IN THE HIGH COURT OF JUSTICE OF THE F.C.T.
IN THE ABUJA JUDICIAL DIVISION (APPELLATE DIVISION)
HOLDEN AT COURT 10, BWARI, ABUJA
ON THE 15TH DAY OF JULY, 2022
BEFORE THEIR LORDSHIPS:
HON. JUSTICE S. B. BELGORE (PRESIDING JUDGE)
HON. JUSTICE ABUBAKAR HUSSAINI MUSA (HON. JUDGE)

APPEAL NO: CVA/525/2020
SUIT NO.: CV/129/2018

BETWEEN:

MR YINKA SONUYI **APPELLANT**

AND

MR JOHN OLABANJI AKEREDOLU **RESPONDENT**

JUDGMENT

Delivered by the Hon. Justice A. H. Musa

This Judgment is in respect of an appeal arising from the Judgment of the Senior District Court of the Federal Capital Territory, Abuja *coram* His Worship Musa A. Eneye brought by the Appellant.

The appeal is seeking to set aside the entirety of the Judgment of the trial Court. The Appellant raised seven grounds of appeal with the supporting particulars of error thereof. On the basis of these grounds, therefore, the appellant seeks the following reliefs from this Court:-

1. *An Order of this Court allowing the Appeal;*
2. *An Order setting aside the Judgment of the trial Court awarding the Respondent's mesne profit from 13th November, 2017 to 3rd of May, 2018 at ₦158,000.00 per month and ₦200,000.00 legal fees;*

3. *And for such further or other order(s) that this Honourable Court may deem fit to make in the circumstances*.

In the Appellant's brief of argument which was settled on the 18th of August, 2021, the Appellant formulated five issues which were distilled from the seven grounds of appeal. The issues are:-

1. *Whether the Respondent claimed arrears of rent in his application for plaint filed on the 20th December, 2017 and evidence at the lower Court and therefore entitled to the grant of same by the lower Court against the Appellant;*
2. *Whether the Respondent is entitled to the award of mesne profit from 13th of November, 2017 to 3rd of May, 2018 having purportedly established arrears of rent at the lower Court;*
3. *Whether the Respondent consented to the renovation carried out by the Appellant on the demised property and the Appellant is therefore entitled to payment for the renovation by the Respondent;*
4. *Whether the Respondent is entitled to the award of the sum of ₦200,000.00 legal fees by the lower Court;*
5. *Whether the Respondent established his case at the trial Court with sufficient and credible evidence as against the evidence of the Appellant as to entitle him to the Judgment of the lower Court and award of mesne profit and legal fees by the lower Court.*

The facts of the case can be seen from the record of appeal. The Respondent had instituted a suit at the Senior District Court of the Federal Capital Territory, Abuja, the trial Court, seeking the following reliefs thereat against the Appellant:-

1. Possession of the said three (3) bedroom detached bungalow with one boy's quarters, No. 2 Johnson Adetoye Drive, Andikan Beulah Estate, Gwarinpa, F.C.T., Abuja.
2. Mense profit of ₦158,000.00 (One Hundred and Fifty-Eight Thousand Naira) only monthly from 13th November, 2017 till the day vacant possession is finally given to the Plaintiff.
3. The sum of ₦200,000.00 (Two Hundred Thousand Naira) only as the cost of this suit.
4. Interest of 10% on the judgment sum until the whole sum is fully liquidated.

The Appellant responded by filing his Statement of Defence and Counter-Claim wherein he claimed against the Respondent as follows:-

1. The sum of ₦800,000.00 being the amount owed by the landlord to the Defendant/Counter-Claimant arising from the renovations, the Defendant/Counter-Claimant carried out on the property the subject of the suit.
2. 10% interest on the Judgment sum from the date of Judgment till such time as the Judgment sum is paid.

3. The ₦250,000 as cost of this suit.

The Respondent opened his case. He called two witnesses who testified for him. He tendered documents and, then, closed his case. The Appellant testified on his behalf. He tendered a couple of documents and then closed his case. Both parties filed and exchange their respective Final Written Addresses which they adopted in Court as their legal argument in support of the positions they respectively canvassed. Thereafter, the Court adjourned for Judgment. In a considered Judgment, the trial Court found for the Respondent. Dissatisfied, the Appellant lodged an appeal against the Judgment on the grounds set out in the Notice of Appeal. The Respondent did not file a Respondent's Brief of Argument challenging the Appellant's Brief of Argument.

