

SUPREME COURT OF NIGERIA
5TH FEBRUARY, 1993. SC.245/1989

**CORAM:- A. G. KARIBI-WHYTE, A. B. WALI, U. OMO,
I. L. KUTIGI, M. E. OGUNDARE, JJSC**

UCHANCHI ANYIGOR & 5 OTHERS DEFENDANTS/
(for themselves and on behalf of the People of Inyimagu Ikwo) RESPONDENTS

AND

AWOKE OWATA & 3 OTHERS PLAINTIFFS/
(for themselves and on behalf of the People of Igbo Ikwo) APPELLANTS

CIVIL PROCEDURE - Practice and procedure - applicable rule of court - whether the one in force at time of trial - or the one in force at time of application

COURTS - Admission of further evidence on appeal - powers of the Court of Appeal- whether empowered to exercise all powers of the trial court

EVIDENCE - Application to give further evidence on appeal - attitude of court - factors that must be considered - when application will be granted

FACTS

The Plaintiffs brought an action against the Defendants in 1970 claiming inter alia, a declaration of title to a piece of land. Defendants filed a separate action in respect of the same piece of land for claims similar to that of the Plaintiffs. The actions were consolidated and trial was commenced. Both parties pleaded and relied on the judgment in the Agubia Group Civil suit No. 50/51. Defendants claiming that the said previous suit was decided in their favour relied on it in raising the plea of estoppel. Defendants alone led evidence to show effort made to produce that document.

None of the parties could produce the said judgment at the trial. The trial court gave judgment in favour of the Plaintiffs and the Defendants appealed to the Court of Appeal.

Defendants subsequently discovered the said judgment and filed a motion relying on s. 16 of the court of Appeal Act, 1976, for leave to adduce further or fresh evidence. The Court of Appeal granted this prayer. The Plaintiffs then appealed to the Supreme Court against Court of Appeal's ruling. Plaintiffs/Appellants submitted that the applicable rule of Court was the one in force at the time the parties suits were filed at the High Court and not the rule in force at time of the application.

HELD (unanimously dismissing the appeal and approving Court of Appeal's grant of application to receive further evidence)

1. The rule governing practice and procedure is the rule in force at the time the application is made except there is any contrary provision. This is founded on the principle that there is no vested right in any course of procedure. (p. 158 L32)
2. The motion that gave rise to this appeal is distinct from the cause of action between the parties. Since it is not a claim for a substantive right, it is not governed by the principles relating to determination of causes of action. (p. 159 L 31)
3. Under the provisions of the applicable rule, the Court of Appeal has power to receive further evidence only on special grounds. This power is generally exercised reluctantly, sparingly and with great circumspection. (p. 160 L 27)
4. As the purpose of the further evidence sought to be admitted is to supply the missing link in the trial which diligent search did not disclose, the Court of Appeal could not have refused to receive the further evidence discovered. Moreso, when the Defendants had pleaded *res judicata* relying on that judgment now sought to be admitted. (p. 162 L 10)
5. The overriding consideration for the exercise of the power to receive fresh or further evidence is to enable the court exercise at its best and in the interest of justice, the powers vested in it by s. 16 of the Court of Act 1976.

150 ANYIGOR V. OWATA (1993) 3 KLR 148; (1993) 2 NWLR

This provision empowers the Court of Appeal to exercise all the powers of the trial court (p. 162 L 22)

6. It is in the interest of justice to ensure that evidence which ought to be admitted at trial, but was not because diligent search did not lead to its discovery be received in evidence on appeal, when sought to be admitted on its subsequent discovery. This will minimize the prolongation of litigation. (p. 162 L 31)

REPRESENTATION

Chief L.M.E. Ezeofor with Ladi Williams and T.E. Williams for the Appellants.

Emeka Ofodile with C.O. Erondu, and I.C. Azubika for the Respondents.

