

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GUDU - ABUJA
ON MONDAY THE 1ST DAY OF JULY, 2019.
BEFORE HIS LORDSHIP ; HON. JUSTICE MODUPE OSHO-ADEBIYI
SUIT NO. CV/1475/2018

ILIYASU HARUNA YAMAH -----PLAINTIFF

AND

SARAH HOMES NIGERIA LIMITED-----DEFENDANT

JUDGMENT

Plaintiff filed an Originating Summons dated 13th April 2018 claiming for:-

1. An Order for specific performance by the Defendant by giving possession of 4 bedroom detached Duplex (Block D4161) at their System property Development Consortium Estate, Plot No. G (313), Galadimawa District, Abuja as particularly attached to the affidavit in support of the Originating Summons as per the Defendant's letters of allocation dated 28th November 2013 given to the Plaintiff.

Or

A similar plot of the same dimension in the same estate as specified in the said Letter of 28th November 2013.

2. An Order of Perpetual Injunction restraining the Defendants, their privies, assigns, personal representatives, agents howsoever described from alienating, disposing or giving the property to anybody, person, individual, company or corporate body.

In support of the Originating Summons is a 13-paragraph affidavit deposed to by Hope C. Patrick, a litigation officer in the law firm of Plaintiff's Solicitors. Attached are 3 Exhibits A, B, and C which are:-

Writ of Summons between same parties dated 13th September 2013 and attached to the said Writ is a Statement of Claim dated 12th September 2013, Copy of receipt issued by Defendant for the sum of ₦10,500.00 being money received from Plaintiff for application form, receipt issued by Defendant to Plaintiff for the sum of ₦5m being payment for a 4 Bedroom Duplex (to balance ₦2m), receipt for the sum of ₦300,000.00 issued by the Defendant to Plaintiff being money for "setting and excavation, letter of allocation with ref no: SRH/SEL/DPL/D53 dated 17/1/2012 written by Defendant to Plaintiff allocating a 4 bedroom detached duplex to the Plaintiff and attached is an acceptance of offer signed by Plaintiff dated 19/1/2012, letter dated 24th July 2012 with ref no: SRH/SEL/DPL/D53, being a letter authorising Plaintiff to proceed to site to commence work on a 4 bedroom detached duplex duly signed by Defendant, witness statement on oath of Plaintiff dated 13th September 2013; letter of allocation of 4 bedroom detached duplex addressed to Plaintiff and signed by Defendant; pictures of site work; letter written by Plaintiff to Defendant dated 7/1/2018 and a breakdown estimate of amount expended on work so far done on site valued at ₦7,550, 340.00 Plaintiff also filed a further affidavit of 4 paragraphs in support of his Originating Summons and attached is a structural drawing in respect of the proposed detached 4-bedroom duplex.

Defendant on its part filed a 16-paragraph counter affidavit deposed to by Abdul Isah Usman and dated 12th March 2019. Attached to the counter affidavit is a written address. Defendant also filed a notice of

preliminary objection dated 12th March 2019, attached to the preliminary objection is a 13-paragraph affidavit in support, deposed to by Abdul Isah Usman and attached to the preliminary objection is a written address in support of same.

Plaintiff in return, filed a 7-paragraph affidavit in reply to the Defendants notice of preliminary objection/reply to Defendant's counter affidavit.

This judgment will address both the preliminary objection and issues raised in the substantive suit conjunctively.

A summary of facts of the plaintiff's case are as follows:- Plaintiff (representing himself) is a Legal Practitioner who bought a plot of land from Defendant and was duly allocated the said plot via a letter of allocation issued and signed by the Defendant. The estate of the Defendant is called Kingstown Estate wherein Plaintiff built a 4-bedroom duplex up to window level but same was demolished by the Development Control Authority as it was discovered that the Plot allocated to Plaintiff did not belong to Defendant. Plaintiff thereafter filed a suit in the year 2013 against the Defendant as evidenced by Exhibit A, which is a Writ of Summons filed by the Plaintiff and served on Defendant on 13th September 2013 seeking for a refund of ₦5,310,500.00 being money expended so far on the project before demolition. Defendant thereafter sought for an out of Court settlement of the suit by allocating a replacement plot of land to Plaintiff, but till date, Defendant has refused to give Plaintiff possession of the said newly allocated plot not minding that Plaintiff has performed all that is necessary on his part as evidenced by Exhibit C which is a letter of demand written by Plaintiff to Defendant. Plaintiff in his written address stated that parties are bound by their agreement and prayed the Court

to order defendant to specifically perform their part of the agreement by giving possession of the 4 bedrooms duplex as claimed on the face of the originating process before this Court. Plaintiff stated that the Court should interpret the contract to give effect to the intents of the parties as expressed in the contract bearing in mind that parties freely entered/signed the contract.

