

SUPREME COURT OF NIGERIA
15TH JANUARY, 1993: SC. 275/1990
CORAM:- M. L. UWAI, S. KAWU, U. OMO,
I. L. KUTIGI, M. E. OGUNDARE, JJSC

MICHAEL ADEBAYO AGBAJE APPELLANT

AND

ALHAJI LASISI ADIGUN
(MOGAJI OGANLA) & 2 OTHERS RESPONDENTS

APPEALS - Absence of a party and or his counsel at the hearing of appeal - Grounds of appeal containing mixed law & facts - leave must be sought and obtained - leave must be obtained before a new issue not canvassed in the lower court can be raised.

BRIEFS - Where filed - appeal treated as having been argued.

EVIDENCE - Admission during judgment of evidence previously rejected by court - wrong in law - counsel's addresses should have been called for - effect of the error - may not lead to setting aside of judgment where that piece of evidence did not affect the decision.

FACTS

The plaintiffs who are the respondents in this case sued the Defendant, (now appellant) in the High court of Oyo State claiming N1,000.00 damages for trespass on their land and an injunction restraining the Defendant, his servant, agents and privies from committing further acts of trespass on the said land. In a previous case with a party from who the appellant derived title to the land of which the one now in dispute is part of, title was granted to the Respondents by the Supreme Court.

2 AGBAJE V. ADIGUN (1993) 1 KLR 1; (1993) 7 NWLR

The learned Trial Chief Judge found for the Plaintiffs and entered judgment in their favour awarding N200.00 damages for trespass and granted them the injunction sought. The Defendant appealed to the Court of appeal against the decision of the learned Chief Judge. The court of appeal dismissed his appeal. He further appealed to the Supreme Court against the dismissal of his appeal by the Court of Appeal upon six grounds of appeal.

At the hearing of the appeal at the apex court, both the appellant and his counsel were absent. Counsel for the Respondent drew the Court's attention to the notice of preliminary objection he raised in his brief as to the competence of grounds 1 - 4 and 6 contained in the appellant's notice of appeal. He contended that these grounds raised issues of mixed law and facts and should not be entertained since leave to appeal on them had not been sought and obtained as required by S.213 (3) of the constitution. The court held the grounds were incompetent as submitted and struck them out accordingly. The surviving ground 5 sought to appeal against the trial judge's admission in the judgment of a document marked "Exhibit X5 rejected" during trial without giving opportunity to the parties to address him on the issue.

HELD (Unanimously dismissing the appeal).

1. Where the Appellant and or his counsel are absent at the hearing of appeal and briefs had been filed, the appeal is treated as having been argued on the appellant's brief properly so filed. (p.8 L. 31)

2. New issues that arise from the High Court's judgment not canvassed at the court of appeal cannot be raised at the Supreme Court without leave of the Supreme Court first sought and obtained.(p.10 L.16)

3. A trial Judge realising his error in rejecting a document should call on the parties to first address him on admissibility before suo motu admitting the document in evidence in the judgment. (P. 13 L. 7)

4. A disputed document having been rejected in evidence during trial cannot be made use of, since a trial Judge cannot sit on appeal on his own decision. (p.13 L.17)

5. Where the evidence so wrongfully admitted by the trial Court did not affect the Court's decision there being no miscarriage of justice, the Supreme Court would not set aside that judgment just on that ground of wrongful admission of evidence. (p.14 L.13)

REPRESENTATION:

J. O. A. Ajakaiye Esq. for the Respondents.

Appellant absent and not represented by counsel.

