 272. The Claimant having not proved that the pre-judgment interest he has claimed was either statutory or contractual has failed to justify his entitlement to that head of claim. The Supreme Court in the case of **AFRIBANK v. AKARA** (2006) ALL FWLR (PT.304) p. 401 held:

"Except where parties have agreed on payment of interest, it is not right to award interest predating the date of judgment. There must be express agreement that interest will be charged. In the instance case, the trial court was in error to have awarded pre-judgment interest to the Plaintiff without prior agreement between the parties".

Relief 6 seeks for an order directing the Defendant to pay N250,000.00 (Two Hundred and Fifty Thousand Naira) as general damages. In **ECONOMIC AND FINANCIAL CRIMES COMMISSION v. ALHAJI BABA INUWA & ANOR(2014) LPELR-23597(CA)** my Lord Akeju, J.C.A reasoned thus:-

General damages is the kind of damages which the law presumes to be the consequence of the act complained of and unlike special damages a claimant for general damages does not need to specifically plead and specially prove it by evidence, it is sufficient if the facts thereof are generally averred."

The issue of damages arises only when there is breach of contract. Damages for breach of contract are compensation to the plaintiff for the

damage, loss or injury suffered through that breach. It is meant as far as money can do it, for the Claimant to be placed in the same position as if the contract has been performed. see **STAG ENGINEERING COMPANY LTD. v. SABALCO NIGERIA LTD & ANOR (2008) LPELR-8485(CA)**

It is trite that courts do not award damages as a matter of course. It is also trite that damage will necessarily flow from a breach of contract. Now in this proceeding, I must state that I have difficulty ascertaining the breach the Claimant seeks damages for. I find that there are no materials on which to base the award under this head of claim.

Relief 7 seeks an order of this court compelling the Defendant to the sum of N500,000.00 to the Claimant as cost of litigation. The law as it stands today is that a claim for Solicitors fee is not one that can be granted under the present state of Nigerian law. In **GUINNESS NIGERIA PLC V. NWOKE** (SUPRA), the Court of Appeal, per Ibiyeye, JCA, held that a claim for Solicitors fee is outlandish and should not be allowed as it did not arise as a result of damage suffered in the course of any transaction between the parties.

It would seem that the established legal position is that it is unethical and an affront to public policy for a litigant to pass the burden of costs of an action

including his solicitors fees to his opponent in the suit. This is on the basis of the self-evident truth that Solicitors fees do not form part of the wrong on which the plaintiff pivoted his cause of action. It is outside it. It is therefore, improper to allow a plaintiff to pass his financial responsibility to a defendant.

It seems that the reliefs which a plaintiff in an action is entitled to, if established by evidence, are those reliefs which form part of the plaintiff's cause of action. It cannot be disputed that a claim for solicitors fees does not form part of the plaintiff's cause of action. See **NWANJI vs. COASTAL SERVICES LTD** (2004) 36 WRN 1 at 14- WRN 1 at 14-15.

I have no hesitation whatsoever in disallowing the Claimant's claim for N500,000.00 (Five Hundred Thousand Naira) as the cost of his solicitor's fees for this action.

Defendant's Counsel's issue 4 questions whether the Defendant's Counter Claim would not succeed.

Reliefs 1 and 3 in Defendant's Counter Claim has already been addressed. As I earlier mentioned, title to the property in dispute still resides in the Vendor, that is the Claimant herein. Both Reliefs must fail.

Relief 2 of Defendant's Counter Claim appears to be the pivot upon this suit hangs. In the case of **HELP (NIG) LTD. V. SILVER ANCHOR NIG. LTD.** [2006] 5 NWLR (Pt. 972) 196 at 203, it was held:

"where a plaintiff has wholly or in part executed his own part of the parole agreement or has paid the purchase money and been let into possession even though no deed of sale or assignment has been executed, a court of equity will order specific performance on the ground that it would be a fraud on the defendant's part not to carry out his own part of the contract". See also the case of ADENIRAN V. OLAGUNJU [2001] 17 NWLR (Pt. 741) 169; AGROVET SINCHO PHARM LTD. V. ESTATE OF ENGR. DAHIRU [2013] LPELR 20364 (CA)." Per MBABA, J.C.A.

Also in **MR. VICTOR EKA v. MR. CALEB ADETUNJI BODUNRIN KUJU** (2013) LPELR-22124(CA) it was held that:-

In a contract for sale of property where part payment was paid, the law is that contract for purchase has been concluded and is final, leaving the payment of the balance outstanding to be paid. The contract for the sale and purchase are absolute and complete for which each party can be in breach for non-performance and for which an action can be maintained for specific performance." Per IYIZOBA, J.C.A.

I therefore must come to the conclusion that Reliefs 2 and 4 of Defendant's Counter Claim succeeds. It is in that light that I order that the Claimant is entitled to specific performance in the contract of sale of the property known and situate at No. 19, Idahosa Street, off Mela Motel Road, Benin City, Behind Uselu Market, Uselu, Benin City in the sum of N420,000.00 (Four Hundred and Twenty Thousand Naira) only.

I further make an order of perpetual injunction restraining the Claimant, her agents, privies, servants or her representatives from harassing the defendant or transferring the said house to another person or doing anything which is inconsistent with the interest of the defendant.

I make no order as to costs.

HON. JUSTICE J.O. OKEAYA-INNEH
JUDGE
..... MARCH, 2016

COUNSEL

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|----|-------------------------|-------|-------------------------|
| 1. | C. E. AGBONMWANEGBE ESQ | õ | FOR CLAIMANT/RESPONDENT |
| 2. | A. M. ALEOGHO ESQ | õ õ õ | FOR DEFENDANT |