Defendant on its part, filed a notice of preliminary objection dated 12th March 2019 seeking for an order striking out the entire suit for want of jurisdiction and for being incompetent on the ground that this Court lacks the jurisdiction to entertain this suit because it is incompetent.

It is worthy to note at this stage that after closing arguments and adoption of written addresses, Plaintiff raised the issue that Defendant filed his processes out of time and failed to seek leave of Court for extension of time which is a contravention of Order 17 Rule 16, which states that:

“A respondent to an originating summons shall file a counter affidavit with all the exhibits he intends to rely upon and a written address within 21 days after service of the originating summons”

Defendant was served in May 2018 but only filed his process in March 2019 without seeking for an extension of time. Defendant had moved his motion and adopted all processes before learned plaintiff raised an objection that defendant's processes were filed out of time. Order 5 of the Rules of this Court states that in the event that there is a non-compliance with the Rules of this Court, such shall be treated by the Court as an irregularity while Order 5 rule 2 states:

(1) “ An application to set aside for irregularity any step taken in the course of any proceedings may be allowed where it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity

(2) “ An application under this rule may be made by summons or motion and the grounds shall be stated”

Learned Plaintiff in raising his objection raised same orally but worthy to note is that Learned Plaintiff waited patiently for Defendant to adopt and rely on all his processes before raising the objection and urging this Court to ignore same. Learned Plaintiff is also in contravention of Order 5 Rule 2, as such application for irregularity ought to be brought by way of motion and not by oral application as done by learned Plaintiff.

Also, the Apex Courts have ruled that irregularities concerning procedure will not vitiate a suit unless, miscarriage of justice has been occasioned and Learned Plaintiff in this suit failed to prove to this Court how the late filing of Defendant’s processes have occasioned a miscarriage of justice to his person. Moreover, the Court in *MOBIL PRODUCING NIG UNLIMITED V. MONOKPO* (2003) 18 NWLR (Pt. 852) 364 @ 411 Para A-B Pg. 412 Para H, Justice Uwaifo (JSC) held; a Court faced with a statement of defence filed late should not ignore such process simply based on the fact that it is irregular, rather the Court should consider same in order to ascertain if it discloses a defence which might be considered in the interest of justice. In the words of the learned Jurist, Justice UWAIFO (JSC): “

“the Court must set down the motion and hear and determine it one way or the other even if it might be of the opinion that the motion was brought late and that what it seeks is downright irregular and frivolous. It has to give the applicant a hearing, it is a basic right”

Consequent to the above, this Court will not discountenance processes filed by Defence Counsel for being out of time but will consider same in line with the rule of “audi alteram partem” of natural justice and a right to fair hearing as guaranteed under the Constitution.

Defendant filed a 16 paragraph Counter affidavit to Plaintiff’s Originating motion and the following is a summary of Defendant’s written address. Learned Counsel to the Defendant raised a sole issue for determination “whether this Hon. Court can Order Specific Performance of the Contract between the Plaintiff and Defendant in view of the facts deposed in the Defendant’s counter affidavit”

Learned Counsel to the Defendant in his written address submitted that the Plaintiff lacks the moral justification to pray for specific performance of the Contract between himself and the Defendant due to the fact that Plaintiff knew right from the onset of the transaction that the said land was being occupied by settlers, which Defendant had patiently explained to the Plaintiff from the onset, hence, urging this Court to order Specific performance at this point would foist undue hardship on Defendant. Learned Counsel to Defendant submitted that Plaintiff is aware that removing settlers from a land of which settlers have taken temporary occupation takes time and the procedure and process is on-going and in

no distant time, the settlers will be removed. That Plaintiff is aware of all steps taken by the Defendant. Learned Counsel to the Defendant further submitted that giving the nature of this case, the Court ought not determine same by Originating Summons as the facts are contentious and there is need for the Court to call oral evidence. Defence Counsel concluded that if the Court were to accede to the prayers of the Plaintiff then the Court would be foisting on the Defendant, the option of resorting to self help rather than follow due process to remove the settlers on the plot allocated to Defendant. Counsel referred to the case of DOHERTY VS. DOHERTY (1968) NMLR 241 to support his submissions that a suit can only be commenced by way of originating summons when the facts are not contentious.