CASES REFERRED TO

1. Sken Consult Nig Ltd. v. Ukey (1981) 1 SC 6
2. Akpene v. Barclays Bank of Nig. Ltd. (1977) 1 SC 47
3. Djukpan v. Orovuyovbe (1967) 1 ALL NLR 134
4. Re-Cowburn (1881-85) ALL E.R. 987
5. Lanipekun v. Balogun 1/262/77 - unreported
6. Kuti v. Jibowu (1972) 6 SC 167
7. Mustapha v. Gov. of Lagos State (1987) 2 NWLR (Pt 58) 539
8. Attorney General of the Federation v. Ajibose (1974) N.S.C.C. (Vol. 6.) 129.
9. Kponuglo v. Kodadja 2 WACA 24
10. Mogaji v. Mogaji SC 405/1967 unreported
11. Uor v. Loko (1988) 2 N.W.L.R. (Pt. 77) 430
12. Attorney General of Oyo State v. Fairlake Hotel (1988) 5 N.W.L.R. (Pt 92) 1
13. Oniah v. Onyia (1989) 1 N.W.L.R. (Pt. 99) 5
14. Adedeji v. N.B.N. Ltd (1989) 1 N.W.L.R. (Pt 96) 212
15. Oguma v. I.B.W.A. (1988) 1 N.W.L.R. (Pt 73) 658

STATUTES & RULES REFERRED TO

1. 1979. Constitution of the Federal Republic of Nig. S.213 (3)
2. 1990. Evidence Act S. 227 (1)
3. Rules of the Supreme Court - Order 6. Rule 8 (6),
-Order 6. Rule 5 (1)

LEAD JUDGMENT BY OGUNDARE JSC

By a writ of summons issued in February, 1990 in the High Court of Oyo State, the plaintiffs (who are now respondents before us) sued the defendant (now appellant) claiming N1,000.00 damages for trespass “committed and still being committed by the defendant on plaintiffs’ land situate, lying and being at Arena Lemonu Street, Ekotedo, Ibadan” and an injunction restraining the defendant, his servants, agents and privies from committing any further act of trespass on the said land. The plaintiffs are all members of Oganla family. Indeed 1st plaintiff is the Mogaji of family. Pleadings were tiled and exchanged. Three witnesses testified in support of the plaintiffs’ case while the defendant and another witness testified in support of the defence. The learned trial Chief Judge, after addresses by learned counsel for the parties, in a reserved judgment, found for the plaintiffs and entered judgment in their favour awarding them N200.00 damages for trespass and granting them the injunction sought. The defendant appealed against that judgment to the Court of Appeal which court (coram: Akanbi, J.C.A. (as he then was), Sulu-Gambari, J.C.A. and Ogwuegbu, J.C.A. (as he then was) dismissed the appeal. The defendant has now further appealed to this court upon six grounds of appeal which read as follows:-

“1. *The Court of Appeal erred in law in dismissing the appeal after upholding the complaint of misdirection in law contained in Ground 6 of the grounds of appeal argued before the Court of Appeal, that the learned trial Judge was in error in holding that the plaintiffs/respondents were pronounced the owners of the land edged red in Exhibit A or B including the land in dispute edged green in Exhibit A in Suit S.C. 405/1967 (i.e. Exhibit D).*

PARTICULARS

- 35 (i) The Court of Appeal appreciated that the trial court’s finding on possession and title to sustain the claim for trespass was based on this erroneous view:-
 - (a) that the respondents had been adjudged

- owners of the land verged red in Exhibits A and B;
- (b) that having so held, the trial Judge further concluded that the respondents had established a better title to the land in dispute and therefore ousted the appellant from possession.
- (c) I therefore agree totally with the appellant's counsel on this point. Indeed the learned counsel for the respondents seems not to have any answer for the point canvassed..... Thus the complaint on this ground is valid' 5
- (d) the Court of Appeal had wished to revert to the matter - BUT did not. 10
- (ii) This finding negates the conclusion of the High Court (and the Court of Appeal) that title to and/or possession of the land in dispute had been proved by the respondents without which, no judgment could be given in their favour. 15
- (iii) The dismissal of the appeal thus amounted to a grave miscarriage of justice. 20
2. The Court of Appeal erred in law in dismissing the appellant's appeal after upholding the complaint (in Ground 7 of the grounds of appeal) that the High Court was in error in holding that the appellant was bound by the judgment in Appeal No.S.C.405/1967 when the parties, the subject-matter and cause of action in that appeal were different from those in this action. 25

PARTICULARS

- (i) The Court of Appeal had concluded after an exhaustive consideration of the pleadings, the evidence and the ground that: 'if the learned trial Judge had been mindful of the above warning he would not have arrived at the conclusion he reached which in my view is erroneous. To this extent ground of appeal succeeds. 30
- (ii) The High Court based its finding of title to and possession the land in dispute in the respondents, on this erroneous finding. 35