CASES REFERRED TO:

1. Ukariwa Obasi & anor v. Eke Onwuka & ors (1987) 7 S.C. part 1. 233
 2. Agbajo v. Federal Attorney General (1986) 2 NWLR (pt 23) 528
 3. Uwaifo v. A.G. Bendel State (1982) 7 S.C. 124
 4. Savannah Bank of Nig. Ltd v. Pan Atlantic Shipping and Transport Agencies (1987) 1 NWLR (pt 49) 212
 5. Costa Rica v. Erlanger (1874) 3 Ch. D. 69
 6. Attorney - General v. Sillian (1864) 10 HLC 704
 7. Adeleke v. Aserita (1990) 3 NWLR 94
 8. Asaboro v. Arunwaji (1974) 4 S.C 119
 9. Ladd v. Marshall (1954) 3 All ER 745
 10. Fawehinmi v. The State (1990) 5 NWLR (Pt 148) 42
 11. Nwokoro v. Nwosu (1990) 1 NWLR 679
 12. Rinco Construction Co. v. Veepee Industries Ltd (1990) 6 NWLR 630
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13. Attorney - General of the Federation v. Alkali (1972) 1 S.C. 20

14. Uche v. The State (1986) 3 NWLR (Pt 30) 528

15. Latinwo v. Ajao (1973) 2 S.C. 99

16. Skone v. Skone (1971) 2 All ER 582

STATUTES & RULES:

1. Court of Appeal Act 1976 ss. 16, 8 (3)

2. Supreme Court Act 1960

3. Constitution of the Federal republic of Nigeria 1979, s. 227

4. Federal Court of Appeal (Amendment) Act 1982

RULES

5. Court of Appeal Rules 1981 Order 1 rule 20 (3) (5)

6. Order 3 rule 2 (1) (5) 6. Supreme Court Rules 1961 Order v11 Rule 24

LEAD JUDGMENT BY KARIBI-WHYTE JSC

This appeal is against the ruling of the Court of Appeal, Enugu Division granting respondent leave to adduce further evidence in that court and to amend their pleadings. The facts are straightforward and not contested. The only issue raised by appellant is that the Court below erred in law in relying on the provisions of Order 1 rule 20(3) and (5) of the Court of Appeal Rules and section 16 of the Court of Appeal Act 1976 instead of Order VII rule 24 of the Supreme Court Rules 1961 which it is claimed is the applicable rule.

The facts of this case are that plaintiffs are natives of Igbudu village, Ikwo. Plaintiffs brought an action in 1970 against the defendants, who are natives of Inyimagu village, also of Ikwo. Plaintiffs claimed a declaration of title to a piece of land called Agu Igbudu, N400 general damages for trespass and an order of perpetual injunction restraining the defendants by themselves, agents and servants from crossing the boundary between the two communities. The boundary is verged yellow in plaintiffs, plan No.L/D.316. This action was suit No.AB/3/70.

The defendants on their part, also in 1971 filed an action suit No.AB/6/71 in respect of the same piece of land which they called "Agu Inyinmagu" claiming identical reliefs, except for a sum of N800 as general damages for trespass. They relied on the plan No.MEC/174/71 filed with the statement of claim. Both parties filed and exchanged pleadings.

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The actions were consolidated for trial. The plaintiffs in suit No.AB/3/70 became the plaintiffs in the consolidated action, and plaintiffs in AB/6/71 became the defendants. The action was tried on pleadings and viva voce evidence. Both parties pleaded and relied on the judgment in Agubia 10 Group Civil suit No.50/51. The plaintiffs pleaded the judgment in civil suit No.50/51 of the Agubia Native Court in paragraph II of the statement of claim as follows -

15 *"Each side has resented any encroachment by the other across the boundary. Thus about 1952 the Defendant resisted the attempt of Imeogo Village of Igbudu to settle on Defendant's land known as Uduwa across Ngene Otoneng when they were hit by flood disaster. The Defendants took action in the Agubia Native Court. The matter was finally settled by the then*
 20 *Resident Ogoja Province and the Plaintiffs withdrew to their side thus respecting this traditional and natural boundary. At that time the paramount Chief of Ikwo was Chief Owata Nwedu from Igbudu -the Plaintiffs."*

In paragraphs 6, 7 and 8 of the statement of defence, defendants pleaded as follows -

25 6. *The defendants further say that the concrete pillars INIG 1 to INIG 40 as shown in the defendants plan NO.MEC 174/71 number 1459 form the boundary between the plaintiffs and the defendants and that the pillars were placed there by a licensed*
 30 *Surveyor, Mr. Inyang O. Inyang in 1952 in pursuance of the decision of Agubia Customary Court in Suit No. 1/52/1 and 5/20-40 between Nwanchor Atuma and Elom Nwali for Inyimagu against*
 35 *1. Iluma Egwu 2. Ali Idoke 3. Iganga 4. Nar Eke 5. Ukwa Onyiba 6. Alobu Orogba 7. Oduburu Otubo 8. Nwarie Anyigor 9. Ominyi Nwankpa 10. Ukwa Nwogboji 11. Aligbudu Agum 12. Iggoji 13. Nwanchor Ukwaru 14. Ekechi Iburu 15. Wachukwu Okpokpo and Nworie Ichanchi for the people of Igbudu, which said decision was confirmed on appeal by the then District Officer, Mr. O.P. Gunning and later still on further appeal by the Resident Ogoja Province."*