Learned Plaintiff filed a reply to Defendant's preliminary objection merged with a reply to defendants Counter affidavit by filing a 7-paragraph affidavit deposed to by Constance O. S. Illiyasu, a legal practitioner in the law firm of the Learned Plaintiff. The said affidavit is dated 9th April 2019 and attached is a written address dated 8/4/2019. Learned Plaintiff in his written address submitted that the argument of Defendant that this suit is incompetent has no support in law as the preliminary objection does not make any reference to the statement of claim or the affidavit in support of the Originating Summons and therefore incompetent as well as the counter affidavit and written address of the Defendant. Learned Plaintiff submitted that contrary to Defence Counsel's submission, this suit is properly commenced by an Originating Summons as it is to deal with questions of simple construction of document and/or statutes or on the determination of facts which ex-facie are not hostile and contentious between parties.

Counsel referred to NATIONAL BANK OF NIGERIA & ANOR VS. LADY ALAKIJA & ANOR (1978) 9-10 S.C 59 @ 71 Per Kayode Eso JSc.

Learned Plaintiff further submitted that the coming by way of originating summons in this suit is proper as the suit deals with questions of construction of an instrument. Counsel submitted that since defendant did not file a counter claim to the claim of the plaintiff, it could not raise the issue to determine the relief sought by the Plaintiff in this suit. Relied on OSSAI VS. WAKWAH (2006) 2 S.C (Pt.1) 19.

Learned Plaintiff submitted that Defendant in his counter affidavit has admitted the claim of the Plaintiff via paragraphs 6 and 7 and Exhibit B should be the only document the Court should consider. That the issue of settlers was never in parties initial agreement nor was it ever contemplated. That by paragraphs 6 and 7 of the affidavit in support of the preliminary objection and paragraphs 7 and 8 of counter affidavit of Defendant form an admission and consequently, Defendant admitting the claim of the Plaintiff, is estopped from saying that Plaintiff should not be granted the prayers as contained in the Originating Summons. That Defendant is further estopped from denying any terms of Exhibit B, which is the Letter of Allocation issued by the Plaintiff to Defendant, which specifies the binding nature of a contract, and prevents a person from denying a term, fact or performance arising from a contract. Submitted that the last paragraph of the admitted allocation Letter/Plot Defendant gave to the Plaintiff states:-

"By this offer, our letter with Ref No: SRH/SEL/DPL/D53 dated 17th January, 2012 at our estate, KINGSTOWN is hereby deleted."

Plaintiff submitted that by this Clause in the new contract, it extinguished all issues and documents in the old contract. That

Defendant in the new contract also stated that Plaintiff was required to commence work at the site immediately and Section 128 (1) of the Evidence Act does not permit this Court to accept oral evidence of Defence Counsel to vary the contents of the letter of Allocation (Exhibit B). Submitted that when transactions have been reduced into writing by agreement of parties, the written document becomes the exclusive record and no evidence may be given to the contrary except the document itself or secondary evidence of its contents, hence, all the depositions in the counter affidavit should be taken as extraneous and jettisoned by the Court as the Court is to confine itself to Exhibit B in interpreting the contractual document. That the instant case is a contract for sale of land gone sour and Plaintiff was right to have sought for specific performance on the part of Defendant in his prayers as money cannot be adequate compensation for the deprivation of land Defendant has refused to give to Plaintiff not minding the fact that Plaintiff pays the sum of ₦1.5m per annum as rent in the apartment he is currently residing. Plaintiff concluded that contrary to Defence Counsel's submissions, parties never discussed alternative land nor did parties discuss any issue of settlers occupying the land, rather, all discussions were reduced into writing as evidenced in the Agreement and Letter of Allocation of land. Plaintiff relied on the cases of OJIBAH V OJIBAH (1991) 6 S.C 182; IDUFUEKO V. PFIZER PRODUCTS LTD (2014) 5-6 SC (PT.11) 33; FAKOYA V. ST. PAULS CHURCH SAGAMU (1996) 1 A.L.R Comm; 461;

From the above submissions of both learned counsel, the following issues arise for determination:-

1. Whether Defendant in his preliminary objection has been able to prove that this Hon. Court lacks jurisdiction to entertain this suit?
2. Whether this suit ought to have been filed via an Originating Summons.
3. Whether Plaintiff has been able to prove that Defendant should specifically perform his part of the Contract.

On the first issue for determination, Defendant's Counsel filed a notice of preliminary objection seeking for an order to strike out the suit for want of jurisdiction. Defendant's Counsel had initially filed the notice of Preliminary Objection in respect of two Defendants, comprising the current Defendant in this suit, "Saraha Homes Ltd" and a certain "Alhaji Kabiru Haruna" who is the alter ego of the Saraha Homes Ltd. The preliminary objection was to the effect that both Defendants are separate legal entities and the act of Alhaji Kabiru Haruna who is an agent to "Saraha Homes" should not make him liable where his principal is disclosed. Consequently, Plaintiff sought to strike out the name of the 2nd Defendant i.e "Alhaji Kabiru Haruna" which the Court granted, thereby leaving "Saraha Homes Ltd." as the only Defendant.