- (iii) No further argument or consideration was offered or made to detract from the earlier finding of the Court of Appeal.
- 5 (iv) The dismissal of the appeal in the circumstances, thus amounted to a miscarriage of justice.
3. The Court of Appeal erred in law in accepting the erroneous view of the High Court that the respondents proved title to the land in dispute when on the judgment relied upon by the High Court and the Court of Appeal the said land be
10 belonging to Iyemoja Family (not in dispute) extended south wards to the house in dispute in that suit (S.C. 405/67) - Buraimoh Lawan's (sic) house, cultivated in common by
15 Buraimoh Lawani, Iyemoja family Oganla family and the Baptist Church.

PARTICULARS

- 20 (i) The land said to be in dispute in this case was not proved, it being situate, more northerly than the land of Buraimoh Lawani as shown in both plans, Exhibits A and B.
- (ii) The land of Iyemoja family not in dispute was not delin
25 eated even though the respondents conceded that is close to the land in dispute.
4. The Court of Appeal erred in law in upholding the findings of the High Court and refusing to dismiss the respondent's claims when the High Court based its decision entirely on
30 the weakness of the appellant's defence and not on the strength of the respondents' case thus casting a heavier onus of proof on the appellant than is required by law.

PARTICULARS

- 35 The respondents did not prove:-
- (a) the land in dispute in this case:
- (b) the land said to belong to this case:
- (c) that the land in dispute fell outside Iyemoja family land

which was not contested in Appeal No: S.C. 405/67 or in this suit:

- (d) possession of the land in dispute at any time material to this suit;
 - (e) title to the land in dispute at any time relevant to this suit. 5
5. The Court of Appeal erred in law in not suo motu discarding the document X5 (rejected) upon which the High Court relied to arrive at its decision, when the document was rejected and was not admitted as evidence when tendered by the respondent during the hearing. 10

PARTICULARS

- (i) When the trial Judge decided to admit the document after close of evidence and address. It did not give the appellant the opportunity to react to its admissibility. 15
 - (ii). When the document was rejected during the hearing the appellant did not consider it any more, did not refer to it in his address or lead evidence to explain, or contradict or distinguish or deal with it in any other matter. 20
 - (iii) Later admitting the document as evidence out of court, has led to a miscarriage of justice and amounted to a denial of fair hearing on the issue. 25
6. The Court of Appeal erred in law in rejecting the defences of laches, waiver, acquiescence, standing-by etc., which apply and which operate to defeat the claims of the respondents in the High Court.” 30

PARTICULARS

- (i) The Court of Appeal considered delay only and did not have regard for the nature of the acts and circumstances which make it inequitable to enforce the claim. 35

- (ii) The courts did not decide the issues of acquiescence and standing-by.
- (iii) The respondents departed considerably from their pleadings at the trial with regard to their evidence in respect of persons who were on the land in dispute.

In accordance with the rules of this court the parties filed and exchanged their respective written briefs of argument. In the appellant's brief Chief Chukura, S.A.N. learned leading counsel for the appellant. set out three questions as calling for determination. The questions are:

- "3.1(i) Was the Court of Appeal right in dismissing the appeal after holding that two of the grounds of appeal argued before it succeeded; and without giving any reason for not upholding the favourable findings on the grounds, in favour of the appellant*
- (ii) Was the Court of Appeal right in upholding the decision of the High Court which was not based on the strength of the respondents' case, but on attacks on the appellant's case?*
- (iii) The Court or Appeal being obliged to decide an appeal only on legal evidence and to discard statements and document...which do not pass that test, was the court right in not allowing the appeal on the ground that the learned trial Judge during the course of tile hearing rejected a document. X5 as evidence, but in the course of writing his judgment admitted it without giving the parties the opportunity to argue its admissibility?"*

These three questions are adopted in the respondent's brief. At the hearing of the appeal before us on the 12th of October 1992 both the appellant and his counsel were absent in court even though the appellant was in court on 21/1/92 for hearing. Pursuant to Order 6 Rule X(6) of the Rules of this court, the appeal was treated as having been argued on the appellant's brief.