In determining this appeal, this Court considers the record of appeal and the Appellant's Brief of Argument. The following issues, accordingly, readily lend themselves for determination:

1. ***Whether the trial Court, in the course of its Judgment, did not grant reliefs not sought by the Respondent?***
2. ***Whether the Respondent did not prove his case on a balance of probability as to be entitled to the Judgment of this Court in his favour.***

On Issue 1, learned Counsel for the Appellant argued strenuously that "*since the Respondent did not claim arrears of rent in his application for plaint and did not also by the evidence he produced before the lower court establish his entitlement to arrears of rent against the Appellant for the period of 13th November, 2017 to 3rd May, 2018, the Respondent is not entitled to the award of arrears of rent for the period of 13th November, 2017 to 3rd May, 2018 and/or mesne profit of ₦158,000.00 (One Hundred and Fifty-Eight Thousand Naira) only monthly from 13th November, 2017 that was awarded by the lower Court for the purported established evidence of arrears of rent by the Respondent.*" See paragraph 4.4, page 4 of the Appellant's Brief of Argument. I have carefully gone through the Application for Plaint as well as the record of proceedings and the Judgment of the trial Court and I can neither find where the Respondent claimed arrears of rent nor where the trial Court made an award of arrears of rent. The only place in the Judgment of the trial Court arrears of rent was mentioned was in page 62 of the record of appeal where the trial Court found that the Appellant was in arrears of rent. A contextual reading of that judgment would show that the mention of arrears of rent was a slip on the part of the trial Court, as it consistently maintained mesne profit, and not arrears of rent, as the relief the Respondent sought in the suit.

In the Application for Plaint, the Respondent (as the Plaintiff) had sought for the following reliefs: possession of the three (3) bedroom detached bungalow

with one boy's quarters particularly described as No. 2 Johnson Adetoye Drive, Andikan Beulah Estate, Gwarinpa, F.C.T., Abuja, mense profit of ₦158,000.00 (One Hundred and Fifty-Eight Thousand Naira) only monthly from 13th November, 2017 till the day vacant possession wouldbe given to the Plaintiff, the sum of ₦200,000.00 (Two Hundred Thousand Naira) only as the cost of this suit, and Interest of 10% on the judgment sum until the whole sum is fully liquidated. On the 3rd of May, 2018, when the matter came up for the second time in Court, Counsel for the Respondent informed the Court that the Appellant had delivered vacant possession of the premises. This necessitated the Respondent abandoning his claim for recovery of the said premises while he pursued the other reliefs. See pages 35 – 36 of the record of appeal.

In the Judgment of the trial Court, the Court made the following Orders:

> "*In view of the above, judgment is found for the Plaintiff based on the successful establishment of proof for his case thus:*
>
> *Prayer One possession not awarded as it has been overtaken by events as the Defendant handed over possession on the 3rd day of May, 2018.*
>
> *Prayer Two is granted which is mesne profits to be calculated from 13th November, 2017 – 3rd May 2018 at ₦158,000.00 per month. The Court awards ₦200,000.00 for legal fees. No award is made for interest upon judgment sum."*

It becomes immediately obvious, therefore, that the learned Counsel for the Appellant conflated a claim for arrears of rent and a claim for mesne profit and seems to use both interchangeably. This is not so. The Courts, in a number of judicial decisions, have drawn a distinction between arrears of rent and mesne profit. In the case of ***Joyland Ltd. v. Wemabod Estates Ltd. (2008) 17 NWLR (Pt. 1117) 651 SC***, the Supreme Court per Muntaka-Coomasie JSC held at pp. 660 – 661 paras H-A that "***There is no much difference between mesne profit and arrears of rent. The former is only calculated monthly or yearly and is unliquidated, while a claim for rent is liquidated***."

In ***Oteri Holdings Ltd. v. H.B. Co. Ltd. (2021) 1 NWLR (Pt. 1756) 29 CA at Pp. 73-74, paras. G-A***, the Court of Appeal held that **"*Generally, a claim for mesne profit is based on trespass by the defendant in occupation and it is inappropriate in respect of lawful occupation as a tenant. It can only be maintained when the tenancy has been duly determined and the tenant becomes a trespasser*."**

See also in this regard the following cases: ***Abeke v. Odunsi (2013) 13 NWLR (Pt.1370) 1; Consolidated Tin Mines Ltd. v. Mangu (2017) LPELR-43297; Umenyi v. Ezeobi (1990) 3 NWLR (Pt. 140) 621 CA at p.628, para. D*** **per Uwaifo JCA (as he then was)**

In view of this therefore, I have no hesitation in finding that the Court has not granted a relief or reliefs that was or were not sought by the Respondent. Issue One is therefore resolved against the Appellant.