Unfortunately, the 13-paragraph affidavit in support of the motion is hundred per cent about how an act of an agent cannot make him personally liable where there is a disclosed principal not minding that the name of the agent had been struck out. Learned Counsel to the Defendant 's accompanying affidavit to his preliminary objection, woefully failed to address the issue raised in his Preliminary Objection and I am of the view and therefore hold that the affidavit in support of the motion is null and void and of no effect having no bearing to the preliminary objection at hand.

When a motion is supported by affidavit, such affidavit must set out the grounds on which the party moving it intends to rely, whether legal or factual. See OPOBIYI & ANOR VS. MUNIRU (2011) LPELR08232 S.C (pp. 21-22) Paras (E-A) where FABIYI JSC held:

“it is apt that every motion must be supported by an affidavit and failure to file such an affidavit renders same bare and without support. Any decision arrived at in such a circumstance, would have been rendered in vacuo leading to the inescapable end result of arriving at abstract justice.

Also in the case of ONUJABE & ORS VS. IDRIS (2011) LPELR- 4059 (CA) (P.26 para A-C), where GALINJA J.C.A held

“The motion herein is not supported by affidavit, as the affidavit in support is clearly incompetent.....and liable to be struck out.”

Order 36 Rule 1 of the Rules of this Court states:-

“Upon any motion, petition, summons or any other application, evidence may be given by affidavit.”

Order 43 Rule 1 of the FCT High Court Civil Procedure Rules 2018 states

“whereby in this Rules any application is authorised to be made to the Court, it shall be made by motion which may be supported by affidavit and shall state the rule of Court or enactment under which the application is brought”

From the above cited cases and rules, a motion supported by affidavit “SHALL” state the grounds upon which applicant relies on and failure to

do so as in the preliminary objection filed by the Defence Counsel, renders the affidavit incompetent. I therefore hold that the affidavit attached in support of the preliminary objection is incurably incompetent.

The question that arises at this stage is “what is the effect of an incompetent affidavit on the preliminary objection?” I refer to the case of MAGNUSSON VS. KIOKI & ORS (1993) LPELR-1818 (S.C) PP. 11-12 para F-A where KUTIGI J.S.C held

“an application or motion on the other hand is usually supported by affidavit or affidavits with or without exhibit depending on the nature of the application. It is necessary for an applicant to state fully in an affidavit or affidavits, the facts he intends to rely upon in seeking the prayers or order contained in the motion paper because except with the leave of Court, he will not be heard in respect of facts not contained in the affidavit.”

Also, in the case of ADEGBOLA & ORS VS. IDOWU & ORS (2017) LPELR-42105 (SC) P. 3 Para a-d-42105 (SC) p.3 paras A-D where GALINJE J.S.C held

“Motions are generally argued on the basis of the grounds upon which they are predicated, the supporting affidavits and counter affidavits.....Applicants are not allowed to proffer arguments not deposed to in their affidavit...applicants certainly cannot formulate issues that are at variance with the contents of

their affidavits and expect a favourable endorsement from the Court.”

The essence of filing an affidavit along with a preliminary objection is to state out the facts of the case, it is the evidence, which the Court will rely upon and it is trite law that cases are won based on evidence. It therefore follows that with the affidavit being incompetent, the preliminary objection is simply one that has no evidence whatsoever supporting it. Such a preliminary objection is dead on arrival and a written address, no matter how brilliantly written cannot take the place of evidence and on this backdrop, I am of the view and therefore hold that the preliminary objection cannot stand without a competent affidavit supporting it. Consequently, the preliminary objection dated 12th March 2019 is struck out.

On the second issue for determination whether this suit ought to have been filed via an Originating Summons. Learned Counsel to the Defendant in his written address in support of his counter affidavit opposing the originating summons submitted that this suit ought not to come by way of Originating Summons given the nature of the facts deposed to in the counter affidavit on the grounds that Plaintiff failed to disclose to the Court the mutual agreement between Plaintiff and Defendant regarding settlers being in temporary occupation of the land allocated to Plaintiff by Defendant. To this end, Defendant's Counsel is of the view that this suit ought not to have been filed as an Originating Summons as it is a contentious matter; rather, parties ought to give oral evidence in order to give this Court a clearer view of the transaction between both the Plaintiff and the Defendant.