Mr. Ajakaiye learned counsel for the respondents then addressed the court. He drew our attention to the notice of preliminary objection he raised in his brief to the competence of grounds 1 to 4 and 6 of the grounds of appeal contained in the notice of appeal on pages 139 to 142 of the record which the appellant relied on. He observed that the appellant in paragraph 1.5 of his brief of argument abandoned the first notice of appeal filed by him on 13/6/89 and contained on pages 134 to 1.17 of the record.

On being satisfied that the first notice of appeal has been abandoned by the appellant as indicated in paragraph 1.5 of page 1 of his written brief, that notice of appeal was struck out by us. We considered the preliminary objection and after examining grounds 1 to 4 and 6 to which objection was raised in respondents' brief and being satisfied that those grounds raised issues of mixed law and fact and leave to appeal not having been sought nor obtained either in the court below or in this court as required by S. 213(3) of the Constitution we held those grounds incompetent and struck them out leaving only ground 5 for consideration.

Mr. Ajakaiye observed that ground 5 was covered by question 3 which was dealt with on pages 10 to 12 of appellant's brief and on pages 10 to 11 of respondents' brief. Learned counsel further observed that the admissibility of the document X5 (rejected) was never raised as a ground of appeal in this court without leave of this court. He observed that although the document was admitted in the trial court judgment after it had been rejected during the proceedings, it was however, not made use of by the learned trial Judge in arriving at his decision. Mr. Ajakaiye then submitted that the admission of the document in the judgment without more, did not affect the judgment of that court. He referred to Exhibit D. a judgment of this court wherein the document in question was referred to. He submitted that there had been no miscarriage of justice occasioned by the admission of the disputed document in the judgment of the trial court. He urged the court to dismiss the appeal.

Ground 5 which is covered by question 3 is a ground of law and relates to the effect in law of the admission in the judgment without the parties being heard of a document already rejected during the trial. In view of the nature of the question that now remains for this court to decide in this appeal, I do not consider it necessary to go
5 into the facts of the case as pleaded and adduced in evidence. Learned counsel for the respondents Mr. Ajakaiye, had submitted that as the issue raised in Ground 5 was not raised in the court below and that court, therefore, had no opportunity of pronouncing on it, it could be raised in this court without leave of this court. I think he is right. I
10 have examined the record of the court below, particularly the issues canvassed by appellant's counsel in his written brief on page 80 of the record and I can find no issue therein calling into question the propriety of the disputed document being admitted in evidence in
15 the judgment of the trial court after it had been rejected during the trial. That being so, the issue is a new point in respect of which leave of this court ought to be sought and obtained before it could be raised here. No such leave was sought nor obtained. I hold, therefore, that it is not open to the appellant to canvass Ground 5 in this
20 court. See *Skenconsult Nigeria Limited v. Ukey* (1981) 1 S.C. 6 where Nnamani, J.S.C. delivering the lead judgment of this court said at page 18 of the Report:-

"Before dealing with the various arguments of learned counsel
25 *sel. I would wish to dispose of the complaint of the learned counsel for the respondent that the points raised in argument before us were never raised by the appellants before the trial court and the Court of Appeal. It is clear that this court will not allow a party on appeal to raise a question not raised in the court of trial or grant leave to a*
30 *party to argue new grounds not canvassed in the lower courts except where the new points or new grounds involve substantial points of law substantive or procedural which need to be allowed to prevent an obvious miscarriage of justice. See K. Akpene v. Barclays Bank of Nigeria Limited and Anor. (1977) 1 S.C. 47; Debesi Djukpan v. Rhorhadjor Orovuyovbe and Anor. (1967) 1 All N.L.R.134at 137. Also see Re Cowburn Ex Parte Firth (1881-85) All E.R. 987, at 991. The rationale of this attitude is that it is desirable for your Lordships*
35 *to have the benefit of the views on such*

points in issue of their Lordships of the lower court."