7. *The defendants also say that the Plaintiffs are estopped from relitigating over the area in dispute and/or the subject-matter of this action by virtue of the above mentioned decision which led to the award of the area in dispute to the defendants and/or any of their representatives.*

8. *The defendants have made several abortive attempts through the Agubia Customary court, the Residents Office. and Mr. Inyang O. Inyang to obtain a certified true copy of the said judgment and plan but they all complained that the relevant documents were lost during the Nigerian Civil War. The defendants will call witnesses to support this averment, and to establish that judgment was given in their favour."*

Consistent with their pleading the defendants called as the 3rd defendant's witness, Chukwuka Igwebuike, the Archive Assistant, at the National Archives. Enugu who testified as follows -

"I was authorised by the Controller of Archives to give evidence in this case. I received a letter of inquiry from Barrister Ebele Nwokoye about a judgment between Inyimagu and Igbudu people. We were not able to trace any judgment in our office from Agubia Native Court. There is no Native Court records from the whole of Abakaliki province in the National Archives at Enugu:"

He was not cross-examined.

The 4th defendant's witness Umangi Amiara gave evidence about the litigation between the parties including the judgment relied upon by the parties. Defendants alone gave evidence of the effort made to produce the judgment. At the trial none of the parties could produce the judgment relied upon. The trial Judge gave judgment in favour of the plaintiffs. The defendants who were dissatisfied with the judgment appealed to the Court of Appeal. The first appeal to the Court of Appeal was dismissed on the grounds of want of diligent prosecution. Defendants further appealed to the Supreme Court. The judgment of the Court of Appeal was set aside on the ground that the motion to dismiss the appeal was not served on the appellants, or their counsel. The appeal was then sent back to the Court of Appeal for hearing on May 9, 1988.

It was on this occasion that defendants/appellants discovered the record of proceedings relating to the land pleaded and relied upon by the parties at the trial. Accordingly learned counsel to the appellants/defendants considered it necessary to plead the record of proceedings. In doing so it was considered also relevant and important to amend the statement of defence. Appellant then brought a motion on notice to the respondents, relying on the inherent jurisdiction of the court, and pursuant to Order 3 rule 2(1) and (5) of the Court of Appeal Rules 1985, and Order 1 rule 20(3) & (5) of the same Rules and section 16 of the Court of Appeal Act, 1976, for:

- 10 (a) *accelerated hearing of the motion*
- (b) *to amend the notice and grounds of appeal*
- (c) *granting leave to the Appellants/Applicants to adduce further or fresh evidence in this appeal*
- 15 (d) *leave to amend paragraphs 6 of their statement of defence and paragraphs 8 and 13 of their statement of claim.*

The defendants/appellants, having obtained certified true copies of the judgment relied upon from the National Archives, now sought to adduce further evidence by tendering the judgment. The Court of Appeal granted the application. Plaintiffs, then brought this appeal against the ruling granting leave to adduce further evidence and to amend their pleadings on 11th July, 1989,

25 The grounds of appeal, including particulars of errors are as follows

Grounds of Appeal

- 30 "1. *The lower Court erred in law in relying on Order 1 rule 20(3) and (5) of the Court of Appeal Rules 1981 and Section 16 of the Court of Appeal Act 1976 instead of Order VII rule 24 of the Supreme Court Rules 1961 which is the applicable rule in granting leave to the respondents to adduce further evidence of the record of proceedings in suit No. 50/51.*

35 Particulars of Error

- (a) *The judgment in this case was given in 1974 and appeal against the judgment was filed in 1974, As at that time the applicable*

rules of court was the Supreme Court Rules 1961 it was not the right of the applicant to adduce new evidence but only in exceptional circumstance the court may grant an applicant leave to adduce new evidence. See the cases of:

Ukariwo Obasi & anor.v. Eke Onwuka & ors (1987) 3 NWLR (Pt.61) 364, 5 (1987) 7 S.C. part 1 page 233 at pages 252 to 254;