A brief summary of the facts as contained in the counter affidavit are as follows:- That the initial land which Plaintiff bought from Defendant and which same was allocated to Plaintiff by Defendant was demolished by the Federal Capital Development Authority (FCDA) that Defendant allocated another land to Plaintiff out of sympathy in one of its estate known as System Estate, but during negotiation process, Defendant disclosed to the Plaintiff that the plot given to him forms part of land currently being temporarily occupied by settlers and that effort was being made by the Defendant to eject the settlers from the land. That Plaintiff accepted but after some time, demanded for his land of which defendant pleaded for time as the process of removing settlers is a long and cumbersome process and that Plaintiff ought to exercise some "patience". Learned Defendant's Counsel is therefore of the view that the Court ought to call for oral evidence and that Plaintiff ought not to have come by way of Originating Summons.

Order 2 Rule 3 of the FCT High Court (Civil Procedure) Rules 2018 states:

"Any person claiming to be interested under a deed, Will, enactment or other written instrument may apply by Originating Summons for the determination of any question of construction arising under the instrument and for a declaration of the rights of the person interested."

From Order 2 Rule 3, it is obvious that where the sole or principal question in issue is the construction of a written law, or any instrument made under any written law, or will, contract, deed or any document or some other question of law, the Plaintiff can file an Originating Summons. Hence, Originating Summons is filed where there is unlikely

to be any substantial dispute of facts but same is incompetent where facts are likely to be contentious. See INAKOJU VS. ADELEKE (200&0 4 NWLR (Pt.1025) 423, the Supreme Court relying on its earlier decision in DOHERTY VS. DOHERTY (1969) NMLR 24 @ P.123 emphasised the importance of the Originating Summons when it held inter alia; by AKINTAN JSC

“The merits of the Originating Summons lie in the fact that proceedings commenced thereby are very expeditiously dealt with. This is so because pleadings are not filed and consequently witnesses are rarely called and examined. Rather, affidavit is mostly used and relied upon. Proceedings for which it is used therefore usually involve questions of law rather than disputed facts. Where it is otherwise, a proper initiation process should be adopted if the proceedings are hostile proceedings which the facts are apparently disputable”.

From the facts of the case at hand, the following facts are undisputed:

1. Plaintiff entered into a contract for the sale of land from the Defendant to Plaintiff.
2. That a land was allocated to Plaintiff by Defendant but same was demolished by Federal Capital Development Authority.
3. That in view of No. 2 above, Defendant allocated another land to Plaintiff through a Letter of Allocation with ref no: SRH/SEL/DPL/D416 dated 28th November 2013.
4. That for over 4 years of allocating a 2nd plot to the Plaintiff, Defendant is yet to give Plaintiff possession of the 2nd Plot.

5. That the Contract for the sale of land of the 2nd Plot is premised upon the letter of allocation dated 28/11/2013 issued to the Plaintiff by the Defendant where the terms and conditions of the contract/sale is well spelt out.
6. That the new letter of allocation/contract of sale; dated 28/11/2013 expressly deleted and replaced the old plot of land which was demolished.

As earlier stated, the enumerated facts above are not in contention. What the Plaintiff is praying the Court is to Order the Defendant to specifically perform its own side of the contract by putting him in possession of a plot of land as agreed. Plaintiff has consequently attached Exhibit B which is the letter of allocation dated 28/11/2013 for the allocation of the new plot of land which Plaintiff wants the Court to look into and determine the terms as stated in the new contract of sale of land. As spelt out by the Supreme Court in a number of cases, commencing an action by Originating Summons is a procedure used where the facts are not in dispute and it is also reserved for commencing an action where the issues are for determination of questions of construction of documents arising from instruments as in this instant case. See INAKOJU & ORS VS. ADELEKE & ORS (2007) LPELR-1510 (SC) Pp. 28-30 para D-C where Tobi J. S.C held

“the action was commenced in the High Court by Originating Summons. Commencement of action by Originating Summons is a procedure, which is used in cases where the facts are not in dispute or there is no likelihood of their being in dispute. Originating Summons is also reserved for issues like the determination of questions of Construction and not matters of such

controversy that the justice of the case could demand the setting of pleadings. The very nature of an Originating Summons is to make things simpler for hearing. It is available to any person claiming interest under a deed, will or other written instrument whereby he will apply by originating summons for the determination of any question of construction arising under the instrument for a declaration of his interest.... It is a procedure where the evidence in the main is by way of documents and there is no serious dispute as to the existence in the pleadings of parties to the suit. In such a situation, there is no serious dispute as to the facts but what the Plaintiff is claiming is the declaration of his rights. Where facts are in dispute or riotously so, an originating summons procedure will not avail a plaintiff who must come by writ of summons. In other words, an originating summons will not lie in favour of a plaintiff where the proceedings are hostile in the sense of violent dispute. In originating summons, facts do not have a pride of place in the proceedings. The cynosure is the applicable law and its construction by the Court. The situation is different in a trial commenced by writ of summons where the facts are regarded as holding a pride of place and the fountainhead of the law, in the sense that the facts lead to a legal decision on the matter. That is not the position in proceedings

commenced by originating summons where facts do not play a central role but an infinitesimal role, if at all."