On Issue Two, that is, "***Whether the Respondent did not prove his case on a balance of probability as to be entitled to the Judgment of this Court in his favour***", the Appellant had argued that the Respondent was not entitled to the award of mesne profits which the Court made, since he did not lead evidence to prove same, particularly, as there was no evidence of service of the statutory notices. Indeed, I have gone through the record of appeal and cannot find where the Respondent led evidence in proof of the service of the required statutory notices. This is notwithstanding the fact that he had pleaded in paragraph 4 that the Appellant was a tenant for one year certain whose tenancy commenced on the 13th of November, 2016 and terminated on the 12th of November, 2017 and, further, in paragraph 7 that he had served on the Appellant the statutory Seven-Day Notice of Owner's Intention to Apply to Court to Recover Possession. The Respondent did not lead evidence in support of these facts and there is no proof of service of the Seven-Day Notice of Owner's Intention to Apply to Court to Recover Possession in the list of exhibits which occupies pages 22 – 34. Since that is the case, the action for recovery of premises instituted at the trial Court, ordinarily, would have been incompetent for lack of service of the required notice.

However, there is no evidence that the Appellant challenged the competence of the suit on this ground. On the other hand, he participated in the action up to the point of judgment. This is the first time he is challenging the competency of the proceedings at the trial court on the ground of non-service of the statutory notice. As I have pointed out, the Appellant delivered vacant possession of the property on the 3rd of May, 2018. On that day, Counsel for the Appellant stated: "*I am aware they have other claims. If they are ready to proceed we are ready because we have our own counter-claim*." See pages 35 – 36 of the record of appeal. Having participated in the proceeding at the trial Court without raising the issue of competence of the Court, he cannot raise it at this point for the first time without leave of Court. in **Wowem v. State (2021) 9 NWLR (Pt. 1781) 295 S.C.**, the Supreme Court held at***pp. 326-327, paras. H-D*** that:

> "***Fresh issues can only be raised and argued upon leave having been sought and obtained. The only exceptions where leave is not required to argue fresh issue on appeal is where the issue of jurisdiction is raised for the first time on appeal, and where the fresh issue is based on point of law only, does not require adducing any further evidence to determine the matter and such issue is necessary to prevent a miscarriage of justice***."

See also: ***Tiza v. Begha (2005) 15 NWLR (Pt. 949) 616 S.C.; New Res. Intl Ltd. v. Oranusi (2011) 2 NWLR (Pt. 1230) 102 C.A. at p. 117, paras. C-D;***

Bamikole v. Oladele (2011) 1 NWLR (Pt. 1229) 483 C.A. p. 504, paras. E-G; *and* ***Gods Little Tannery v. Nwaigbo (2005) 7 NWLR (Pt. 924) 298 C.A.***at ***p. 315, para. D, F- G***

I have gone through the file and there is no evidence that the Appellant has sought and obtained the leave of this Court to raise the issue of competency of the suit for the first time on appeal.

Having found that the tenancy in question commenced on the 13th of November, 2016 and terminated on the 12th of November, 2017, the Appellant, ordinarily, was liable to pay mesne profit from the 13th of November, 2017 when he began to hold over to the 3rd of May, 2018 when he delivered vacant possession of the premises. Contrary to the claim of the Appellant that the amount claimed was not certain, it should be pointed out that the sum claimed as mesne profit is arrived at after computing the rental value of the property. in There is evidence before the Court that the rental value of the property is ₦1,900,000.00. The Respondent claimed for ₦158,000.00 per month as mesne profit. A simple division would show that ₦1,900,000.00 divided into twelve would give the sum of ₦158,333.33 and some fractions.

Considering that the mesne profit is awarded only where the tenancy has been determined validly, this Court, having found that no statutory notice was served on the Appellant by the Respondent, will be in manifest contradiction to uphold the award of mesne profit which the trial Court made. However,

since it was established that the Appellant was in occupation from 13th of November, 2017 to the 3rd of May, 2018, the Respondent is entitled to recover damages from the Appellant for use and occupation of the said property. On how the damages can be arrived at, the Supreme Court in ***Abeke v. Odunsi (2013) 13 NWLR (Pt. 1370) 27 at 28, paras C – E*** per Ariwoola, JSC held that.

