

SUPREME COURT OF NIGERIA
26TH FEBRUARY, 1993. SC. 151/1991
CORAM:- A.G. KARIBI-WHYTE, S. KAWU,
S.M.A. BELGORE, P. NNAEMEKA-AGU, U. OMO, JJSC.

FRANCIS NWANEZIE 1ST DEFENDANT/APPELLANT
AND

NUHU IDRIS PLAINTIFF/1ST RESPONDENT

ABBA DABO 2ND DEFENDANT/2ND RESPONDENT

*INTERLOCUTORY
APPLICATIONS*

- Application for leave to adduce additional evidence - attitude of court thereto - additional evidence to show lack of jurisdiction - when application will be granted - court's discretion - how exercised.

JURISDICTION

- Of the Supreme Court - whether extended to judgment of the High Court - or limited to Court of Appeal's decisions.

JURISDICTION

- Point of law - raising the issue of jurisdiction on appeal - whether proper at that stage - subject matter of action - when not within court's jurisdiction - whether such proceedings can stand.

STATUTES

- Statutory provisions - deemed superior to a rule of court made under a statute - unambiguous provisions of applicable statute whether preferred to a provision under court rules.

FACTS

The 1st Respondent as Plaintiff claimed declaration of title to two plots of land against the Defendants (now Appellant & 2nd Respondent) before the Upper Area Court, Kaduna. The Plaintiff was not represented by Counsel whilst the Appellant (then 1st Defendant) was represented by Counsel. Judgment was delivered in favour of the Defendants. Plaintiff being dissatisfied appealed against the trial court's decision to the High Court, being now represented by Counsel.

Plaintiff's Counsel filed an application before the appellate High Court seeking for leave to adduce additional evidence for purposes of showing want of jurisdiction in the trial court. It was averred that Plaintiff not being represented by Counsel could not have envisaged the evidence as to lack of jurisdiction now sought to be tendered. The appellate High Court granted Plaintiff's application.

The 1st Defendant being dissatisfied appealed to the Court of Appeal which dismissed his appeal, upholding the ruling of the appellate High Court. 1st Defendant has now further appealed to the Supreme Court. The Supreme Court has to determine whether there is in existence the conditions which ought to be fulfilled before an appellate court could grant leave to adduce additional evidence. Whilst the Plaintiff relied inter alia, on the provisions of s. 59(2) of the Area Courts Edict, 1967, in his successful prayer for leave to adduce additional evidence, the 1st Defendant/Appellant relied on Order 7 rule 24 of the Supreme Court Rules, 1961, in urging that the leave was wrongfully granted.

HELD (unanimously dismissing the appeal)

1. The Supreme Court can only exercise jurisdiction in respect of decisions of the Court of Appeal. Ground of appeal and issue questioning correctness of the judgment of the High Court is therefore, outside the jurisdiction of the Supreme Court.

(P. 57 L. 17)

2. A party is expected to present all the evidence he relies upon for his case at the trial. Consequently, the courts have always been reluc

tant to grant leave to adduce new or further evidence on appeal.
(p. 58 L. 27)

3. Only new or additional evidence which was not available at the time of trial could be allowed on appeal for it is in the interest of justice to avoid the incidence of protracted proceedings.
(p. 59 L. 11)

4. In the exercise of its appellate civil jurisdiction from Area Courts, the High Court is vested with the discretion under the applicable Edict to hear such additional evidence as it considers necessary for the just disposal of the case. And exercise of judicial discretion must be on grounds of recognised and accepted principles as may be governed by the peculiar facts of each case. (p. 60 L. 36)

5. S. 59 of the Area Courts Edict being a statutory provision is superior in status to a rule of Court made under a statute. Since the unambiguous words of the said s. 59 (2) make reference to “additional evidence” the decisions on the construction of the different expression in Order 7 rule 24 of the Supreme Court Rules 1961, which speak of “new evidence” would seem not applicable. And the High Court is not bound by decisions on the said order. (p. 63 L. 11)

6. In the instant case, it was in the interest of justice proper and necessary to grant leave to adduce additional evidence as was done by the appellate High Court, for the purpose of establishing absence of jurisdiction at the trial court. (p. 63 L. 25)

7. It is not his being a layman per se (i.e. not a lawyer) that entitles the applicant to the grant of leave to adduce additional evidence. Rather, it is the fact that such evidence could not have been discovered even by reasonable diligence. (p. 64 L. 28)

8. Where the challenge to the decision of the trial court is founded on lack of jurisdiction, the appellate court is bound to consider such evidence which goes to the root of the matter towards showing that the court has acted without jurisdiction. (p. 64 L. 32)

9. A party to a litigation and the court cannot on technical grounds be shut out or precluded from receiving evidence showing a court's decision was given without jurisdiction, since the issue of jurisdiction is fundamental to the proper hearing of a cause. (p. 65 L. 1)

REPRESENTATION:

B. Aluko Olokun for the Appellant.

S.Y. Arabo for the Respondents.