Applying the above to this present suit, the basic facts of this case as enumerated above are not in dispute, they are unchallenged and uncontroverted. What is before the Court is the interpretation of the contract for sale of land where Plaintiff wants the Court to determine his rights under the said sale of land and I am of the view and therefore HOLD that this action was properly commenced by Originating Summons.

On the third and last issue for determination, whether Plaintiff has been able to prove that Defendant should specifically perform his part of the contract. The principle of specific performance is a discretionary remedy. It is to order specific performance based on the existence of a valid and enforceable contract, which does not suffer from defects such as informality, mistake or irregularity. It is an equitable remedy. In INTERNATIONAL TEXTILE INDUSTRIES (NIG) LTD VS. DR. ADEREMI & ORS (1999) 8 NWLR (pt.614) 268, the Supreme Court Per Katsina-Alu J.S.C held that

"To sue for specific performance is to assume that a contract is still subsisting and therefore to insist that it should be performed. That would mean that the Plaintiff would not want it repudiated unless for any reason the Court was unable to aid him to enforce specific performance of it. He may fall back on the remedy at common law for damages".

As stated earlier, it is uncontroverted that both Plaintiff and Defendant entered into a contract for sale of land of which Defendant is yet to put

Plaintiff in possession of the said Plot of land although same has been allocated to Plaintiff via the Letter of Allocation/Contract of sale otherwise known as Exhibit B.

A contract for sale of land is said to exist where there is a final and complete agreement of the parties on essential terms of the contract, namely the parties to the contract, the property to be sold, the consideration for the sale and the nature of interest to be granted. Once there is an agreement on these essential terms, a contract of sale of land is made and concluded and it does not matter that the purchaser only made a part payment as in such instance, the law is that the contract for purchase has been concluded and is final, leaving the payment of the balance outstanding to be paid. The contract for the sale and purchase is absolute and complete for which each party can be in breach of non-performance and for which an action can be maintained for specific performance. See FUNTUA VS. INGAWA (2016) LPELR-41166 (CA) PP. 20-21 paras C-B. In the case of MINILODGE LTD & ANOR VS. NGEI & ANOR (2009) LPELR-1877 (SC) P.41 PARA G-B, ADEKEYE J.S.C held

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

It is worthy to note at this stage that after close of arguments, adoption of written addresses and matter adjourned for judgment, Learned Counsel to the Defendant submitted through the Registrar of this Court

authorities not cited by him during arguments in Court; SAKA VS. IJUAH (2010) 4 NWLR (pt.1184) 405 @ 410 ratio 10 (p.432). The authority submitted is to the extent that Plaintiff ought to show that he has paid the purchase price and that failure to show same constitute a fundamental breach which goes to the root of the contract and upon which a Court cannot decree Specific Performance.

I will discountenance this authority for the following reasons:-

Plaintiff in the affidavit in support of his Originating Summons stated in paragraphs 5, 6 and 10 as follows:-

(5) That Illiyasu Haruna Yamah Esq., bought a plot Number RE: Allocation of 4 bedroom detached duplex (block D 53) at Kingstown Estate, Plot No. 55, Cadastral Zone C05 Kage District, Abuja in the Estate of Defendant called Kingstown in Gwarinpa/LifeCamp wherein he built a 4 bedroom duplex to above window level

(6) That development Control demolished the building.....

(10) That Plaintiff performed all that is necessary on his part in the contract between Plaintiff and Defendant and made oral and written demand for the subject contract for the Plaintiff to erect his building of annual rent of N1.5m but the Defendant has refused to give possession of the 2nd Plot as agreed by the parties till date to the Plaintiff.

Defendant in his counter affidavit in paragraph 3 admitted paragraph 5 but denied paragraph 6 and 10. Defendant's denial of paragraph 6 is to the extent that the demolition had nothing to do with the legality of the Defendant's title to the said plot. That the building was demolished by FCDA is controverted. Defendant's Counsel simply denied paragraph 10 to the extent that Defendant did not refuse to give Plaintiff possession of the plot of land but Defendant's hands are tied as the said

plot is part of an expanse of land belonging to the Defendant which is currently occupied by settlers of which Defendant is taking steps to get the settlers ejected legally. The fact in paragraph 10 that *"Plaintiff had performed all that is necessary on his part in the contract between Plaintiff and Defendant...."* remains uncontroverted by Defendant. Consequently, it is too late in the day for the Defence Counsel to submit authorities of facts he failed to contradict in his counter affidavit. Defendant's Counsel at this stage cannot via a written address submitted after close of argument and after matter adjourned for judgment, deny what has been admitted in the counter affidavit.

