ALH. TAJUDEEN IBRAHIM OLAGUNJU

V.

ALHAJA HABIBAT YAHAYA

COURT OF APPEAL (ILORIN DIVISION)

CA/IL/19/2000

PATRICK IBE AMAIZU, J.C.A. *(Presided)*
WALTER SAMUEL NKANU ONNOGHEN, I.C.A.
JA'AFARU MIKA'ILU, J.C.A. *(Read the Leading Judgment)*

THURSDAY, 12TH JUNE, 2003

AGENCY — Agency relationship — How created. CONTRACT - Agency - Agency relationship - How created. DAMAGES - General damages - Nature of.

EVIDENCE - Judicial notice - Enactments and statutes - Duty on courts to take judicial notice of- Section 74 of the Evidence Act.

EVIDENCE - Judicial notice - Fact judicially noticeable by court - Whether need be proved - Section 73 of the Evidence Act.

EVIDENCE - Onus of proof- Proof in civil cases - Onus on plaintiff to succeed on strength of his own case — When can rely on weakness of defendant's case.

EVIDENCE - Onus of proof - Proof of an assertion - On whom lies.
EVIDENCE- Proof of civil case - Where defendant offers no evidence - Whether plaintiff ipso facto entitled to judgment.

EVIDENCE - Witnesses - Evidence adduced by a party's witnesses-Uniformity of- When useful.

LAND LAW - Declaration of title - Damages for trespass and injunction - Claim there for- Failure of claim for declaration of title — Whether and when claim for trespass and, injunction can succeed.

LAND LAW— Land Use Act — Urban area — Designation of- Power of Governor of a State in respect of- Where derived.

LAND LAW- Trespass to land- What constitutes -Action therefor - Who can maintain.

LAND USE ACT- Urban area-Designation of-Power of 'Governor of a State in respect of— Where derived.

MAXIM - "Nemo dat quod non habet" -Application of.

TORT — Trespass to land — What constitutes — Action therefor -Who can maintain.

Issue:
Whether having regard to the pleadings of the parties and the evidence adduced at the trial, the trial court acted properly in entering judgment in favour of the respondent.

Facts:
The appellant instituted a suit against the respondent. Subsequently, he applied for the joinder of a 2nd defendant. The appellant sought a declaration of title to a piece of land; an order of injunction to restrain the respondent from trespassing on the property; and an order for possession of the property. The appellant also sought an order of account by the respondent and the 2nd defendant of money received in respect of the property; and damages.

The appellant averred that he bought the property from the 2nd defendant and paid the purchase price in two installments on 15th February. 1994 and 16th June. 1994. He however, did not plead that he was put in possession of the property after he purchased it. The appellant adduced evidence that he purchased the property from the 2nd defendant and was issued a right of occupancy over the property by the Ilorin West Local Government which also issued a permission to alienate the land in his favour. The appellant further adduced evidence that when the solicitor instructed by the 2nd defendant to sell the property demanded for the title documents of the property on behalf of the respondent, he, the appellant, gave the solicitor the purchase price paid by the respondent to return the money to the respondent. The appellant however did not adduce evidence that he was in possession of the property.

The 2nd defendant on his part, filed a statement of defence in which he averred that the respondent purchased the property in dispute from him on 27th November, 1993. He further averred that the purchase price paid by the respondent was refunded to her through the solicitor involved in the sale of the property.

The respondent, in response, filed a statement of defence and counter-claim against the appellant and the 2nd defendant. The respondent averred that she bought the property from the 2nd defendant and paid the purchase price of the property to the 2nd defendant on 27th November, 1993; and that the 2nd defendant immediately put her in possession and paid over to her all the rents he had collected from the tenants on the property in respect of the period over the date of her purchase of the property. The respondent also denied that she demanded and received a refund of the purchase price she paid for the property. The respondent then sought a declaration of title to the same land; and a declaration that the sale of the property by the 2nd defendant to the appellant after she, the respondent, had paid the purchaser price for the property was null and void. The respondent also sought an order of injunction to restrain the appellant and the 2nd defendant from trespass on the property; and general damages.

The 2nd defendant on his part, filed a reply to the respondent's counter-claim. He reiterated that the purchase price paid by the respondent for the property was given to the solicitor to return it to the respondent, but that he later found out that the solicitor did not pay the money to the respondent but lodged same in his account.

At the trial, the appellant and the 2nd defendant testified and called witnesses. The respondent on the other hand, did not testify

or call any witnesses. The evidence adduced by the 2nd defendant was in the main in accordance with the averments in his pleadings.

The trial court in its judgment, held that as at the date the 2nd defendant sold the property to the appellant, he had no title to the property by virtue of his prior sale of the property to the respondent. The trial court also held that Ilorin where the property is situate is an urban area and that consequently the Ilorin Local Government had no statutory power to issue a right of occupancy and a permit to alienate the property in favour of the appellant. The trial court therefore annulled the right of occupancy and permit to alienate the property which was issued in favour of the appellant; and also dismissed the appellant's suit. On the other hand, the trial court entered judgment in favour of the respondent on her counter-claim for title and awarded

damages in her favour.

The appellant was dissatisfied with the judgment of the trial court and he appealed to the Court of Appeal, where it was contended on his behalf that the trial court erred in entering judgment in favour of the respondent who did not testify at the trial; it was also contended on his behalf that the trial court erred when it annulled the right of occupancy and permit to alienate granted in favour of the appellant, because the respondent did not ask for such relief and because evidence was not adduced to prove that Ilorin where the property is situate is in an urban area. And consequently not within the area in respect of which a local government can issue a right of occupancy and a permit to alienate land.

Held *(Unanimously dismissing the appeal):*

1. *On When uniformity in evidence adduced by a party's witnesses useful -*
The conformity of evidence adduced by the witnesses of a party cannot assist the party unless the evidence is in support of the case of that party. *(P. 47, para. G)*

2. *On Onus of proof in civil cases -*
In a civil suit, the person who asserts has the primary burden of proving his assertion. The failure of the defendant to prove or his refusal to testify cannot alleviate the primary burden on the plaintiff . In the instant case, it was the appellant who asserted that the respondent demanded a refund of the money she paid for the property in dispute. While the respondent denied that she asked for the refund of her money. Consequently, the appellant had the burden of proving her assertion; but the respondent was not bound to prove the negative that the money was not refunded to her. Also, the 2nd defendant who asserted that he paid back to the respondent the money she paid for the property in dispute had the burden of proving his assertion, but failed to do so because he confirmed in his oral evidence that he subsequently found out that the solicitor he gave the money to did not pay same over to the respondent. *[Umeojiako v. Ezenamito* (1990) 1 NWLR (Pt. 126) 253 referred to.] *(Pp. 47, para. H; 48, paras. C-E)*

3. *On Exception to rule that plaintiff must succeed on strength of his own case -*
The rule that a plaintiff must succeed on the strength of his own case and not on the weakness of the defendant's case does not apply where the defendant's case itself supports that of the plaintiff and contains evidence on which the plaintiff is entitled to rely. In the instant case, the pleading and evidence of the 2nd defendant at the trial court supported the respondent's case that she bought and paid for the property in dispute before the appellant did. In the circumstance, the respondent was entitled to rely on the pleading and evidence of the 2nd defendant in support of her counter-claim against the appellant and the 2nd defendant. *[Chukwiteke v. Okoronkwo* (1999) 1 NWLR (Pt. 587) 410; *Onwugbufor v. Okoye* (1996) 1 NWLR (Pt, 424) 252 referred to.] *(Pp. 48, paras. A-C; 54-55, paras. H-A)*

4. *On Whether plaintiff ipso facto entitled to judgment on failure of defendant to adduce evidence at trial –*
The mere fact that a defendant did not testify at a trial does not preclude a court from giving judgment in favour of the defendant where the evidence
adduced by the plaintiff supports the case of the defendant; and it does not matter that the defendant filed a counter-claim in the suit. In other words, if a plaintiff fails to establish his claim, the defendant is not duty bound to call evidence. In the instant case, the trial court acted properly when it entered judgment in favour of the respondent on the basis of the evidence adduced by the appellant and the 2nd defendant on the ground that the evidence adduced supported the respondent's case. *[Umeojiako v. Ezenamuo* (1990) 1 NWLR (Pt. 126) 253; *Okonkwo v. Okonkwo* (1998) 10 NWLR (Pt. 571) 554 referred to.] *(Pp. 47, para. H; 48, paras. E-F)*