Be that as it may, however, as the issue raised in question (3) does not require further evidence to resolve it, I shall proceed to consider the merit of it for all that it is worth. The disputed document was tendered in evidence by P.W.3, the Senior Registrar of the High Court, Ibadan. The document was purported to be certified true copy of a judgment in Suit No. 1/262/77: Lanipekun v. Ishola Otun Balogun. I say "purported" because on the face of the document it is a photocopy of the proceedings in the Lands Court, Mapo Ibadan between Lanipekun and Ishola Otun Balogun and 2 others and in which judgment was delivered on 25th January, 1940. The certified true copy of the proceedings in that case was admitted in evidence in Suit No: 1/108/60 as Exhibit B and in Suit 1/262/77 as Exhibit G. It was Suit 1/108/60 that eventually reached this court as S.C. 405/1967 the judgment in which is Exhibit D in the present proceedings. Thus the document tendered in evidence is the photocopy of the certified true copy of the proceedings and judgment in Suit No. 5/40 in the Lands Court Ibadan. Objection was taken to the admissibility of the document by counsel for the defence on the ground that it was not the original. The trial court ruled as follows:-

"Document marked XS is rejected"

No attempt was made thereafter to have the document admitted in evidence even though learned counsel for the plaintiffs asked for an adjournment (which was granted) to enable him look into the possibility of tendering the said document. In the course of his judgment however, the learned trial Chief Judge had this to say:-

"During the trial I marked Exhibit X5 as rejected. I now hold that Exhibit XS is admissible in view of Exhibit D which is the Supreme Court judgment based essentially on Exhibit X5 erroneously marked rejected during the hearing of evidence in this case. I now rule that Exhibit X5 is admissible because it was referred to in Exhibit D as Suit No. 5/40 Lanipekun of Ibadan v. Ishola Otun Balogun of Ibadan."

No further reference was made to this document in the judgment. Rather the learned trial Chief Judge relied heavily on Exhibit D in finding in favour of the plaintiffs on the issue of title and possession.

5 The question that now arises is: Was the learned Chief Judge right in admitting in evidence a document he had previously rejected, without hearing parties on the point? I rather think not. The learned counsel for the appellant in his brief argues as follows, and quite rightly in my view:-
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“Thirdly, in afterwards admitting the document, the parties were denied a right of fair hearing on its admissibility and the use to which it could be put.

15 Where a court in the process of writing its judgment discovers that there is still outstanding a point of law in respect of which further address was required, he should invite further address:- Mustapha v. Governor of Lagos State (1987) 2 NWLR (Pt.58) 539.

20 In Kuti v. Jibowu (1972) 6 S.C. 147 at 172-3 the Supreme Court held that generally, a court ought not to raise an issue which the parties themselves have not raised. However, in exceptional cases a court may find it necessary to raise a point of its own motion, if it is
25 considered material to the determination of the case. In such cases, the parties concerned should be given an opportunity to express their views on the point before the court decides on it.

30 The case of Attorney-General of the Federation v. Ajibose & 4 Ors. (1974) N.S.C.C. (Vol.6) 129 at 132 is a case in point. The trial Judge rejected the evidence of two experts on assessment of compensation when proffered, but in writing his judgment the Judge relied on their evidence. The Supreme Court held:

35 *‘We feel bound to observe that consideration of assessment of compensation must be based on evidence proffered in court and certainly not on any other expediency..... we are satisfied*

that the observations of the learned trial Judge were not based on any recorded evidence as they should have been and in any case having rejected the evidence of the two experts called by the parties.....We are utterly surprised that the learned trial Judge was willing eventually to base his findings on the testimony of the experts or either of them..." 5

The learned trial Chief Judge, realising his error in rejecting the document, could have called on the parties to first address him on admissibility before suo motu admitting the document in evidence in the judgment. Where if he could even reverse himself as he had done in this case, it may be that the learned trial Chief Judge had in mind a situation where evidence is admitted on facts not pleaded. The law is that in a situation such as the latter, the trial Judge must expunge such evidence from the record when considering his judgment since it does not go to any issue and cannot be legal evidence upon which he could make a finding of fact. That is a different situation to the one in hand. The disputed document having been rejected in evidence cannot be made use of. The learned trial Chief Judge cannot sit on appeal on his own decision. It must be left with the Court of Appeal when the issue is raised before that court to decide whether or not the said evidence was rightly rejected in evidence. I am therefore, of the view, with profound respect to the learned trial Chief Judge, that he was wrong in admitting the document in evidence when writing his judgment. 25