> "***There is no doubt that the respondents were in possession and occupation of the premises lawfully and they were not given the required statutory quit notice by the previous owners who were their landlords. Up till today they had not been given the said notice. As a result, they are not liable to pay mesne profits to the appellant. In other words, the appellant is not entitled to mesne profits. What the appellant is entitled to, at best, is damages for the use and occupation of the property, which will ordinarily be the rent being paid to the previous owners up to the time the appellant purchased the said property and until possession of same is finally delivered by the Respondent.***"

African Petroleum Ltd. v. Owodunni (1991) 8 NWLR (Pt. 210) 391 S.C. at P.418, paras. C-D, the Supreme Court held that "***A distinction between a claim for 'mesne profits' and damages for use and occupation is the date of commencement. While 'mesne profits' start to run from the date***

of service of the process for determining the tenancy, damages for use and occupation start to run from the date of holding over the property, the function of the court being to ascertain an amount which may constitute a reasonable satisfaction for the use and occupation of the premises held over by the tenant."

In view of this therefore, I hereby hold that the Respondent is entitled to damages for use and occupation of the premises. Same is computed on the rental value of the property put at ₦1,900,000.00 (One Million, Nine Hundred Thousand Naira) only already established by the trial Court. Since the quantum for damages for use and occupation is computed based on the rental value of the property, no miscarriage of justice has been occasioned the Appellant whether the amount due to the Respondent is described as arrears of rent, mesne profit or damages for use and occupation.

On whether the landlord, that is the Respondent consented to the renovation of the property the subject of this appeal, section 15 of the Recovery of Premises Act is relevant. The said section provides that "***A tenant shall not be entitled to compensation in respect of any improvement, unless he has executed it with the previous consent in writing of the landlord.***" The Appellant has contended most strenuously in his Appellant's Brief of Argument that the landlord consented to the renovations when he endorsed on the receipt of payment the following words: "*One year rent minus renovation cost of ₦400,000.00.*" Though I agree with learned Counsel for the

Appellant that the Recovery of Premises Act does not make provision on the specific form the written consent envisaged under section 15 should take, I must add hastily that the section stipulates that the consent must be obtained before any improvementis executed on the property.

The word 'previous' is defined in the Oxford Advanced Learner's Dictionary (8th Edition, International Student's Edition)at page 1160 as follows: "***happening or existing before the event or object that you are talking about; immediately before the time you are talking about***." Within the context of section 15 of the Recovery of Premises Act, it means the landlord's consent in writing must be obtained before the tenant carries out any improvement on the holding.

Though the landlord endorsed "*One year rent renovation cost of ₦400,000.00: Duration 12-11-2016 – 11-11-2017*", this endorsement does not translate to a consent within the meaning of the Act; it is a waiver of his entitlement to a prior application for the said consent. There is no evidence before the trial Court that the Appellant and the Respondent agreed that the cost of renovation was ₦1,200,000.00 and that the said sum would be deducted from the Appellant's rent in three batches. In fact, there was no agreement on the actual figure spent on the renovation. The PW1 in his evidence-in-chief stated at page 36 of the record of appeal that "*Upon renewing the tenancy in October, 2016 which commenced 13th October, 2015, he claimed to have spent about ₦500,000.00 on renovation of the*

house. There was no agreement on that. By the time he was paying in 2016, the landlord went to evaluate the extent of the renovation done. The landlord discovered the renovation is not as much as claimed. The landlord now agreed to give ₦400,000.00 as the cost of renovation of the property to which the tenant agreed. In 2017 when he wanted to renew the tenancy he claimed another ₦500,000.00 as cost of renovation. He presented a cheque of ₦1.1 Million having deducted the sum. The landlord rejected same. As a result of that, the landlord terminated my appointment as manager of the house."

During cross-examination, the PW1 reiterated that the renovation was executed without the prior consent of the landlord. See page 40 of the record of appeal. Interestingly, the Appellant had paid the full rent of ₦1,900,000.00 for the rental period 2015 – 2016 while he wanted to deduct the sum of ₦800,000.00 from the rent for the rental period 2017 – 2018. Curiously, the Appellant had testified at page 48 of the record of appeal that "*I spent over ₦2,000,000.00 in the house but at the end of negotiation, we arrived at ₦1.2 Million to be refunded me. We agreed that it was going to be deducted for three years by deducting ₦400,000.00 per rent. In the first payment I was deducted the sum from my rent and it was indicated in the receipt. After the expiration of the period when my rent was due, I was asked to pay*." The Appellant did not tell the Court why he presented the cheque for ₦1,100,000.00 and not ₦1,500,000.00 if indeed, there was an agreement for ₦400,000.00 to be deducted from his rent each year. During his cross-

examination, he confirmed that the only evidence of the consent of the landlord in writing he had was the endorsement on **Exhibit DA2**.