5. *On Whether and when claim for trespass and injunction can succeed where claim for title to land failed* – Although the failure of a claim for title to land does not automatically result in the failure of a party's claim for trespass and injunction, a party who failed to prove his title to land can only succeed in a claim for trespass and injunction where he has proved exclusive possession of the land in dispute. In the instant case, the appellant did not plead or prove exclusive possession of the property in dispute. Consequently, the trial court was right when it refused to grant the appellant's claims for injunction and trespass after it had held that the appellant was not entitled to a declaration of title to the property in dispute. *[Olaloye v. Balaam* (1990) 5 NWLR (Pt. 148) 24; *Ojibah v. Ojibah* (1991) 5 NWLR (Pt. 191) 296; *Ekretsn v. Oyebebere* (1992) 11-12 SCN.I 189 referred to.] *(Pp. 51, paras. C-l); 51-52, paras. G-B)*

6. *On What constitutes trespass to land and who can maintain action therefor* -
Trespass to land is a wrong committed against a person who is in exclusive possession of the land trespassed on. Consequently, when a parcel of land which was trespassed on is in the lawful exclusive possession of another person, a suit in trespass is not maintainable by the owner of the land who has no right to immediate possession at the time the trespass was committed, nor can a person who has a right to possession or in actual possession of a land be liable for trespass. *[Olagbemiro v. Ajagungbade 111* (1990) 3 NWLR (Pt. 136) 37; *Universal Vulcanising (Nig.) v. Ijesha United Trading & Transport Co. Lid.* (1992) 9 NWLR (Pt. 266) 388 referred to.] *(P. 51, paras. E-F)*

7. *On When maxim "nemo dat quod non habet" is applicable* -
The maxim *"nemo dat quod non habet"* is most applicable where a party who does not have something purports to sell it. In the instant case, the maxim is applicable because the purported sale of the property in dispute by the 2nd defendant to the appellant took place after the sale of the property to the respondent. Consequently, the trial court was right when it held that the 2nd defendant had nothing to sell to the appellant. *(P. 54, paras. F-H)*

8. *On Source of power of Governor of a State to designate urban areas in a State* -
By virtue of section 3 of the Land Use Act, the Governor of a State may by an order published in the State Gazette designate the parts of the territory of the State constituting land in an urban area for the purposes of the Act. *(Pp. 57-58, paras. H-A)*

9. *On Whether fact judicially noticeable need be proved* –
By virtue of section 73 of the Evidence Act, a fact which a court must take judicial notice need not be proved. *(P. 58, para. F)*

10. *On Duty on court to take judicial notice, of all laws and enactments* -
By virtue of section 74 of the Evidence Act, the facts which a court is enjoined to take judicial notice include all laws or enactments and any subsidiary legislation made there under. In the instant case, the trial court was entitled to take judicial notice of the Kwara State Legal Notice No. 2 of 1978 titled Land Use (Designation of Urban Areas, Fees and Forms) Regulation, 1978 which designated Ilorin as an urban area for purpose of the Land Use Act, and to hold that the Ilorin Local Government had no authority to issue a customary right of occupancy over the property or a permit to alienate same since the property is situate in Ilorin, as admitted by the parties, which is an urban area by operation of law. *(Pp. 58-59, paras. F-A)*

11. *On Nature of general damages and whether need be pleaded* -
General damages unlike special damages do not have to be pleaded because the relief flows directly from the cause of action. In the instant case, the trial court is right to have granted an award of general damages in favour of the respondent. *(P. 55, paras. D-E)*

Nigerian Cases Referred to in the Judgment:

Aliyu v. Aturu (1999) 7 NWLR (Pt. 612) 536
Amodu v. Amode (1990) 5 NWLR (Pt. 150) 356
Anambra Housing Corporation v. Emekwue (1996) 1 NWLR (Pt. 426) 505
Chukwueke v. Okoronkwo (1999) 1 NWLR (Pt. 587) 410
Dabup v. Kolo (1993) 9 NWLR (Pt. 317) 254
Ekretsu v. Oyobebere (1992) 9 NWLR (Pt. 266) 438
F.C.D.A. v. Naibi (1990) 3 NWLR (Pt. 138) 270
Guda v. Khta (1999) 12 NWLR (Pt. 629) 21
Iheanacho v. Ejiogu (1995) 4 NWLR (Pt. 389) 324
Ojibah v. Ojibah (1991) 5 NWLR (Pt. 191) 296
Okonkwo v. Okonkwo (1998) 10 NWLR (Pt. 571) 554
Olagbemiro v. Ajagungbade HI (1990) 3 NWLR (Pt. 136) 37
Olaloye v. Balogun (1990) 5 NWLR (Pt. 148) 24
Oluwi v. Eniola (1967) NMLR 339
Onwugbuforv. Okoye (1996) 1 NWLR (Pt. 424) 252
Popoola v. Adeyemo (1992) 8 NWLR (Pt. 257) 1
Shittu v. Egbeyemi (1996) 6 NWLR (Pt. 457) 650
Tsalibawa v. Habiba (1991) 2 NWLR (Pt. 174) 461
Umeojiako v. Ezenamuo (1990) 1 NWLR (Pt. 126) 253
Universal Vulcanising (Nig.) v. Ijesha United Trading & Transport Co. Ltd. (1992) 9 NWLR (Pt. 266) 388

Nigerian Statutes Referred to in the Judgment:

Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990, Ss. 74 and 75

Land Use (Designation of Urban Areas, Fees and Forms) Regulation of Kwara State, 1978

Land Use Act, 1978, Cap. 202, Laws of the Federation of Nigeria, 1990, Ss. 2(1) <& 3

Nigerian Rules of Court Referred to in the Judgment:

Court of Appeal Rules, 1981 (as amended) O. 3 IT. 3, 15(1) High Court of Kwara State (Civil Procedure) Rules, 1989, O. 25 r. 6(1)

Appeal:

This was an appeal against the judgment of the High Court of Kwara State in favour of the respondent. The Court of Appeal, in a unanimous decision, dismissed the appeal.

History of the Case:

Court of Appeal:

Division of the Court of Appeal to which the appeal was brought: Court of Appeal, Ilorin
Names of Justices that sat on the appeal: Patrick Ibe Amaizu, J.C.A. *(Presided);* Walter Samuel Nkanu Onnoghen, J.C.A.; Ja'afaru Mika'ilu, J.C.A. *(Read the Leading Judgment)*
Appeal No.: CA/IL/19/2000
Date of Judgment: Thursday, 12th June, 2003
Names of Counsel: Yusuf O. Ali, Esq. *-for the Appellant*
Ayodele Ogundele, Esq. *-for the Respondent*

High Court:

Name of the High Court: High Court of Kwara State, Ilorin
Name of the Judge: Gbadeyan, J.
Dale of the Judgment: Friday, 12th November. 1999
Councel:
Yusuf O. Ali, Esq. – for the Appellant
Ayodele Ogundele, Esq. – for the Respondent

MIKA'ILU, J.C.A. (Delivering the Leading Judgment): This is an appeal against the decision of Kwara State High Court presided over by J. F. Gbadeyan delivered on 12th day of November, 1999, in suit No. KWS/267/94, *Alhaji Tajudeen Ibrahim Olagunju v. Alhaja Habibat Yahaya & Anor.*

At the trial court the appellant, who was the plaintiff, instituted the action against Alhaja Habibat Yayaha, the 1st respondent. Later on one Mr. Makanjuola Ayoola was joined as the 2nd defendant. As per the amended statement of claim, particularly paragraph 19 thereof, the appellant/plaintiff claimed against the defendants as follows:-

"(1) A declaration that the plaintiff is *bonafide* purchaser for value without notice of all that piece of parcel of land with all the developments thereon situated, lying and being at Geri-Alimi round-about (known as Ayoola Estate) along Ilorin, Lagos Road near Ilorin Grammar School, Ilorin and covered by permit to alienate land No. 0024 dated 16/11/74 as well as by customary right of occupancy No. 245 dated 14/9/94 issued by the Ilorin West Local Government of Kwara State.