Agbajo v. Federal Attorney General (1986) 2 NWLR (Pt.23) page 528,

(b) Under Order 1 rule 20(3) (5) of the Court of Appeal Rules 1981 the court shall have power to receive further evidence on question of fact The 1961 and 1981 Rules of Court are not the same, The 1981 Court of Appeal Rules is wider than the 1961 Supreme Court Rules,

2. The Lower Court misdirected itself in law in holding that the applicants made sufficient effort to get a copy of the judgment of the 1950/51 Native Court case when there was no such evidence in the Record of Proceedings to support the same apart from the evidence of Archives' Assistant Chukwuka Igwebuike to the effect that 'We are not able to trace any judgment in our office from Agubia Native Court. There is no Native Court Records for the whole of Abakaliki Province at the National Archives Enugu at page 133 of the Record of Proceedings,

(a) There is no witness who testified as to the effort they made in getting the copy of the judgment or as to the effect of the Civil War as stated by the Lower Court at page 4 of the ruling.

(b) There is no evidence as to how the respondents were able to get the certified copy of the Record of Proceedings of suit No.50/51 from the National Archives Enugu in spite of the prior evidence of Igwebuike aforesaid.

3. The Lower Court erred in law in granting the respondents leave to amend the statement of defence and statement of claim under Order I rule 20(1) of the Court of Appeal Rules 1981 and Section 16 of the Court of Appeal Act 1976 when there is no such provision in the Supreme Court Rules 1961 which is the applicable law.

Particulars of Error in Law

Under Order 1 rule 20(1) of the Court of Appeal Rules 1981 the Court of Appeal has all the powers and duties as to amendment and otherwise of the High Court, but there is no such power granted to the Court of Appeal
5 *under the Supreme Court Rules 1961 which is the applicable Rule of Court.*

It is contended that for the Lower Court to grant the respondents the leave to adduce further evidence and amend their pleadings, such power must exist in the Supreme Court Rules 1961."
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Learned counsel filed and exchanged briefs of argument. Chief Ezeofor for the appellant in his brief of argument formulated 8 issues for determination from the three grounds of appeal. I reproduce below the issues so formulated notwithstanding the irrelevance of a number of them to the grounds
15 of appeal from which they have been formulated. Besides irrelevance, prolixity is not generally a merit in the formulation of issues for determination. Appellants' issues for determination are as follows-

Issues/Questions for Determination

20

"2.1 What is the applicable law to be applied by the Court of Appeal in considering whether or not to grant the defendants/appellants/ respondents leave to adduce further evidence? Is the applicable law the Supreme Court Act 1960 and Order VII Rule 24 of the
25 *Supreme Court Rules 1961 or the Court of Appeal Act 1976 and Order I Rule 20(3) of the Court of Appeal Rules 1981?*

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2.2 Is there any material difference between Order VII Rule 24 Supreme Court Rules 1961 and Order I Rule 20(3) Court of Appeal Rules 1981?

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2.3 If there is any difference between the two Rules has any miscarriage of justice occurred by applying Order I Rule 20(3) Court of Appeal Rules 1981 as against Order VII Rule 24 Supreme Court Rules 1961?

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2.4 Did the defendants/appellants/respondents satisfy the requirements for adducing further evidence on appeal as envisaged in Order VII

Rule 24 to warrant the Court of Appeal granting them leave to adduce further evidence on appeal?

2.5 *Assuming but not granting that Order I Rule 20(3) of the Appeal Court Rules 1981 is applicable, have the respondents satisfied the requirements of that Order for adducing further evidence on appeal?* 5

2.6 *Is there any provision in the Supreme Court Rules 1961 for amending the pleadings in the High Court as is provided for in Order I Rule 20(1) of the Court of Appeal Rules 1981?* 10

2.7 *What is effect of the absence of a provision granting power to amend the pleadings in the lower court in the Supreme Court Rules 1961?* 15

2.8 *Did the respondents satisfy the requirements for amending the pleadings before the Court of Appeal granted them leave so to do?"*

It could be seen that apart from 2.1 which stands alone, 2.2 and 2.3 are clearly irrelevant and not related to the grounds of appeal relied upon. Issue 2.4 and 2.5 can be formulated into one issue relating to the preconditions for granting leave to the provision for amending pleadings in Order 1 Rule 20(3) of the Court of Appeal Rules 1981, and the Supreme Court Rules 1961. 25

On the other hand the formulation of the issues for determination by learned counsel to the respondent are consistent with and cover the grounds of appeal from which they are formulated. They are as follows -

3.01 Were the learned Justices of the Court of Appeal right in receiving the certified copies of the Agubia Group Court judgment in suit No.50/51 as well as the appeal proceedings therefrom as further evidence on appeal? 30

3.02 Has the Court of Appeal jurisdiction to grant an amendment to the pleadings filed at the court of trial? 35

3.03 What is the applicable law to be applied by the Court of Appeal in considering whether or not to grant the defendants/appellants/respondents leave to adduce further evidence?"