It is the law that paragraphs of affidavit not denied nor controverted are deemed admitted. Where facts deposed in an affidavit on a crucial and material issue are not controverted or denied in a counter affidavit, such facts must be taken as true. Learned Counsel to the Defendant in his counter affidavit simply made a general denial of paragraphs 6 and 10 of plaintiff's affidavit without specifically controverting the claims of the Plaintiff or controvert the material facts of the Plaintiff's affidavit in paragraphs 6 and 10 particularly paragraph 10 which states that Plaintiff has performed all that is necessary on his part of the contract.

The consequential effect is that Plaintiff's paragraphs 5, 6 and 10 remains uncontroverted on material facts that Plaintiff bought a Plot of land from defendant, that Plaintiff's initial building which he erected on the land he bought from Defendant was indeed demolished by FCDA and it also remains uncontroverted that Plaintiff has performed and perfected his own side of the contract. See **FNB OLC Vs. NDAREKE & SONS (Nig.) LTD (2009) 15 NWLR (pt.1164) pg.406** where the Courts held that specific facts in an affidavit must be specifically controverted

by way of a counter affidavit. Where facts deposed to in a counter affidavit are extraneous, foreign or not directed at the facts in an affidavit they are irrelevant and the Court will disregard them as such. Where facts deposed to in a counter affidavit are disregarded and discountenanced, it would mean that the specific facts in the affidavit remains uncontroverted and I therefore hold that paragraphs 5, 6 and 10 of the Plaintiff's affidavit in support of the Originating Summons remains uncontroverted on material facts to wit; Plaintiff bought a plot of land from Defendant, erected a building on it which was demolished and Plaintiff had performed all that is necessary on his part in the contract between Plaintiff and Defendant as evidenced in Exhibit B and I therefore hold that Plaintiff in this regard has perfected his side of the contract of sale for the Plot of Land in issue.

Having established that Plaintiff has perfected his own side of the contract of sale of land/allocation of land as exhibited in Exhibit B, the Defendant's defence for not putting Plaintiff in possession of the agreed plot of land is that the said land as at the time it was allocated to the Plaintiff (during negotiation) was and is still being occupied by "settlers" who have refused to vacate. Defendant in his counter affidavit stated that Plaintiff is well aware of this situation while Plaintiff in reply to defendant's Counter affidavit categorically denied knowledge of settlers occupying the said plot of land. It is trite that in a contract for sale of land duly executed by both parties, it is the contract alone to the exclusion of any other document that guides the Court in arriving at a just conclusion.

The defence of settlers occupying the property is not tenable as there is no proof of same before this Court. It is trite that "he who alleges must

prove” hence burden of proof is on the party who alleges a fact to prove same and Defendant has not been able to prove that settlers are currently occupying Plaintiff’s plot of land. Learned Counsel to the Defendant in his Counter affidavit and written address submitted that as at the time the Defendant took the Plaintiff to the Plot of land in issue, particularly during the process of negotiation, Plaintiff was briefed and well aware that “settlers” were occupying the said land. It is therefore surprising that the contract of sale of land/allocation letter which stipulates and itemized the terms and conditions of the contract did not state that settlers were currently occupying the land in issue; rather the said Exhibit B states:-

“You are required to commence work at the site immediately. This allocation is subject to revocation after the expiration of three (3) months.”

It is therefore contradictory that Defendant being well aware that “settlers” were occupying the said plot of land as at the time same was allocated to the Plaintiff in the year 2013 would go ahead and insert a clause in the contract of sale/allocation letter that Plaintiff must commence work at the site immediately. It is even more contradictory that five (5) years down the line Plaintiff is unable to commence work on the said land because defendant in the past 5 years is still in the process of ejecting settlers from the said land.

This piece of evidence is not only contradictory, but fraught with discrepancy because when evaluated, it goes to no issue. See IKPEAMAGHIEZE & ANOR VS. AZUMARA & ORS (2014) LPELR 22502 (CA) P.19 Paraa A-C where EKPE J. S. C stated:

"In the law of evidence, two pieces of evidence contradict one another when they are by themselves inconsistent. Also, two or more pieces of evidence may seem to contradict one another or vary."

Also, in MOLEGBEMI & ORS VS. AJAYI & ORS (2011) LPELR-4501 (CA) PP. 61-62 Paras E-A Per TSAMMANI J. C. A stated that:

"The law is that where there are material or grave contradictions in the evidence of a party and which contradictions touch on a vital or material point in issue, such party's case becomes weakened. The result is that such party's case is taken with a pinch of salt and therefore regarded as unreliable and therefore of no probative value".