(2) An order of perpetual injunction restraining the 1st defendant either by herself, agents, servants, privies or through any person(s) howsoever from further trespassing and/or disturbing the plaintiff on the said property situated, lying and being at Geri-Alimi Roundabout (known as Ayoola Estate) along Ilorin- Lagos Road near Ilorin Grammar School, Ilorin and covered by permit to alienate land No. 024 dated 16/11/74 as well as by customary right of occupancy No. 245 dated 14/9/94 issued by the Ilorin West Local Government of Kwara State.

(3) An order of the court compelling the 2nd defendant to give to the plaintiff possession of the said premises in dispute situate and lying and being at Gari-Alimi roundabout (known as Ayoola Estate) along Ilorin - Lagos Road near Ilorin Grammar School, Ilorin and covered by permit to alienate land No. 0024 dated 16/11/94 as well as by customary right of occupancy No. 245 dated 14/4/94 issued by the Ilorin West Local Government of Kwara State.

(4) An order of the court for the two defendants jointly and severally to account for and pay over to the plaintiff all rents collected at the premises in dispute from the date of deed of transfer from the 2nd defendant to the plaintiff to date of giving possession to the plaintiff.

(5) Nl.408.069 (One million, four hundred and eight thousand and sixty nine naira against the 1st defendant being the cost of the 3 bedroom bungalow demolished by her on the property.

(6) General damages for loss of use, trespass, pains and humiliation suffered by the plaintiff in the hands of the defendants.

The 1st respondent denied the claim of the appellant/plaintiff and in her amended statement of defence counter-claims against the plaintiff as follows:-

(i) A declaration that as between the plaintiff and herself she is the prior and *bonafide* purchaser for value and or without notice of any interest of the plaintiff of all that piece or parcel of land and all the appurtenances thereon situate, lying and being at Geri-Alimi round-about, Ilorin-Lagos Road which has been styled, known and called Alhaja Habibat Yahaya Estate since November, 1993 and long before the purported negotiation between the plaintiff and the 2nd defendant on the said estate.

The respondent 1st defendant further counter-claim against the plaintiff and the 2nd defendant jointly and severally as follows:-

(i) A declaration that all (if any) transaction or negotiations between the plaintiff and the 2nd defendant relating to or connected with the estate of the defendant situate, lying and being at Geri-Alimi round-about, Ilorin-Lagos Road and otherwise known and called as Alhaja Habibat

Yahaya Estate after the 27th day of November, 1993 when the 2nd defendant collected from the defendant a sum of N1 million (One million naira) being the purchase price of the said estate is illegal, immoral, questionable, condemnable, and therefore, null and void and of no effect whatsoever.

(ii) An order of perpetual injunction restraining each of the plaintiff and the 2nd defendant either by himself, agents, solicitors, servants, privies or through any person or persons howsoever, from trespassing on the said estate or from disturbing the defendants peaceful or peaceable enjoyment of the said estate which is popularly, commonly and legally known as Alhaja Habibat Yahaya Estate.

(iii) A sum of N1 million (One million naira) being general damages for the embarrassment, pains, inconveniences and disturbances suffered by the defendant in the hands of the plaintiff and the 2nd defendant.

The second defendant filed his statement of defence and his reply to 1st defendant counter claim.

At the trial the appellant testified and called three other witnesses who also testified. The 2nd defendant also testified and called one other witness who also testified. However the respondent/ 1st defendant neither testified nor called any witness. At the end of the trial the trial court in its judgment dismissed the claim of the appellant/plaintiff and gave judgment for the respondent/lst defendant granting the first three reliefs counter-claimed. A sum of N200,000 (Two hundred thousand naira only) as general damages was ordered in favour of the respondent/1st defendant against the appellant and the second defendant

There are two appeals in this matter. Here, I am concerned with the appeal of the appellant who was the plaintiff at the trial court. That is the 1st appeal.

In this appeal the appellant has filed fifteen grounds of appeal. The grounds of appeal, without their particulars are as follows:-

1. The learned trial Judge erred in law and truncated the appellant's right to even handed justice in the way and manner he first of all in his judgment reviewed, found fault with and rejected the case of the appellant even before considering the defence of the respondent and this led to a grave miscarriage of justice against the appellant.
2. The learned trial Judge erred in law by basing his judgment in favour of the respondent on unpleaded facts and speculation which led to a miscarriage of justice against the appellant.
3. The learned trial Judge misdirected himself on the facts by holding that

   'It is noteworthy that exhibit 2Dll,Eletu's savings passbook buttressed the view that it was in May 1994 that things started happening. It was on 9th May, 1994 that he paid in N850,000.00 which only shot up to Nl,000,473.11 on 21/11/94 when proceeds from his impounded and sold Peugeot 505 Car was paid in. All these glaring inconsistencies show that there only existed an imaginary sale of the estate to the plaintiff in February, 1994. If ever there was one even in May, 1994 one wonders why there could be a straightforward sale without making an attempt at taking physical possession until November, 1994. It was a shady deal clandestinely executed.'
4. The learned trial Judge further misdirected himself on the fact when he held thus:

   'It is important to further note that in this case in which there abounds plaintiff documentary and oral evidence, there is a dearth nay total lack of evidence of any demand by the first defendant or her agent for the Nl million she had paid on the estate. In fact, unlike the plaintiff or the second defendant she has since 1993 been enjoying peaceable possession apart from the untoward incident of November, 1994.'
5. The learned trial Judge erred in law and misunderstood the case of the appellant when he held that:

   'At any rate what appeared to have happened is that he exploited the benefit of inside knowledge to wit that the release of the title documents having not been effected by the authorities, the begger carrot dangled by the plaintiff became overwhelmingly too attractive to be overlooked by him, Eletu and the second defendant. Hence Oniwona, Eletu and Ayoola threw caution to the winds to create this perilous, illegal and immoral

situation for their own advantage and that of the plaintiff who, apparently, waited patiently to take full benefit of it. Two applicable Latin maxims must guide the court in this matter. They are *ex turpi causa non oritur action* meaning "out of illegal cause no action can arise" and *ex dolo malo non oritur action* meaning that "no court will lend its aid to an immoral or illegal act.'

6. The learned trial Judge erred in law by raking a defence for the respondent and in holding that the receipt issued to the appellant for the payment of N1.5 million and the customary right of occupancy were documents of questionable authority.
7. The learned trial Judge misdirected itself on the fact when he held that:
'The real issue, however, in whether or not the customary right of occupancy, obtained in respect of the estate as Geri Alimi area in the city of Ilorin is valid. The city of Ilorin falls within the designated urban area of Kwara Slate by virtue of section 2(1) of the Land Use Act, 1978 what is required is the statutory right of occupancy which can only be issued by the Governor of Kwara State whereas by virtue of S. 6(1) of the same Act the Chairman of a Local Government can only validly issue rights of occupancy for rural areas under his domain and under S. 21 of the Land Use Act only an area or Customary Court has jurisdiction over it. See *Oyeniran v. Egbetola* (1997) 5 NWLR (Pt.504) 122 at 135 and *Dweye & Ors. v. lyomahan & Ors.* (1983) 2 SCNLR 135, (1983) 14 NSCC 393 and *Sadikwu* v. *Dalori* (1996) 5 NWLR (Pt. 447) 151 (1996) 4 SCNJ 208. Even then, any document such as site plans grounding the issue of whatever right of occupancy must be correct in every material particular. It must be an authentic title document
8. The learned trial Judge further misdirected himself and embarked on fault finding with the case of the appellant by holding as follows:
'It is pertinent to note that exhibit 9 purports to cover an area of 7930 sq. metres while the survey plan covers 7920 sq. metres. His own description of the estate as being in a built up area contradicts the site survey plan attached to his exhibit 9 which shows the neighbourhood as vacant. Besides, the estate which the plaintiff is purporting to buy consists of 10 three bedroom bungalows and 10 bungalows bedrooms and 12 lock-up shops *(vide* exhibit 3)'
9. The learned trial Judge erred in law by holding that: 'Moreover, one issue that is of fundamental importance is whether or not the second defendant having divested himself of his title in the estate through outright sale to the first defendant in 1993 when having taken case and in turn, in passing lawful possession having paid the unutilized balance of rents to the original buyer who has since taken and enjoy peaceable possession had anything left that he could transfer to the plaintiff. By virtue of the sale to the first defendant with the purchase price fully paid as from November 1993, the second defendant had nothing left in the estate to sell.'
10. The learned trial Judge misdirected himself or the fact by holding thus:
'I find as a fact that the plaintiff has no true claim to ignorance of the fraudulent and immortal practices of his cohorts but in fact he deployed his wealth to undermine and subvert the interest of the first defendant. He cannot benefit from the self-inflicted sham.'
11. The learned trial Judge erred in law when he held that once a claim for declaration of title fails, the ancillary reliefs of injunction and damages for trespass will also fail *ipso facto, (sic)*
12. The learned trial Judge erred in law by purporting to
nullify and set aside the customary right of occupancy when there was no such claim before him and he thereby granted a relief that was not sought nor asked for by any of the parties.
13. The learned trial Judge misdirected himself on the fact by holding thus:
'Consequently, when the estate was purportedly being resold clandestinely to the plaintiff for almost double the original price, with the full participation of Eletu, he (Eletu) was not action as the agent of the first defendant and automatically had ceased to be the agent of the first defendant. So if any money was paid to the said Eletu, who paid it into his account in consequence of the second defendant's unilateral repudiation of the earlier sale that was their own business and they were acting at their own peril.'
14. The learned trial Judge erred in law by granting the reliefs claimed in the counter-claim by