5 I prefer the formulation of the issues for determination by learned counsel to respondent. They cover all the issues raised in the grounds of appeal. They are neither prolix nor repetitive. I will therefore adopt them in the determination of this appeal.

10 I find it convenient to consider issue 3.03 first, which raises the question of the applicable law in granting leave to adduce further evidence in this appeal.

Chief Ezeofor has argued in his brief of argument and orally before
15 us that the rule of Court applicable to the grant of leave to adduce further evidence is Order VII rule 24 Rules of the Supreme Court 1961 and not Order 1 rule 20(3) of the Court of Appeal Rules 1981. This submission was founded on the consideration that the cause of action arose about 1967 and the judgment was delivered in 1974. Learned counsel cited and relied
20 on *Agbajo v. A.G for the Federation* (1986) 2 NWLR (Pt.23) 528; *Uwaifo v. AG. of Bendel State* (1982) 7 SC.124 (1983) 4 NCLR 1; *Savannah Bank of Nigeria Ltd. v. Pan Atlantic Shipping & Transport Agencies Ltd.* (1987) 1 NWLR (Pt.49) 212.

25 It seems to me that Chief Ezeofor's contention is founded on the well settled law that the action is governed by the law applicable, and in force at the time the cause of action arose. In this proposition he is on firm ground. All the decided cases cited and relied upon by Chief Ezeofor were decided on this principle. It is however not the same principle when the
30 procedure governing the action is being considered. There is a clear distinction between the substantive law applicable, and the rule of law governing practice and procedure.

It is similarly well settled that the rule governing practice and pro-
35 cedure is the rule in force at the time of the trial or the application is heard, unless there is any provision to the contrary. This is based on the principle that there is no vested right in any course of procedure - See *Costa Rica v. Erlanger* (1874) 3 Ch.D.69.

A litigant only has the right to rely on the procedure prescribed for the time being. Where the procedure is altered, he must proceed according to the altered manner. See *Att.-Gen. v. Sillem* (1864) 10 HLC.704.

5

The Court of Appeal Act No.43 of 1976 came into force on the 1st October, 1976. Section 8(3) of the Act provided that until rules are made under this section, the rules in force in the Supreme Court at the time of the commencement of this decree shall be deemed to have been made under this section "

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At the commencement of this Decree on 1st October, 1976, the Supreme Court Rules 1961 was in force in the Court in accordance with the above mentioned provision. Section 8(2) of the Court of Appeal Act No.43 of 1976 empowered the President of the Court to make rules regulating the practice and procedure of the Court. On the coming into force of the Constitution 1979 on Oct. 1 1979 section 227 therein conferred powers on the President of the Court of Appeal with the approval of the President of the Country to make rules for regulating the practice and procedure of the Court. In exercise of powers under section 227 of the Constitution, the President of the Court of Appeal made rules regulating the practice and procedure in the Court of Appeal and which came into force on the 1st day of July, 1981.

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The Federal Court of Appeal (Amendment) Act, 1982 which came into force on the 15th July, 1982, repealed sub-section (3) of section 8 of the Federal Court of Appeal Act No.43 of 1976, which introduced the application of the Supreme Court Rules 1961 for the regulation of practice and procedure in the Court of Appeal. Thus as from 1st July, 1981, the Supreme Court Rules 1961 ceased to apply in the Court of Appeal. The Federal Court of Appeal Rules 1981 became the rules applicable for regulating practice and procedure in that Court.

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The motion subject matter of the ruling which gave rise to the appeal before us, was dated 24th February, 1989. It is a distinct proceeding from the cause of action between the parties. It is not a claim for a substantive right and is therefore not governed by the principles relating to determination of causes of action. It is an application in the proceedings for the determination and enforcement of the substantive right in the claim before the Court. It was not intended for the definition or determination of the substantive right.