Having said all that, what is the effect of this error? Learned counsel for the appellant in his brief referred to S. 226(1) of the Evidence Act (now S.227(1)) which reads:- 30

"227(1) The wrongful admission of evidence shall not of itself be a ground for the reversal of any decision in any case where it shall appear to the court on appeal that the evidence so admitted cannot reasonably be held to have affected the decision and that such decision would have been the same if such evidence had not been admitted." 35

It is submitted in the appellant's brief that:-

"(i) it is impossible to say that the decision of the court would

have been the same were Exhibit X5 to be expunged from the record.

(ii) it swayed the court, and the fact that the court considered it necessary to admit it at that rather late stage shows that it meant so much to the trial Judge:'

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With respect to learned counsel, I do not agree with his submissions. Apart from the reference made to the disputed document in the passage I have earlier quoted passages wherein he admitted it in evidence, the learned trial Chief Judge said nothing more about this document. Nowhere again did he refer to it nor made use of any material from it. Rather it was Exhibit D he quoted extensively from and applied, as he was bound to do. I do not see, therefore, how this document could have affected the decision reached by the learned trial Chief Judge. I agree with learned counsel for the respondents that no miscarriage of justice has been occasioned by the error committed by the learned trial Chief Judge. In conclusion, therefore, even on the merit, I must answer question 3 in the affirmative.

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The correctness of the learned trial Chief Judge's decision on the admissibility of the disputed document is not an issue before us; I make no pronouncement on it. In the net result, I find no substance in this appeal which is accordingly dismissed by me with N1,000.00 costs in favour of the respondents.

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UWAIS JSC

I have had the advantage of reading in draft the judgment read by my learned brother Ogundare. J.S.C., I entirely agree that the appeal has no merit. I too will, therefore, dismiss it and it is hereby dismissed with N1,000.00 costs to the respondents.

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KAWU JSC

I have had the advantage of reading in draft, the lead judgment of my brother, Ogundare, J.S.C I am in complete agreement with his reasoning and also with his conclusion that there is no merit in the appeal which should be dismissed. I also dismiss the appeal with N1,000.00 costs awarded to the respondents. 5

OMO JSC

The claim of the respondents (as plaintiffs) in the High Court of Oyo State (Ibadan Division) was for: 10

“(a) N1,000 general damages for trespass committed and which is still being committed by the defendant on the plaintiffs land situate lying and being at Arena Lemomu Street, Ekotedo, Ibadan, which is to be more particularly described on a plan to be filed later on. 15

(b) Injunction to restrain the defendant, his servants, agents and privies from committing any further acts of trespass on the said land.” 20

This claim by itself put title in issue vide Ahotche Kponuglo v. Adja Kodadjo (1934-1935) 2 WACA 24. The appellant (as defendant) in his pleadings specifically disputed the respondents’ title to the land which they therefore had to prove. Pleadings were duly filed by the parties. 25

In proof of their case, the respondents in addition to oral evidence led, tendered and relied on several documentary exhibits A, C, D and X5, which were admitted in evidence. The appellant also led evidence and tendered a plan - Exhibit B. showing the land in dispute, which is also identical with Exhibit A (respondents’ plan). It is also the case of the respondents that the Oniyemoja family, from which the appellant claimed to derive his title, had previously litigated this land with them in Suit No. 1/108/60, which ended up with the judgment of the Supreme Court in SCA05/1967 Ojo Magaji Oganla & Ors v. Popoola Mogaji & 3 Ors and Buraimoh Lawani in which title to the land of which the land in dispute in the 30 35