the respondent when there was no credible, cogent nor believable evidence to support the reliefs.

15. The learned trial Judge erred in law by awarding damages of N200,000.00 for trespass against the appellant and Mr. Ayoola when the damages are excessive and based on wrong principles of law.

Thus, brief have been filed and exchanged. The learned counsel for the appellant, Yusuf O. Ali, has informed the court that he has adopted appellant's brief of argument filed on 14th August, 2000 and the appellant's reply brief dated 14th November, 2000. He urges the court to allow the appeal. The learned counsel for the respondent Ayodele Ogundele has adopted respondent's brief of argument lied on 20th June, 2002. Therein a preliminary objection pursuant to Order 3 rule 15(1) of the Court of Appeal Rules, 1981, (as amended) has been raised.

The preliminary objection of the learned counsel for the respondent is that all the grounds of appeal and their particulars are either argumentative, narrative and, or repetitive and as such incompetent and a fortiori should be discountenanced.

He has submitted that all the grounds, except grounds 1, 3, 8 and 15 on the notice of appeal dated 18th November, 1999 are argumentative and repetitive and therefore contrary to the provision of Order 3 rule 3 of the Court of Appeal Rules, 1981 (as amended). He avers that the gamut of the afore stated grounds is an array of reasoning and arguments intruded to persuade the court, thus making the grounds prolix, lengthy and unwieldy and therefore should be struck-out. He refers this court to the cases of *Guda v. Kitta* (1999)1 12 NWLR (Pt. 629) 21; 39 *and Jamiu Aliyu v. Aturu* (1999) 7 NWLRJ (Pt. 612) 536. He has also averred that grounds - 2,4, 5, 6, 7, 9,10, 12, 13, Hand 15 and their particulars are repetitive. His averments can be summarized as follows:

i. Grounds 2 and 3 are repetitive.
ii. Grounds 4 and 13 could have been made as a single ground.
iii. Grounds 5 and 9 are based on a single issue.
iv. Grounds and 12 are based on a single issue.
v. Grounds 14 and 15 and their particulars are similarly based on one alleged error.

He has submitted that the enumerated grounds are to be discountenanced for the reasons given. He has maintained that in this appeal only grounds 1,2,8,11 and 16 will escape the reliminary objections. He urges the court to summarily strike out these grounds of appeal and the issues formulated thereon for being incompetent as well as dismiss the appeal.

The learned counsel for the appellant, in the appellant's reply brief, has counter-argued that a careful perusal of the grounds of appeal will reveal clearly that the grounds of appeal are very concise, pungent and precise. That they are not argumentative or repetitive.
He urges the court to dismiss the preliminary objection.

I have carefully perused the grounds of appeal and their particulars. Grounds 2,6, 10 arc not repetitive as they are on distinct complaint. The same grounds 4 and 13 are not on a single issue as well as grounds 14 and 15 and their particulars are not on one alleged error. The preliminary objection of the learned counsel for the respondent is therefore overruled. It is dismissed.

The learned counsel for the appellant in the appellant's brief of argument has formulated ten issues for determination as follows:-

1. "Whether the learned trial Judge was right in holding that the receipt issued to the appellant by the second defendant for the sum of one million, five hundred thousand naira (N1.5m) paid by him and the customary right of occupancy issued to the appellant thereafter were of questionable character and whether there were materials from which the learned trial Judge could lawfully conclude that the land on which the disputed property is situate is in an urban area so as to preclude the applicability of customary right of occupancy.
2. Whether the appellant was not prejudiced by the style of writing of judgment adopted by the trial court and whether the judgment is not against the weight of evidence adduced before

the trial court.

3. Whether the learned trial Judge was right to have speculated on material points without the support of the pleadings and evidence to come to his conclusion.
4. Whether the learned trial Judge was right in the manner he treated exhibit 9 tendered before him *vis-a-vis* the evidence adduced by the appellant and his witnesses on the point.
5. Whether the trial court was right in nullifying the customary right of occupancy that was issued to the appellant when there was no prayer to that effect by the respondent.
6. Whether the trial court was correct in its view on the relationship between the relief for declaration and the ancillary reliefs for injunction and damages and whether the error has not occasioned a miscarriage of justice in the circumstances.
7. Whether the trial court was right to have held that there was dearth of evidence by the plaintiff and 2nd defendant that the 1st defendant did not demand her money and whether the trial court was justified in holding that there was illegality and immorality in the transaction between the plaintiff and the 2nd defendant and that the plaintiff was fully aware of same but deliberately chose to benefit from it.
8. Whether the trial court was right in holding that lawyer Rasaz Eletu was not the agent of the 1st defendant and that he had ceased to be her agent and whether that holding has not occasioned a miscarriage of justice.
9. Whether the trial court was not in error in holding that the 2nd defendant had nothing to transfer to the plaintiff/ appellant with effect from November, 1993 and whether the maxim *nemo dat quod non habet* was wrongfully applied by the trial court.
10. Whether the trial court was not in error to have granted! the reliefs sought by the 1st defendant in her counterclaim and whether the two hundred thousand naira (N20(),000.00) damages awarded in her favour was not excessive and against all known principles of law on the point.

The learned counsel for the respondent in his turn has formulated four issues for determination as follows:-

(i) Whether or not from the way and manner the judgment was written, the learned trial Judge did not appreciate all the issues involved and dealt with them accordingly. Grounds 1, 3, 4, 8, 9 and 11.

(ii) Whether or not the learned trial Judge properly ascribed to the actions of the appellant (PW1), Makanjuola Ayoola (2nd defendant), Messers Victor Oniwona and Abdul-Razak Eletu fraudulent intents and if it so, whether it was compulsory to have specifically used certain words in the pleadings of the respondent which are otherwise deducible from the facts pleaded. Grounds 2, 5, 6, 10 and 13.

(iii) Whether or not the respondent was entitled to elect not to give evidence or call further evidence in view of the evidence given by her adversaries favorable to her case. Grounds 14, 15 and 16.

(iv) Whether or not the learned trial Judge was right to have impugned the customary right of occupancy relied upon by the appellant and other documents related thereto in view of the relevant evidence before him. Grounds 7 and 12.

The first issue has been based upon grounds 6 and 7. On this the learned counsel for the appellant has submitted that the issue of authenticity of the receipt issued to the appellant by the 2nd defendant. and the customary right of occupancy issued to the appellant by the Ilorin West Local Government was not at any time either by way of pleading or evidence before the trial court put in issue. That the holding by the trial court that the two documents were fake or unauthentic raised a *primafacie* case of fraud against the appellant.