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In a more concise sense it is for regulating of steps in the action and retrieval of errors and defects in the substantive action.

The rules of practice and procedure are the rules and practice in operation at the time the application was being heard. In the instant case it is the Court of Appeal Rules 1981.

Learned counsel to the appellant was clearly wrong in his contention that Order VII rule 24 Rules of the Supreme Court 1961 applicable when the substantive action was brought and the President of the Court of Appeal had not made rules of practice and procedure was still applicable after 1st July, 1981, when the President of the Court had made such rules. The first issue is whether the Court of Appeal has the jurisdiction to receive the certified true copies of the Agubia Group Court judgment in suit No.50/51 as well as the appeal proceedings as further evidence on appeal.

15

In addition to the general powers of the Court provided in order 1 rule 20(1),sub rule (3) of the rule 20 of Order 1 provides as follows -

"(3) The Court shall have power to receive further evidence on questions of fact either by oral examination in court by affidavit, or by deposition taken before an examiner or commissioner as the court may direct, but in the case of an appeal from a judgment after trial, or hearing of any cause or matter on the merits, no such evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted, except on special grounds."

25

It appears from the provisions of this rule that the court is entitled to exercise its discretion where

- (a) the matter on appeal has not been heard on its merits in the trial Court, or
- (b) the appeal is from a judgment after trial or hearing on the merits.

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In the first case the court has the power to receive further evidence on questions of fact in the manner provided. In the second case, further evidence is only received on special grounds. See *Adeleke v Aserifa* (1990) 3 NWLR (Pt.136) 94. The power vested in the court by these rules to receive fresh evidence or further evidence is generally exercised reluctantly, sparingly and with great circumspection.

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This is because of the risks involved in allowing a person to reopen an issue

after it has been decided on the excuse that new facts which could have been discovered and relied upon and used at the trial have now been found. It is likely to prejudice the position of the other party and result in the miscarriage of justice.

The Court however will exercise the power in all cases where the appellant has brought his case within the conditions prescribed in the rules and on the facts of the case, the interest of justice demands that the evidence be received. The rule has provided that fresh or further evidence will be admitted on special grounds.

10

Analysis of decided cases disclose that the courts have relied on the following principles, where:

First, the evidence sought to be adduced should be such that could not have been obtained with reasonable care and diligence for use at the trial - see *Asaboro v. Aruwaji* (1974) 4 SC.119, where the evidence was not within easy reach. The records kept by the Companies Registry was not open most of the time during the period.

Secondly, if the fresh evidence is admitted it would have an important, but not necessarily crucial effect on the whole case. - see *Ladd v. Marshall* (1954)3 All ER.745 .

Thirdly, if the evidence sought to be tendered is such that is apparently credible in the sense that it is capable of being believed even if it may not be incontrovertible - see *Obasi v. Onwuka* (1987) 3 NWLR (Pt.61) 364.

Fourthly, additional evidence may be admitted if the evidence sought to be adduced could have influenced the judgment at the lower court in favour of the applicant, if it had been available at the trial Court- See *Fawehinmi v. State* (1990) 5 NWLR (Pt.148) 42.

Fifthly, the evidence should be material and weighty even if not conclusive. Where evidence sought to be admitted is irrelevant and immaterial it will be Rejected, - See *Nwokoro v. Nwosu* (1990) 6 NWLR 679. *Rinco Construction Co. v. Veepee Industries Ltd*, (1990)6 NWLR (Pt. 158) 35 630, *Adeleke v. Aserifa* (1990) 3 NWLR (Pt. 136) 94.

I have already set out in this judgment, the pleadings of the par-

ties, and the effort by the respondent, in the trial court to obtain certified true copies of the judgment sought to be admitted. At the trial, defendants called the Assistant Archivist as a witness to testify to the unsuccessful effort they made to trace the judgment. The judgment and the proceedings have now been discovered. It will be inequitable not to receive it in evidence. This is the more so when both sides referred to it and relied on it in their pleadings. It will certainly not prejudice the opponent.