CASES REFERRED TO

1. Attorney-General of the Federation v. Alkali Amodu (1972) 12 SC. 29

2. Buraimoh v. Bamgbose (1989) 3 NWLR (pt. 109) 352 SC

3. Inland Revenue v. Rezcallah (1962) All N.L.R. 1

4. Enekebe v. Enekebe (1964) IM.M.L.R. 43

5. Obasi v. Onwuka & anor (1987) 7 S.C.N.J. 84 & (1987)3 N.W.L.R.

52 Nwanezie v. Idris (1993) 3 KLR Karibi-Whyte JSC
364.

6. Akanbi v. Alao (1989) 3 N.W.L.R. (pt 108) 118
7. Severino v. Witt & Busch (1911) 2 N.L.R. 77
8. G. Gottschalck & Co. v. Elder Dempster & Co. Ltd. (1917) 3
- 5 N.L.R. 16
9. Edie Maud Leeder v. Nancy Ellis (1953) A.C. 52
10. Asaboro v. Aruwaji (1974) 4 S.C. 119
11. Ariran v. Adepoju (1961) All N.L.R. 722
- 10 12. Orubu v. N.E.C. (1988) 5 N.W.L.R. (pt 94) 323
13. Williams v. Williams (1987) 2 N.W.L.R. (pt 54) 66
14. Ekwunife v. Wayne (W.A.) Ltd. (1989) 5 N.W.L.R. (pt 122) 422
15. Adeigbe v. Kushimo (1965) 1 All N.L.R. 248
16. Madukolu v. Nkemdilim (1962) 1 All N.L.R. 584.

15

STATUTES & RULES

1. Area Courts Edict 1967 s. 59 (2)
2. Land use Act 1978
3. High Court (interlocutory applications-in Appellate Matters) Rules
- 20 1956, rule 2
4. High Court (Appeals from Native Courts) Rules 1960 Order 11
rule 9
5. High Court (Civil Procedure) Rules 1987. Order 8 rule 1
- 25 6. Supreme Court Rules 1961 Order 7 rule 24.

LEAD JUDGMENT BY KARIBI-WHYTE JSC

30 On the 18th June, 1990, the Court of Appeal in a unanimous decision dismissed the appeal of the appellants. This is an appeal against the judgment. The appeal arose from an interlocutory ruling of the High Court dated 19/1/89 granting leave to the defendant to adduce additional/further evidence on appeal.

35 The facts of the case are quite simple, uncomplicated and short. They are also not disputed.

The substantive action is a claim in the Upper Area Court Daura Road, Kaduna in a land dispute. It was a claim for Declaration of title

to two plots of land situate at Ungwar Sunday, Kaduna South, Kaduna. First respondent was the plaintiff. Appellant and second respondent were the defendants. Plaintiff, now the first respondent was not represented by counsel. So also the 2nd defendant, now 2nd respondent. 1st defendant, now appellant was represented by counsel. After hearing evidence of the parties, judgment was delivered in favour 5 of the defendants, that is appellant and 2nd respondent.

Plaintiff dissatisfied, appealed against the decision to the High Court. This time he was represented by counsel, Dogara Mallam, 10 Esq.

Sequel to the notice of appeal, learned counsel for the plaintiff brought a motion to the High Court under rule 2. of the High Court (Interlocutory Applications in Appellate Matters) Rules, 1956, Order 11 rule 9 of the High Court (Appeals from Native Courts) 15 Rules, 1960, section 59(2) of the Area Court's Edict, 1967, Order 8 rule 1 of the High Court (Civil Procedure) Rules 1987, and in the inherent jurisdiction of the Court for the following orders-

"(a) An order of the High Court to hear additional evidence in the above-named suit namely evidence to prove that the 20 disputed plots and the above-named suit are lying and situate at Ungwar Sunday, Kaduna South and are within Kaduna Urban Area by virtue of the Kaduna State (Designation of Land in Urban Area) Order, 1980, Legal Notice No.8 of 1980 25 (as amended).

(b) Such further or other Orders as this Honourable Court may deem fit to make in the circumstances".

There is no doubt the leave to adduce additional evidence was being sought to enable appellant argue the additional ground of appeal, on want of jurisdiction in the trial court. Applicant brought another motion seeking to file additional grounds of appeal in the appeal. The two additional grounds of appeal sought to be filed, read:

Ground 1.

The decision of the trial Upper Area Court is unreasonable, 35 unwarranted and cannot be supported having regard to the weight of the evidence.

Ground 2.

The trial Upper Area Court erred in law by hearing the case when it had no jurisdiction to do so.

Particulars of Error.

The two plots in dispute being and lying at Ungwar Sunday, Kaduna South, are by virtue of the Kaduna State Legal Notice No. KDSLNNP 8 of 1980 made under the Land Use Act 1963 and titled Kaduna State (Designation of Land in Urban Areas) Order 1980 (as amended) are within an Urban Area and by reason whereof outside the jurisdiction of the Upper Area Court or the trial Court under the provisions of the Land Use Act 1978.”

In paragraphs 6, 7, 8 of the affidavit in support of the motion appellant/applicant deposed to reasons why the evidence now being sought to be adduced was not tendered at the trial. It was deposed to as follows:-

“6. That at the trial Upper Area Court where the appellant/applicant’s case was heard at first instance he was not represented by a counsel.