He avers that the legitimate process is that the authenticity of these documents must be emphatically pleaded by the respondent, the 1st defendant, before the lower court and she has a further duty to supply particulars of such authenticity of the documents. He has relied on the provisions of Order 25 rule 6(1) of the High Court of Kwara State (Civil Procedure) Rules of 1989. He has also relied on the cases *ofAmodu v. Ainode* (1990) 5 NWLR (Pt. 150) 356; 388

and *Iheanacho v. Ejiogu* (1995) 4 NWLR (Pt. 389) 324; 335. Then he submits that the trial court in raising the authenticity of the two documents highly truncated the right of the appellant to a fair hearing and he suffered great prejudice thereby. He has added that the holding weighed heavily in the mind of the learned trial Judge and provided a foundation for setting aside both the sale of the estate involved and for which the sum of N1.5 million naira was paid and the customary right of occupancy issued by the Ilorin West Local Government in favour of the appellant. He also submits that there is no evidence to support the holding of the trial court that the land in dispute is an urban area so as to impugn the power of the local government to issue a customary right of occupancy on the disputed land. The learned counsel for the appellant has concluded by praying this court to resolve this issue against the respondent and in favour of the appellant allowing the corresponding grounds of appeal on which the issue is premised.

The learned counsel for the respondent in the respondent's brief of argument has counter argued that the fact that the word 'fraud' is not specifically used in the pleading in view of the other acronyms like "illegal, immoral, questionable condemnable" in the amended statement of defence and counter-claim as well as the evidence of such witness as DW2, the policeman who investigated the charges bordering on cheating would not affect the conclusion arrived at by the trial. Therefore a pleading will not be condemned for not using a technical term once the words used are capable of leading to the conclusion that the technical word was meant by the pleader. He also avers that the mere production of a customary right of occupancy certificate is not an automatic or an irrefutable proof of title. That once it is proved that the grant of right of occupancy or any title document is predicted on mistake of law or fact or fraud and concealment of any kind, such title document is liable to be set aside by the lower court. He has also averred that there are admissions, which are cogent, direct and unambiguous about the location of the estate and or parcel of land in dispute. It can not be supported canvassed by the appellant that the court ought not to have set aside the right of occupancy issued by the Ilorin West Local Government on land admitted to be in urban area of Ilorin. He urges the court to resolve this issue in-favour of the respondent.

I have carefully perused the pleadings of the parties and there[5] is no where therein fraud has been pleaded. The authenticity of the documents has not also been part of the pleadings and nor question of the land being within urban area has been raised as averred by the learned counsel for the appellant. However, in his judgment, the learned trial Judge on page 169, last paragraph, has opined that the appellant/plaintiff was relying upon the receipt for N1.5 of 15/2/94 and the transfer agreement to establish his claim on the parcel of land in dispute. That they were the documents leading to the issuance of the customary right of occupancy to the appellant/defendant. Later on, the learned trial Judge on page 171 of the record made clear the issue involved in the case as follows:-

"Moreover, one issue that is of fundamental importance is whether or not the second defendant having divested himself of his title in the estate through outright sale to the first defendant in 1993 when having taken cash and, intern, in passing lawful possession having paid the unutilized balance of rents to the original buyer who had since taken and enjoyed peaceable possession had anything left that he could transfer to the plaintiff."

The trial Judge went ahead and held as follows:-

"By virtue of the sale to the first defendant with the purchase price fully paid as from November, 1993, the second defendant had nothing left in the estate to sell". He had made it clear that the second defendant had nothing to transfer to the plaintiff applying Latin maxim *nemo dat quod non habet.* The receipt of N1.5 million issued to the plaintiff, as well as j the transfer deed, were based on the second purported sale of the estate in dispute to the plaintiff and it was holding of the trial Judge that the 2nd defendant had nothing in the estate to sell to the plaintiff. |H I think the trial Judge did not have to decide on the authenticity of f the receipt or the transfer deed and it was wrong for him to do so. However, as he held that the 2nd defendant had nothing to sell to the j plaintiff in the estate, the said documents would be of no legal effect as far as the title in the estate was concerned. Even without declaring
them unauthentic they would have been of no legal effect. Though the authenticity of the

documents was not pleaded the wrongful decision of the trial court on their authenticity has not occasioned miscarriage of justice in this case. This goes also that the decision of the trial Judge that the property is situate in an urban area. His decision that the receipt of Nl .5 and the customary right of occupancy issued to the appellant by the Ilorin West Local Government were of questionable character, though wrongful, it has not occasioned any miscarriage of justice in the circumstances of this case. This issue fails and consequently the grounds 6 and 7 of the grounds of appeal upon which it is distiled fail.

Issue No. 2 is said to cover grounds 1 and 16. On this it is the submission of the learned counsel for the appellant that it is settled that in writing its judgment, a trial court should ensure that the evaluation of the evidence of a witness should proceed the testing of his credibility, for once a witness evidence has been discredited before it is evaluated, the trial court would be in a serious difficulty and would not be in a position to disabuse its mind about the evidence of that particular witness. He relies on *Popoola v. Adeyemo* (1992) 8 NWLR (Pt. 257) 1 and *Tsalibawa v. Habiba* (1991) 2 NWLR (Pt. 174) 461, 477 and 478. He avers that the trial Judge in this case flagrantly violated this known rule on the writing of judgment. The learned counsel for the appellant has drawn the attention of this court that the trial Judge in the every opening paragraph said "in this rather uncommon case, the plaintiff claims against the defendants are as follows:" Then he refers this, court to the treatment of the testimony of PW2 by the trial Judge at the last paragraph of pages 164-165 of the record, the treatment of the 2nd defendant's testimony at page 165. He also refers the court to pages 167, 168, 169, 170 and 172 of the record. He concludes that from the totality of the pages referred to and indeed the entire judgment of the trial court, it was apparent that the court was out, right from the onset, to find fault with the plaintiff's case and to dismiss the same. That the trial Judge with due respect was less than even handed in the consideration of the appellant's case *vis-a-vis* the respondents who did not even call any evidence at the trial.

On the other hand the learned counsel for the appellant has submitted that the judgment of the trial court was against the grant of evidence adduced at the trial. His submission here can be summarized as follows:-

(a) The testimony of the plaintiff is in conformity with the evidence of his three witnesses and he was consistent about the circumstances surrounding his purchase of 1 the estate from the 2nd defendant.

(b) There was evidence from the plaintiff and PW2 that the title deed of the estate was collected from the bank to which it was mortgaged only after payment by the plaintiff the amount owed by the 2nd defendant to the bank and the evidence of the plaintiff was unshaken.

(c) No evidence adduced by the respondent to show that the plaintiff had notice of the prior interest in the estate and that the respondent abandoned her pleading by failing to adduce evidence.

(d) No evidence that the respondent took possession and there was evidence that Rasaq Eletu collected money to the 2nd defendant on behalf of the respondent and he was her agent.

He then, submits that the failure of the respondent to give evidence in support of her statement of defence and counter-claim connotes that she has accepted the evidence adduced by the appellant j not withstanding the general traverse in her statement of defence and counter-claim. He relies upon *F.C.D.A. v. Naibi* (1990) 3 NWLR (Pt. 138) 270. He prays this court to resolve this issue in favour of the appellant and allow the grounds of appeal on which the issue was prescribed.

As for the learned counsel for the respondent in the respondent's brief his averment is that the crucial and important issue to consider is not the style but whether the trial Judge appreciates all the issues against the backdrop of the evidence, oral and documentary, and having evaluated same on the imaginary scale of justice one way or the other. He submits that with the evidence of DW2, amongst others, and that facts elicited under the noose of cross-examination from the 2nd defendant and witnesses to the plaintiff and such documents as exhibits 2D3, 2D4, 2D5, 2D7, 2D8, 2D9 and 2D10 the judgment of the trial court could not have been otherwise. He has added that the evidence of DW2 contains admission against

interest which the courts are enjoined to rely upon as cogent and admissible and without need for further proof. That the issue of whether any demand of money paid by the respondent was ever made, was settled by the 2nd defendant in his evidence when he said that lawyer Eletu told that the respondent was only asking for the release of title documents on the estate having taken possession almost immediately.