10 The purpose of the application to receive the further evidence sought to be admitted is to supply the missing link in the trial which diligent search did not disclose. Defendants had pleaded *res judicata*, relying on the judgment sought to be admitted.- See para.7 of statement of defence. In the circumstances of this case the judgment being material and relevant, the
15 Court of Appeal could not have refused to exercise its discretion in favour of the appellant/applicant to receive the further evidence discovered.-See *Attorney-General of the Federation v. Alkali (1972) 12 S.C.29 Uche v. State (1986) 3 NWLR. (Pt.30) 528*. The judgment having been pleaded and relied upon by both parties, the Court of Appeal was right to have
20 received it. See *Latinwo v. Ajao (1973) 2 SC. 99*.

The overriding consideration for the exercise of this general power to receive further evidence or fresh evidence is to enable the court to exercise to its optimum and in the interest of justice, the powers vested in it by
25 section 16, of the Court of Appeal Act 1976. By virtue of section 16, the Court of Appeal can exercise all the powers of the trial court. It can amend any defect or error in the record of appeal and generally shall have full jurisdiction over the whole proceedings as if the Court of Appeal is a Court of first instance.

30 I think it is in the interest of justice, the efficient and effective administration of justice, and to minimise the prolongation of litigation, to ensure that evidence which ought to be admitted, at the trial, but was not because diligent search did not lead to its discovery, is received in evidence
35 on appeal when subsequently discovered, and is sought to be admitted. The maxim *interest rei publicae ut sit finis litium* is not only a statement of public policy it is a principle of justice of undoubted relevance in all cases.

It will not be justice to refuse to receive relevant and material evidence relied upon by both parties.

The Court of Appeal was right to have granted the application to receive the further evidence. For the reasons I have given in this judgment, this appeal lacks merit and is hereby dismissed. Appellant shall pay costs assessed at N1,000 to the respondents.

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WALI JSC

I have had a preview of the judgment of my learned brother Karibi Whyte, J.S.C. and I agree with his conclusion that the appeal lacks merit. 15

As stated in the lead judgment, the applicable rules of court applicable to the adduction of additional evidence, is the operative rules of court at the time the application is made, hence in the present case, the Court of Appeal Rules, 1981 (as amended) was properly applied by the Court of Appeal. The principle upon which evidence can be allowed to be produced has been stated in several decisions of this court. See in particular *Obasi & Ors v. Onwuka & Ors* (1987) 3 NWLR (Pt. 61) 361, (1987) 2 NSCC 981 at 985 where this court in interpreting Order 1 rule 20(3) of the Court of Appeal Rules, 1981 restated the circumstances upon which the Court of Appeal will permit the reception of additional evidence. These are - 20 25

1. The evidence to be adduced is such as could not have been obtained with reasonable care and diligence for use at the trial. 30

2. The fresh evidence is such that if admitted would have an important but not necessarily crucial effect on the whole case.

3. The evidence sought to be tendered on appeal is such as is apparently credible in the sense that it is capable of being believed. It needs not necessarily be incontrovertible. 35

In my view all these conditions were satisfied by the respondents in the Court of Appeal and that court was perfectly right in receiving the certified true copies of Agubia Group Court judgment in suit No.50/51 as well as the

appeal proceedings therefrom as further evidence.

The Court of Appeal was also right in the circumstances of this case to use its powers under section 16 of the Court of Appeal Act, 1976 in granting leave to the respondents to amend their pleadings.

5 For these reasons and the further reasons given in the lead judgment, I also hereby dismiss this appeal and affirm the decision and orders of the Court of Appeal. I award N1000.00 costs to the respondents.

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OMO JSC

15 I have had the opportunity of reading in draft the judgment of my learned brother, KARIBI-WHYTE, J.S.C. in this appeal with which I am in entire agreement, and adopt as mine. I have nothing useful to add thereto.

Accordingly, I also dismiss this appeal as lacking in merit. I also award N 1,000 costs to the respondents.

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KUTIGI JSC

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This is an interlocutory appeal against the judgment of the Court of Appeal, Enugu granting leave to the applicants/respondents to adduce further evidence and to amend their pleadings.

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35 The facts which are not disputed are as stated in the lead ruling of my learned brother Karibi-Whyte J.S.C. I agree entirely with the submission of Mr Ofodile learned counsel for the respondents that the operative rule governing practice and procedure is the rule in force at the time of trial or of making the application unless there are provisions in the said rule to the contrary. In the instant case the Court of Appeal Rules, 1981 applied.