present case on appeal is part, was granted to the respondents. A plan showing the land in dispute granted to the Oniyemoja family by the respondents was tendered in evidence and the judgment of the trial court was tied to it. That plan No.CK309A/60 marked Exhibit A in Suit No. S/108/60 is, according to the respondents, identical in all
5 material respects with Exhibit A filed by them in the present action. That the present Exhibit A is “a certified true copy of the original plan No. CK309A/60 made (by me) on 4/1 0/65” is stated thereon by the Licensed Surveyor who prepared both plans - Mr. Abolade O. Coker of Ibadan.
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The learned trial Judge in giving judgment for the respondents held inter alia that the appellant had failed to satisfy him that the land in dispute edged green in Exhibits A and B is within the area
15 granted by the respondents to his alleged grantees - the Oniyemoja family. He specifically believed the respondents’ case that it is outside that area, indicated “Land of Oganla family” within the area verged red in Exhibits A and B. The appellant was therefore adjudged to have trespassed when he commenced building therein.
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This judgment of the trial court was affirmed by the Court of Appeal when the appellant to that court appealed against same. Dissatisfied with this second judgment against him, the appellant has again appealed to this court.
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My learned brother, Ogundare, J.S.C. has set out in his judgment, which I have had a preview of, the grounds of appeal on which the appellant relies on in support of this appeal and the issues of determination set out by him in his brief. I do not therefore intend to repeat them in my judgment. For the reasons set out clearly in the
30 lead judgment of my learned brother aforementioned, I would also strike out as incompetent grounds 1 to 4 and 6 of the grounds of appeal sought to be canvassed by the appellant. They are grounds of mixed law and fact for which no “leave to argue has been obtained
35 vide Section 213(3) of the Constitution of the Federal Republic of Nigeria, 1979.

Ground 5 is purely a ground of law. It complains of the admission of Exhibit X5 in evidence by the learned trial Judge in the

course of writing his judgment, when he had held, when it was tendered, that it is inadmissible in evidence, and had proceeded to mark it X5 rejected” . Here again the objection to the argument by the appellant of this ground is very well taken. The error complained of was made in the trial court. For any ground of appeal based thereon to be argued here, without leave, it should have been raised and argued in the court below. This was not done in this case and no leave was sought to argue same in this Court. That being the case, the objection to the argument by the appellant of his Ground 5 is well-taken vide *Skenconsult (Nigeria) Ltd v. Ukey* (1981) 1 S.C. 6. What is more, counsel for the appellant did not in his brief comply with the provisions of Order 6 Rule 5(1) which provides, inter alia that

‘The brief, which may be settled by counsel, shall contain what are, in the appellant’s view, the issues arising in the appeal... Equally, if he intends to apply in the course of hearing for leave to introduce a new point not taken in the court below, this should be indicated in his brief’. (Note: Italics mine).

Vide *Uor v. Loko* (1988) 2 NWLR (Pt.77) 430. Appellant’s argument in his brief of Ground 5 is therefore flawed on two grounds. Not only did he not raise the issue in the court below and seek prior leave to do so in this court, but he did not even see fit to seek leave to do so in his brief. Such leave if sought may have been granted by this court on the ground that no further evidence is required to resolve the issue raised for determination. Vide *Attorney-General of Oyo State v. Fairlakes Hotel Ltd.* (1988) 5 NWLR (Pt.92) 1; *Oniah v. Onyia* (1989) 1 NWLR (Pt.99) 514 at 517. The question/issue sought to be raised must also involve a substantial point of law vide *Adedeji v. N.B.N. Ltd* (1989) 1 NWLR (Pt.96) 212 at 214; *Oguma v. I.B.W.A.* (1988) 1 NWLR (Pt.73) 658 at 660.

My learned brother proceeded in the lead judgment to consider Ground 5 on its merits. I frankly do not think it is deserving of such treatment. I however also agree with him that whatever error the learned trial Judge made in wrongfully admitting Exhibit X5, that error did not affect the final decision to which he arrived vide Section 227(1) of the Evidence Act. The learned trial Judge did not also

rely on Exhibit X5 in coming to the decision on the case before him. Rather he relied, and very justifiably so, on Exhibit D. There is therefore no reason at all for disturbing the judgment of the court below which affirmed the judgment of the trial High Court.

5 Accordingly, for the reasons above set out, which have been amplified in greater detail in the lead judgment of Ogundare, J.S.C. I also dismiss this appeal with N1,000 costs in favour of the respondents.

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KUTIGI JSC

15 I have had the privilege of reading before now the draft of the judgment just delivered by my learned brother, Ogundare, J.S.C. I agree with his reasoning and conclusions. The appeal is dismissed with cost as assessed.

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