Here it will be of assistance to reflect on the facts forming the background of this case. This case is in respect of a land situate, lying and being at Geri-Alimi round-about along Ilorin-Lagos Road near Ilorin Grammar School. The appellant/plaintiff as per his amended statement of claim avers that he bought the land from the 2nd defendant and paid for it *vide* receipt No. 0452 dated 15/2/94 for the sum of Nl,500,000.00 and payment by cheque No. IL037 dated 16/6/94 for the sum of N200,000.00. Thus he paid N 1.7 million for the land. As for the respondent in her amended statement of defence and counter-claim she has averred that she bought the same land from the same person, the 2nd defendant for the sum of N1 million and paid the same on 27th day of November, 1993. The averment of the 2nd defendant, in his statement of defence is that the respondent purchased the said landed property from him for N1 million and she was given receipt on 27th November, 1993. That the said amount was refunded to her through her counsel Abdul Rasaq Eletu. However, in his reply to defendant's (respondent's) counter claim he stated that later the money was round to have been in the solicitor's account.

It is to be noted that the trial court in its judgment as PIT tin-record acted only upon the evidence of the plaintiff (appellant) and his witnesses and that of the 2nd defendant and his witness. The respondent neither gave any evidence nor called any witness. Therefore, this case does not involve a situation where the trial court regarded the evidence of the respondent and disregarded the evidence of the appellant. The side commentary of the trial Judge such as "in this rather uncommon case" - has not operated in leading the trial Judge to accept or reject the evidence he would have accepted or rejected. The style he has adopted in this case has not occasioned any miscarriage of justice.

The conformity of evidence of witnesses of a party cannot assist a party unless the evidence is in support of the case of that party. The mere fact that a defendant has not testified does not preclude a court from utilizing the evidence adduced by the plaintiff and giving judgment in favour of the defendant where the evidence supports the case of the defendant not withstanding that the defendant has a counter-claim. It is trite that in civil cases the person who asserts must prove. The failure of the defendant to prove or his refusal to testify cannot alleviate the primary burden on the plaintiff. Refer *Umeojiako v. Ezenamuo* (1990) 1 NWLR (Pt. 126) 253, (1990) 1 SCNJ 181. A rule that a plaintiff must succeed on the strength of his own case and not on the weakness of the defendant's case does not apply where the defendant's case itself supports that of the plaintiff and contains evidence on which the plaintiff is entitled to rely. Refer to *Chukwueke & Anor. v. Okoronkwo & Ors.* (1999) 1 NWLR (Pt. 587) 410, (1999) 1 SC 71. In our case it is not in dispute that the land was earlier sold to the respondent. What is in question | is whether the sale terminated by refund of her money to her. There was no even burden on her to prove that she bought and paid for the land as that was settled by pleadings and in addition it was supported by evidence of the 2nd defendant. It was the 2nd defendant who asserted that he paid her back her amount and the burden was on him to so prove. It was clear in his testimony that her solicitor went to him several times asking for the release of title documents then he paid her money to her by paying it to the lawyer Eletu. This shows that it was not at her request he paid the money to the solicitor as her request was only for the documents. Even in his reply to the counter-claim, the 2nd defendant has clearly averred that the amount j was later traced in the solicitor's bank account. Also her averment that she was the first purchaser has been settled by the evidence of the 2nd defendant.

The trial court is bound to consider and utilize the evidence adduced before it even whether a party to the case has not called evidence and where it supports the case of the party, who has not called evidence it must decide in his favour. If a plaintiff fails to establish his claim the defence is not duty bound to call evidence. Refer to *Okonkwo v. Okonkwo* (1998) 10

NWLR (Pt. 571) 554, (1998) 2 A.L.R. 1; 11. Therefore this issue fails and any ground upon which it is based fails.

On the 3rd issue the learned counsel for the appellant has submitted that the trial Judge was in a serious error to have speculated extensively and to have based his judgment on the outcome of his speculation. Earlier on from page 11 to 12 of the appellant's brief of argument he has cited some portions of the statements of the learned trial Judge which he is considering to be speculative. I have carefully considered the portion. These are mere opinions expressed by the Judge on evidence. Looking at the entire judgment such speculations could not be said to form the basis of the judgment and the speculations have not caused any miscarriage of justice in this case. Without more this issue fails and therefore the grounds of appeal which it is formulated also fail.

I will treat issues 4 and 5 together. This is because it is clear on page 95 of the record that exhibit 9 mentioned on issue No. 4 is the right of occupancy issued to the appellant. Issue No. 4 is on the manner it was treated by the trial Judge and issue No. 5 is whether it was right for the trial Judge to nullify it when there was no prayer for that. In both issues the averment of the learned counsel for the appellant is that the attacks on exhibit 9 by the trial Judge resulted from his fault finding voyage on the exhibits tendered by the appellant before him. That there was no evidence on record to show that the 1st defendant/respondent had any quarrel with the said exhibit. The trial Judge should have realized that there was no contradiction between exhibit 9 and the plan attached to it. That by finding in the incorrectness of exhibit 9 the trial Judge has concluded that exhibit 9 is not reliable and this occasioned miscarriage of justice. The learned counsel for the appellant has also averred that the respondent having not specifically asked for a prayer nullifying and or setting aside the customary right of occupancy in her counter-claim, the trial court was without jurisdiction to purport to nullify and set aside the customary right of occupancy as it did in this case. That this relief nullifying the customary right of occupancy is unsustainable as it is a substantive relief on its own. It cannot be treated as ancilliary prayer. On this, the learned counsel for the respondent has averred the mere production of a customary right of occupancy is not an automatic and irrefutable proof of title. That once it is proved that the grant of the right of occupancy or any title document is predicted on mistake of law or fact or fraud and concealment of any kind such title document is liable to be set aside by the court. He refers the court to page 114 lines 31-32 of the record where the 2nd defendant admitted that the land is in the city of Ilorin in the urban area and page 121 lines 1-2 of the record where he insisted that the estate is within Ilorin city. He has concluded that these admissions are cogent, direct and unambiguous about the location of the estate in dispute and as such it cannot be supported as canvassed by the appellant that the court ought not to have set aside the right of occupancy issued by the Ilorin West Local Government on land admitted to be in urban area of Ilorin.

I have seen no nature of treatment meted out to exhibit 9 which has caused any miscarriage of justice in this case. It is correct as averred by the learned counsel for the appellant that from the pleadings there is no prayer asking the trial court to nullify the customary right of occupancy issued to the appellant. However, it is to be noted that the trial court in its judgment held that at the time the 2nd defendant purportedly sold the estate to the appellant, he had nothing in the estate to sell. This in itself has automatically nullified all the documents acquired by the appellant as a result of the purported sale of the land to him. Therefore no miscarriage of justice in this case has been occasioned by the grant of the said relief. Issues 4 and *5* fail as well as the grounds of appeal on which they are based.

On issue No. 6 the learned counsel for the appellant has opined that the trial Judge in his judgment was of the view that once a claim for declaration of title fails the ancillary claim on injunction and damages for trespass will also *ipso facto* fail and this influenced the dismissal of appellants ancillary reliefs for injunction and damages by the trial court. He submits that the success or otherwise of a claim for declaration of title to land has title bearing on the fate of ancillary reliefs for injunction and damages for trespass. That it is the law that a relief for injunction and a relief for damages for trespass could be granted by a court though a claim for

declaration of title has been dismissed. He has rounded it up that a claim for injunction would be granted in favour of a party who though has not successfully established his entitlement to the relief for declaration of little but is able to show, that the adversary has no better title. Also damages for trespass would be awarded to a party who has no title to a land once he proved by evidence his possession or occupation of the disputed land as against the rival claimant. He has added that the reason to this is because the law of trespass to land recognizes *defacto* possession as opposed to title. He relies upon *Sliittu v. Egbeyemi* (1996) 6 NWLR (Pt. 457) 650, (1996) 7 MAC 1; 6 and *Oluwi v. Eniola* (1967) NMLR 339. In submitting that the view of the trial court on the relationship between a claim of entitlement to a piece or parcel of land, injunction and damages for trespass precluded it from considering the entitlement or otherwise of the appellant to both or either of the reliefs after dismissing the main claim for declaration of title; he relies upon *Olaloye v. Balogun* (1990) 5 NWLR (Pt. 148) 24; 39-40 where the Supreme Court held as follows:-

"Where a plaintiff fails to prove a claim for declaration of title to land, it does not necessarily follow that, the claims for damages for trespass to the same land or any injunction against further trespass must fail too.'"