Order 1 Rule 20 sub-rule 3 of the said Rules empowers the Court of Appeal to receive further evidence on appeal. It states thus -

"20(3) *The Court shall have power to receive further evidence on questions of fact either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner as the court may direct, but in the case of an appeal from a judgment after trial or hearing of any cause or matter on the merit, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds.*" 5

This rule as rightly stated in the lead ruling of Uwaifo J.C.A. (con- 10
 curred by Katsina -Alu and Oguntade JJ.C.A.) is in pari materia with the Rules of the Supreme Court of England - Order 59 rule 10(2) - which had been interpreted in the case of Ladd v. Marshall (1954) 3 ALL ER 745 at 748, approved in Skone v. Skone (1971)2 ALL ER 582 at 586 and fol- 15
 lowed by this Court in the Attorney General of the Federation v. Alkali (1972) 12 SC..29, Asaboro v. Aruwaju (1974) NMLR 414, Obasi & Ors v. Onwuka & Ors (1987) 3 NWLR (Pt.61) 364, (1987) 2 NSCC 981 just to mention a few.

A careful reading of these authorities show that in civil cases the 20
 court will allow further or fresh evidence in furtherance of justice under the following conditions:

1. *It must be shown that the evidence sought to be adduced could not have been obtained with reasonable diligence for use at the trial.* 25
2. *The fresh evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive.* 30
3. *The evidence must be such as is presumably to be believed or in other words it must be apparently credible although it need not be incontrovertible.* 35

These three conditions must all be satisfied together and at the same time. And I am not aware of any decision of this Court that has in any way modified or even attempted to modify any of the above conditions. The Court of Appeal considered the three conditions and rightly in my view granted the prayer sought.

On the whole I think the Court of Appeal was properly guided in the exercise of its discretion to grant the application. There is no reason to interfere.

Subject to what I said above on the conditions for allowing further evidence on appeal, I agree with the lead judgment of my learned brother Karibi- Whyte J.S.C. which I was privileged to read in draft. The appeal is dismissed with N1,000 costs against the appellants.

OGUNDARE JSC

I have had the advantage of a preview of the judgment of my learned brother, Karibi- Whyte, J.S.C just delivered. I agree with him that Order 1 rule 20(3) of the Court of Appeal Rules, 1981 and section 16 of the Court of Appeal Act applied to the case on hand rather than Order VII rule 24 of the Supreme Court Rules 1961, as contended by learned counsel for the appellants. The court below was right in applying those provisions and not the Supreme Court Rules. 1961.

Order I rule 20(3) apart, section 27 of the Court of Appeal Act empowered the court below to adopt the course it took. The section provides:

"27. In the exercise of its jurisdiction, the Court of Appeal may, if it thinks it necessary or expedient in the interest of justice -

(a) order the production of any document, exhibit, or other thing connected with the proceedings, the production of which appears to it necessary for the determination of the case;

(b) order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court of Appeal, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of court or in the absence of rules of court making provision in that behalf, as it may direct, before any Justice of the Court of Appeal or before any officer of the Court of Appeal or other person appointed by the Court of Appeal for the purpose and allow the admission of any depositions so taken as evidence before the Court of Appeal;

(c) receive the evidence, if tendered, of any witness (including the appellant) who is competent but not compellable witness, and if the appellant makes an application for the purpose, of the husband or wife of the appellant, in cases where the evidence of the husband or wife could not have been given at the trial except on such an application; 5

(d) and where any question arising on the appeal involves prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in the opinion of the Court of Appeal conveniently be conducted before the Court of Appeal, order the reference of the question in matter provided by rules of Court, or in the absence of rules of court making provision in that behalf, as it may direct, for enquiry and report, to a special commissioner appointed by the Court of Appeal, and act upon the report of any such commissioner so far as it thinks fit to adopt it, and exercise in relation to the proceedings of the Court of Appeal, any other powers which may for the time being be prescribed by rules of court, and issue any warrants necessary for enforcing the orders or sentences of the Court of Appeal:" 10 15

The proviso is inapplicable here. 20

Thus, the court below is endowed with wide powers to order, as it did, the production in evidence of the judgment of the Native Court pleaded by both parties but which neither produced at the trial, for the reason in the case of the defendants, that diligent search failed to ensure production until after judgment had been given by the trial court. With profound respect to learned counsel for the plaintiffs/appellants I find no substance in his argument that it is the Supreme Court Rules 1961 that apply and not the Court of Appeal Rules, 1981. 25 30

I dismiss this appeal; it is completely bereft of any merit. I abide by the order for costs made in the lead judgment of my learned brother Karibi-Whyte, J.S.C. 35