The only defence that defendant put forward before this Court is that "settlers" are currently occupying the land of the Plaintiff. That the 'settlers' have been on the land before Plaintiff was allocated the land so much so that during the negotiation process in buying the land, Defendant in paragraph 9 of their counter affidavit stated that Defendant took Plaintiff to the land in issue and disclosed to the plaintiff that settlers were on the land occupying same. That when Defendant took Plaintiff to the said plot of land during the negotiation process, Plaintiff "saw it on ground" that settlers were temporarily occupying the land and efforts were being made by Defendant to eject the settlers.

Paragraph 10 of the same counter affidavit goes ahead to state that Plaintiff accepted the land knowing full well that settlers were on the land as Plaintiff was familiar with the issues of illegal settlers taking

“temporary occupation of people’s lands within FCT, Abuja” (sic). It is therefore contradictory that Defendant thereafter issued Plaintiff with a letter of allocation/contract of sale (otherwise known as Exhibit B) (which Exhibit B is unchallenged and uncontroverted by Defendant) stating that Plaintiff is “required to commence work at the site immediately”.

It is not only logical and rational that I am of the view that the defence has no probative value as the contradictions in the case of the Defendant touches on material facts and I therefore HOLD that the case of the Defendant is not only weak but taken with a pinch of salt.

In determining whether Plaintiff is entitled to the order for specific performance, I refer to the case of ANAEZE VS. ANYASO (1993) 5 NWLR @ Pg. 26 where WALI J.S.C observed:-

“where there is a valid enforceable contract and one of the parties thereto defaults in performance, as in this case, the other party has two options:- (a) insist in the actual performance of the contract or (b) seek damages for breach”

KARIBI-WHITE J. S. C @ page 39 reiterates this view where he said:

“the principle is and has always been that where there is a valid enforceable contract between parties relating to transactions in respect of sale of land, and one of the party defaults in performance of his part, the other contracting party who has performed his part, has the option either to seek the enforcement of the

*performance of the contract or to claim damages
for breach”*

Plaintiff in this suit has stated in his written address that damages would not accord him a remedy as against an order for specific performance, more so, as Plaintiff has been paying a continuous rent of ₦1.5m annually in his present abode and Plaintiff is desperate to own his own property in order to avoid paying rents.

Plaintiff in the 2nd leg of his prayers on the face of his Originating Summons, sought for an order of perpetual injunction restraining the Defendant, their privies, assigns etc. from alienating, disposing or giving the property to anybody, person, individual, company or corporate body. Defence Counsel did not touch on this issue, neither did Defence Counsel argue against same in his written address nor controvert the prayer for perpetual injunction in his counter affidavit. The essence of injunction is to protect recognisable right of a person from unlawful invasion by another. The onus on an Applicant for interlocutory injunction is to establish that he has a serious issue for trial and the Court has no power to grant an injunction where applicant has not established a legal right as it is a condition precedent that Applicant proves to the Court that he has a legal right which is being threatened. See *AKAPO VS. HAKEEM-HABEEB* (1992) 6 NWLR (Pt. 247) pp. 266 SC @ Pp.302 para B Per Nnaemeka Agu.

Unfortunately, Plaintiff has not been able to prove that he is entitled to an order for specific performance by Defendant giving possession of 4 bedroom detached duplex at their System Property Development Consortium Estate but this Court will rather grant the alternative prayer of the Plaintiff in its first leg of the prayer as follows:-

1. IT IS HEREBY ORDERED that Defendant forthwith allocates to the plaintiff a similar plot of land of the same dimension in SYSTEMS PROPERTY DEVELOPMENT CONSORTIUM ESTATE, Galadimawa District, Abuja in the letter of allocation ref no: SRH/SEL/DPL/D416 dated 28th November 2013 duly signed by Defendant and the conditions and terms of the said letter of allocation duly accepted by the Plaintiff.

Plaintiff's second prayer for an order of injunction restraining the Defendants, their privies, assigns, personal representatives, agents howsoever described from alienating, disposing or giving away the property to anybody, person, individual, company or corporate body is hereby REFUSED on the grounds that the Court cannot give an order on a subject matter which is yet to be identified. Until the said Plot is properly identified, a perpetual injunction cannot be given in lieu of a yet to be identified plot of land and I therefore hold that the 2nd prayer for perpetual injunction is hereby REFUSED.

PARTIES: Parties absent.

APPEARANCES: I. H. Yamah, Esq., for the Plaintiff

HON. JUSTICE M. OSHO-ADEBIYI
JUDGE
1ST JULY, 2019