With the above, the learned counsel for the appellant prays this court to resolve this issue in favour of the appellant and to allow ground 11 of the grounds of appeal because the erroneous view of the law held by the trial Judge has led to a miscarriage of justice.

On the other hand in the respondent's brief, the learned counsel for the respondent avers that the appellant has misconstrued the conclusion reached by the trial Judge on the fact that in the circumstances of the case of a party who has no right to title and could not establish any possession of any type as in the instant case cannot claim for either injunction or damages for trespass.

I must agree with the learned counsel for the appellant to the extent that a failure of claim for title does not automatically result in failure of claims for trespass and injunction. So has been held in several authorities. Success on tort of trespass is not always dependent on success of claim for declaration of title. Refer to *Ekretsu & Anr. v. Oyobebere & Ors.* (1992) 9 NWLR (Pt. 266) 438, (1992) 11/12 SCNJ 189. It has been held that a trespass is a wrong committed against a person who is in exclusive possession of the land trespassed onto. That when a parcel of land which was trespassed onto was in lawful exclusive possession of another person a suit in trespass is not maintainable by its owner who had no right to immediate possession at the time the trespass was committed. Also a trespass is not committed by a party who had right to possession as well as actual possession. Refer to *Olagbemiro & Ors. v. Ajagttngbade III & Anr.* (1990) 3 NWLR (Pt. 136) 37, (1990) 5 SCNJ 1 and *Universal Vulcanizing (Nig.) v. Ijesha United Trading 6 Transport Company Ltd. & Ors.* (1992) 9 NWLR (Pt. 266) 388, (1992) 11/12 SCNJ 243. In our case the appellant solely based his claim for a declaration that he is *bonafide* purchaser for value without notice of the land in dispute. Throughout he has not pleaded being in actual possession. Though a failure of claim for title does not automatically result in failure of claim for trespass and injunction, a party who has failed to prove his title can only succeed in a claim of trespass and injunction where he has proved exclusive possession. Refer to *Olaloye v. Balogun* (1990) 5 NWLR (Pt. 148) 24, (1990) 7 SCNJ 205 and *Ojibah v. Ojibah* (1991) 5 NWLR (Pt. 191) 296, (1991) 6 SCNJ 156. The trial court therefore in the circumstances of this case having declared that the 2nd defendant had nothing to sell in the appellant at the time of the purported sale to him and had nothing to decide in his favour on trespass and injunction. No evidence as to his being in possession of the land in dispute and the issue of being in possession has even being pleaded by him. I agree with the learned counsel for the respondent that the learned counsel for the appellant has misconceived the issue. This issue and grounds of appeal upon which it is framed fail.

Issue No. 7 is whether the trial Judge was right to have held that there was dearth of evidence by the plaintiff and 2nd defendant that the 1st defendant did not demand her money and whether the trial court was justified in holding that there was illegality and 1 immorality in the transaction between the plaintiff and the 2nd defendant and that the plaintiff was fully

aware of same and deliberately chose to benefit from it. Issue No. 8 is whether the trial court was right in holding that lawyer Razaq Eletu was not the agent of the 1st defendant and that he had ceased to be her agent and whether that holding has not occasioned a miscarriage of justice. I will treat these two issues together.

On the 7th issue the learned counsel for the appellant has relied on the arguments canvassed in support of issue 3 in appellant's brief of argument. He has added that the 2nd defendant by his paragraphs 10, 11, 13 and 16 of the 2nd defendant's statement of defence has averred that the 1st defendant/respondent did make demand for the refund of the sum paid by one Eletu to the 2nd defendant on behalf of the 1st defendant though the respondent by statement of defence denied making any demand for the refund of the money. He avers that no *iota* of evidence in support of the denial, and as such the denial in the circumstances is deemed abandoned relying upon *Anambra Housing Corporation v. Emekwue* (1996) 1 NWLR (Ft. 426) 505, (1996) 1 SCNJ 98; 133. He has added that on the contrary the 2nd defendant, page 112, lines 20-24 of the record, has testified to the effect that the 1st defendant made demands for the refund on the ground of delay in releasing title documents of the property to her. He added that the respondent did not testify. He has submitted that, therefore, the finding of the trial Judge that there was dearth of and total lack of evidence of demand for the refund of the sum to her is totally baseless and has to be set aside. He has also averred that the finding of the trial court that the 1st defendant/respondent has been enjoying peaceable possession since 1993 is not born out A of the evidence. Being based on speculation this finding should also be set aside.

His other averment is that there was no legal or factual basis for the trial court to have held that lawyer Razaq Eletu was the agent of the 2nd defendant. That the only iota of evidence on this point, was the testimony of the appellant under-cross-examination in which he stated that lawyer Rasaq Eletu was the 2nd defendant's agent. His source of belief was not asked or stated by him. The learned counsel for the appellant urges the court to resolve the issues in favour of the appellant.

The learned counsel for the respondent in the respondent's brief of argument has maintained that the issue of demand of the money was settled by the 2nd defendant in his evidence.

On issue of demand of refund of money, the manner, to my mind, the trial Judge resolved it does not occasion any miscarriage of justice. In this case since it was the appellant who averred that the respondent demanded refund of her money and she denied, it was for the appellant to prove his assertion. She was not bound to prove the negative, in his evidence he made it clear that lawyer came to him to ask for title documents. As he was there for title documents the act of the appellant of giving him the money as refund instantly turned Eletu into his agent in respect of that refund. There was no evidence that she demanded for refund of the money she paid as purchase price. That was only what the trial court meant and from the evidence there is nothing like that. I must reiterate that since Eletu went to ask for title deeds and not refund of the money when he accepted the money he was not acting as her agent. It was an offer by the appellant to the respondent through Eletu to accept the refund of the money instead of title documents. That made Eletu the agent of the appellant at that stage. Both issues 7 and 8 fail as well as the grounds upon which they are framed.

The 9th issue is whether the trial court was not in error in holding that the 2nd defendant had nothing to transfer to the plaintiff/appellant with effect from November 1993 and whether the maxim *nemo dat quod non habet* was not wrongfully applied by the trial court. The 10th issue is whether trial court was not in error to have granted the reliefs sought by the 1st defendant in her counter-claim and whether the two hundred thousand naira damages awarded in her favour was not excessive and against all known principles of law on the point. I will also treat these issues together.

On the above, the learned counsel for the appellant has based his averments on refund of the purchase amount to the respondent by the appellant and averment that the respondent was never put in

possession by the appellant. He avers that the maxim does not apply as legal title did not pass

properly to the 1st defendant. That the 1st defendant had only equitable interest as opposed to the legal interest
procured by the appellant over the same property. That the presumption raised by the possession of the customary right of occupancy by the appellant is *prima facie* evidence that he is the owner of the property covered by it and has exclusive possession over it. The respondent has failed to rebut this presumption by absolute lack of evidence from her. He relies on *Dabup v. Kolo* (1993) 9 NWLR (Pt. 317) 254; 270. He avers that the learned trial Judge was wrong to have granted the reliefs sought by the 1st defendant in her counter-claim for lack of evidence. He adds that the sum awarded as damages was grossly excessive and lacked legal basis. He avers that counter-claim is a distinct claim of its own. It is a separate and independent action which the respondent was bound to prove. He has added that in land matters the counter-claimant like the respondent must rely on the strength of her claim alone but not harp on the weakness in the defendant's case to prove her entitlement to the declaration sought. His other averment is that there was nothing from the respondent to ground the relief granted to her by the court and the sum awarded as damages for trespass in her favour is faulty as there was no evidence of exclusive possession by the respondent over the estate.