In view of this therefore, I agree with the learned trial Court when it held at pages 63 – 64 of the record of appeal thus: "***The wordings of the Recovery of Premises Act are clear on when a tenant seeks to renovate a property there must (be) an express written consent of the landlord (section 15, Recovery of Premise Act) not a document that implies same. It expressly states that a tenant shall not be entitled to compensation in respect of any improvements unless with previous consent in writing of the landlord.*** *Exhibit DA2* ***with all due consideration of the argument of the learned Counsel to the defence does not amount to an express consent in writing of the landlord. In view if the above, the defence's counter-claim must fail as it does not have the virility to stand.***" Accordingly, all the authorities cited by learned Counsel for the Appellant in support of his contention on this point are liable to be discountenanced and are hereby discountenanced as the facts and circumstances of those cases are not in concordance with the facts and circumstances of this present case.

Finally, on whether the award of ₦200,000.00 for legal fees by the trial Court was appropriate, learned Counsel for the Appellant argued in his Appellant's Brief of Argument that the award of ₦200,000.00 by the trial Court as legal fees was inappropriate since no evidence was led in proof of same. This Court is constrained to agree with the Appellant for other reasons in addition

to the reason canvassed in the Appellant's Brief of Argument. The trite position of the law is that it is unethical and against public policy to pass solicitors fee to an opponent where the said fees arose after the occurrence of the cause of action. See the case of ***Audu v. Atkins (2019) LPELR-49701 (CA) pp 41-45 paras B-A,*** where the Court of Appeal per MudashiruNasiruOniyangi (JCA) held *inter alia*that:-

> "***The right to hire a counsel of one's choice is provided for under Section 36 (5) (c) of the 1999 Constitution of the Federal Republic of Nigeria. In exercise of that right, if a party in a suit decides to hire a Counsel of his own choice, that will not amount to a wrongful act of the adverse party creating any injury to the Plaintiff or creating an avenue to complain and seeking for consequential damages. After all, the need to hire a Counsel is for the benefit of the party that hire the Counsel be it a Plaintiff or Defendant or a counter claimant as in the case at hand. I therefore find no hesitation in adopting the view of my learned brother Ibiyeye JCA (of blessed memory) as submitted by the learned Counsel representing the Appellant in the case of GUINNESS NIGERIA PLC VS NWOKE (2000) 15 NWLR (PT.689) 135 at 150. Hear his Lordship. "A claim for solicitors fees is outlandish and should not be allowed as it did not arise as a result of damages suffered in the course of any***

transaction between the parties. It would seem that the established legal position is that it is unethical and an affront to public policy for a litigant to pass the burden of cost of an action including his solicitor's fees to his opponent in the suit. This is on the basis of the self evidence truth that solicitors fees do not form part of the wrong on which the Plaintiff pivoted his cause of action. It is outside it. It is therefore, improper to allow a Plaintiff to pass his financial responsibility to a Defendant. It seems that the reliefs which a Plaintiff in an action is entitled to, if established by evidence, are those reliefs which form part of the Plaintiff's cause of action. It cannot be disputed that a claim for solicitors fees does not form part of the Plaintiff's cause of action"."

I would say no more.

In view of the foregoing, therefore, this appeal succeeds in part. Accordingly, this Court declares as follow:-

1. **THAT the trial Court did not grant a relief or reliefs that was or were not sought by the Respondent. As a consequence, the argument of the Appellant's Counsel that the trial Court made a finding that the Respondent was entitled to arrears of rent and did make an award of arrears of rent is unfounded as same cannot be distilled from the records before this Court.**

2. **THAT since the Respondent did not establish that he served the Appellant with the statutory notices, he is not entitled to an award of mesne profit being made in his favour. Accordingly, the award of mesne profit made by the trial Court is hereby set aside. This Court however, hereby, orders that the Appellant pays damages for use and occupation of the premises for the period 13th of November, 2017 to the 3rd of May, 2018 at the rate of ₦58,333.33 per month being the product of the division of the rental value of the property, which is, ₦1,900,000.00, into twelve.**
3. **THAT the Appellant did not seek for and obtain the written consent of the landlord before he embarked on the renovation of the demised property and, accordingly, is not entitled to the claims sought in his Counter-Claim at the trial Court.**
4. **THAT the award of ₦200,000.00 as legal fees awarded by the trial Court in favour of the Appellant is hereby set aside.**

This is the Judgment of this Court delivered today, the == day of ==, 2022.

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HON. JUSTICE S. B. BELGORE
PRESIDING JUDGE
15/7/2022

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HON. JUSTICE A. H. MUSA
HON. JUDGE
15/7/2022