I do not have to say much on the above issues. It is clear from the record that the decision of the trial court on this issue is based on its finding that when the purported sale of the land to the appellant occurred the sale to the respondent had already taken place. Therefore it was proper for the trial court to hold that the 2nd defendant had nothing to sell to the appellant. The maxim is most applicable where a party had nothing to sell. The presumption raised by the right of occupancy had been negated when the trial court held that the 2nd defendant had nothing to sell to the appellant as it was acquired on the basis of the said purported sale to the appellant. I must repeat that the respondent in this case was entitled to utilize the evidence adduced before the trial court. Though the plaintiff must succeed on the strength of his case but still the plaintiff may take advantage of the defendant's evidence which support his case. *Refer Onwugbufor & Ors. v. Okoye & Ors.* (1996) 1 NWLR (Pi. 424)252. (1996) 1 SCNJ 1.

It is to be noted that the land in dispute was sold to her. The appellant never denied that and indeed admitted it in his pleading and evidence. His assertion is that he refunded her the amount she paid. It was not for her to prove that the money was not refunded as she denied; it was for him to prove the refund. No evidence that she demanded refund. Instead in his evidence it was shown that the amount was later found in the bank account of the person to whom he gave the money. Therefore the averments of the learned counsel in this regard must fail. However, in respect of the sum awarded as damages for trespass his averment is that there was no evidence in exclusive possession by the respondent. No positive evidence from the respondent to show the act of trespass committed by the appellant and the 2nd defendant to warrant the monetary award made against
them.

What is to be noted here is the grant of the award of two bundled thousand naira in this case is for general damages I or embarrassment, pains inconveniences and disturbances suffered by the- respondent in the hands of the plaintiff and the 2nd respondent. General damages unlike special damages do not even have to be pleaded. The relief flows directly from the action. The trial court in the circumstances of this case is right to have granted award for general damages. In the circumstances of this case there is no reason for me to hold the award as excessive.

In the final conclusion, I hereby hold that the appeal fails. I affirm the decision of the trial court and dismiss the appeal with costs fixed at Nl0,000.00 (Ten thousand naira) in favour of the respondent.
Appeal dismissed.

AMAIZU, J.C.A.: The evidence which the court below believed was that the original owner

mortgaged the property in dispute to the Bank of the North in order to obtain a loan. In 1993, the property was sold to the respondent. She was immediately put in possession. She was in addition paid all the rents collected by the former owner from the tenants in advance, i.e. beyond the date of the sale.

It is the evidence of the original owner of the property, that when he could not bear the pressure from the respondent to hand over the title deeds to the property, he

> "arranged to return her money to her by paying it lawyer Eletu by bank draft."

The appellant gave evidence in the court below that -

> "I have met one lawyer Rasaki Eletu. I am aware that he was the one briefed by the second defendant (the original owner) to sell the property to any willing buyers I will be surprised if the second defendant now says that he did not instruct Rasaki Eletu to sell to any willing buyer."

With the above evidence, it is my view that as Eletu failed to give the respondent back her money, the transaction between her and the original owner subsists.

I agree entirely that the appeal has no merit. It is accordingly dismissed. I abide by the consequential order made in the lead judgment including the order on costs.

ONNOGHEN, J.C.A.: I have had the privilege of reading in draft' the lead judgment of my learned brother, Mika'ilu, JCA, just delivered. I agree with his reasoning and conclusion that this appeal lacks merit and should be dismissed.

I however want to comment on one or two issues raised in this appeal particularly the issue as to whether there are materials from which the learned trial Judge could lawfully conclude that the land-on which the disputed property is situate is in an urban area so as to preclude the applicability of customary right of occupancy. The facts of the case have been fully stated in the lead judgment of my learned brother and I do not intend to repeat them here except as needed to emphasis the point being made.

Learned counsel for the appellant at page 6 of the appellant's brief of argument referred to the holding of the trial Judge at page 170 of the record to the effect that the customary right of occupancy obtained in respect of the disputed estate is invalid because the land falls in an urban area and as such the local government had no *vires* to grant a customary right of occupancy in favour of the appellant and submitted that there was no evidence from the respondent nor from any other witness to the effect that the land in dispute falls in an urban area so as to impugn the power of the local government to issue a customary right of occupancy over the disputed land. That a

Court of law is not allowed to speculate but must base its finding on ven facts. That the respondent tendered no plan nor any other Document to show the designation of the land in dispute as one in an than area. That "the fact that a permit to alienate land had earlier been issued by the then *Ilorin Local Government* in favour of the 2nd defendant before the lower court lends credence to the appellant's case that the land in issue falls under the jurisdiction of the Ilorin West Local Government". (Italics supplied by me.)

At page 170 of the record, the learned trial Judge held, *inter alia,* as follows:

> "The real issue, however, is whether or not the customary right of occupancy, obtained in respect of the estate at Gari Alimi area in the city of Ilorin is valid. The city of Ilorin falls within the designated urban area of Kwara State by virtue of section 2(1) of the Land Use Act, 1978 what is required is the statutory right of occupancy which can only be issued by the Governor of Kwara State whereas by virtue of section 6(1) of the same Act the Chairman of a Local Government can only validly issue right of occupancy for rural areas under his domain..."

It must be noted that the appellant is not contesting the statement of the law as restated above by the learned trial Judge but that there was no legal basis for his applying the law as so stated

to the facts of this case. The question is whether the learned counsel is right in his submissions.

On the issue as to whether there are facts to lead the trial court to the conclusion that the land in dispute is within an urban area, at page 114 lines 31 to 32 of the record the 2nd defendant who is not a party in this appeal but was the vendor of the land in dispute, stated thus - concerning the said land:

"It is in the city of Ilorin in the urban area." Under cross-examination by learned counsel for the respondent at page 121 lines 1 to 2 of the record, the said 2nd defendant stated:

"I am still insisting that the estate and *(sic)* is within Ilorin city."

Both parties are agreed that the appellant obtained a right of occupancy from Ilorin West Local Government over the land in dispute instead of statutory right of occupancy. By virtue of the provisions of section 3 of the Land Use Act, 1978 a Governor of a State is enjoined to, for the purposes of the Act. by order publish in the State Gazette, designate the parts of the area of the territory the State constituting land in an urban area. Pursuant to the powers so conferred by the said section 3 thereof, the then Military Govern of Kwara State published Kwara State Legal Notice No. 2 of 19' titled Land Use (Designation of Urban Areas, Fees and Form Regulations, 1978 paragraph 1 of which legal notice provides that "the areas described in the First Schedule hereto are hereby declared as urban areas for purpose of the Land Use Decree, 1978". Now the relevant part of the First Schedule provides, *inter olia*, as follows:

"Part 1 Ilorin

The areas which arc shaded yellow and urged red, detailed descriptions of which are shown on the survey plan number URB/IL/1 which is deposited in the office of the surveyor - general at Ilorin."

It follows that from the provisions of section 3 of the Land Use Act, 1978 and Kwara State Legal Notice No. 2 of 1978 and the evidence from the 2nd defendant earlier reproduced, it is beyond doubt that the land in dispute falls within a designated urban area of Ilorin city as found by the learned trial Judge and I am of the strong -view that the learned trial Judge is right in so finding.

That apart, that is apart from the direct evidence from the 2nd4 defendant on the issue; it is trite law that no fact of which the court must take judicial notice need be proved - however see section 73 of the Evidence Act. Now the facts which the court is enjoined to take judicial notice of include those listed in section 74 of the Evidence Act, to wit all laws or enactments and any subsidiary legislation made there under. The subsidiary legislation envisaged by the said section includes Kwara State Legal Notice No. 2 of 1978. It therefore follows that even without the direct admission by the 2nd defendant as to the land being within the urban areas of Ilorin, the learned trial Judge is empowered by the law to take judicial notice of that fact by operation of law. By the submission of learned counsel for the appellant that the fact that a permit to alienate land had earlier been issued by the then Ilorin Local Government in favour of the defendant lends credence to the appellant's case that the land falls under the jurisdiction of the Ilorin West Local Government - the customary right of occupancy - cannot change the legal status of the land falling within Ilorin urban by operation of law and therefore not subject to a permit to alienate issued by the said Ilorin Local Government.

However the submission confirms the fact that the then Ilorin Local Government is what is designated an urban area in Legal Notice No 2 of 1978.

For these and other reasons assigned in the said lead judgment f my learned brother Mika'ilu, JCA, I too dismiss the appeal as packing in merit and abide by the consequential orders made therein including the order as to costs.

Appeal dismissed.

Appeal dismissed.