7. That the appellant/applicant not being a lawyer could not have envisaged such evidence that is now being sought to be tendered at the High Court of Justice.

8. That the second ground of appeal of the appellant/applicants proposed additional grounds of appeal alleged that the trial Upper Area Court had no jurisdiction to hear the case in the first instance as such evidence of lack of jurisdiction is necessary. A photo-copy of the proposed additional grounds of appeal is annexed herewith and marked Exhibit’ A’.

The appellate High Court granted the application. The 1st defendant, in the Upper Area Court, who was the 1st respondent in the appellate High Court, dissatisfied with the decision, gave notice of appeal to the Court of Appeal. He filed only one ground of appeal which reads -

“(1) That the Ruling is erroneous in that it did not consider the argument put forward by the Respondent’s Counsel in relation to the principles to consider in allowing a new ground to be argued on appeal.

Particulars

(a) That the learned Judges erred when in granting leave to argue a new ground of appeal not raised in the Court below, they said. 'That the issue of jurisdiction can be raised at any stage of the proceeding or in any Court' when that was not in issue before them. 5

(b) The argument of the 1st Respondent's Counsel to the effect that the Court should not grant the leave since additional evidence must be led was not considered in the said ruling" 10

Subsequently learned Counsel to the appellant sought and was granted leave to amend the notice of appeal, to read as follows:

"The Ruling of the Kaduna High Court is erroneous in that the conditions which ought to be fulfilled before an Appellate Court could properly grant a request for leave to adduce additional evidence were not met in the application before the High Court in that it was not shown that the additional evidence sought to be adduced was not available or could not have been available through the use of reasonable diligence at the trial Court. 15 20

Parties filed and exchanged briefs of argument. They both adopted the briefs of argument so filed and exchanged and relied on them in their oral argument before the Court. The Court below, dismissed the appeal of the appellant and affirmed the ruling of the appellate High Court. In a further appeal to this Court, appellant again filed one ground of appeal raising the same issues as was raised and determined in the Court below. The ground of appeal reads:- 25 30

"The Court of Appeal erred in law in not applying the principle in the case of Attorney-General of the Federation v. Alkali Modu (1972) 12 S.C. 29 which was cited to it and extending the matters which are to be taken into consideration in considering whether or not to grant leave to adduce additional evidence on appeal as laid down by the Supreme Court by deciding that it can be granted although the evidence was existing during the trial the first respondent was not in a position to adduce it without giving any reason why the 1st respondent was not in a position to adduce it when there was no 35

allegation or proof that he could not with reasonable diligence and care obtain the evidence sought to be adduced at the trial."

Appellant sought and was on the 23rd October, 1990 granted by the Court below an order for stay of proceedings before the High Court pending the determination of the appeal to this Court.

Learned counsel filed and exchanged briefs of argument on behalf of the parties. Mr. Aluko-Olokun for the appellant formulated two issues from the only ground of appeal filed.
The issues are as follows:

- "1. Whether the 1st Respondent fulfilled the conditions which ought to be met before an appellate court can grant leave to adduce additional evidence on appeal.*
- 2. Whether the fact that a party to a suit in a trial Court is a layman per se entitles him being granted leave to adduce additional evidence on appeal."*

Learned counsel to the 1st Respondent adopted the first of the issues formulated by learned counsel to the appellant but went further to formulate two issues he considered to be the issues for determination. These are -

- (a) Whether the High Court of Justice, Kaduna was right in granting leave to the First Respondent to adduce additional evidence before it in view of the fact that the first Respondent's additional ground of appeal complained of lack of jurisdiction by the trial Upper Area Court because "the plots in dispute being lying and situate at Ungwar-Sunday, Kaduna South. Kaduna, are within the area declared as an Urban Area by Kaduna State Government.*
- (b) Whether the Court of Appeal was right in affirming the decision of the High Court of Justice, Kaduna."*

The above two formulations of the issues for determination in this appeal aim at isolating the issue between the parties from the only ground of appeal filed and to be argued before us.

This Court has pointed out in several of its decisions that the issue for determination must arise from the ground of appeal relied upon and should not be formulated in abstracto - See *Buraimoh v.*

Bamgbose (1989) 3 N.W.L.R. (Pt.109) 352 SC.

It seems to me unarguable that the second issue in appellant's formulation clearly does not arise from the ground of appeal filed and relied upon. There is no doubt the question is based on the actual facts of the case; it is however not a primary issue for determination. This is because the issue whether a party to a litigation is a layman or not, may be relevant in the determination whether the additional or further evidence sought to be adduced on appeal could not have been discovered or known at the trial. That is not the issue arising from the ground of appeal. The issue is whether the Court of Appeal applied the well settled principles for the grant of leave to adduce additional evidence. The determination of the second issue is implicit in the first issue.

The determination of 1st respondent's first issue is outside the jurisdiction of this Court. This Court can only exercise jurisdiction in respect of decisions of the Court of Appeal. The first issue is questioning the correctness of the judgment of the High Court. The ground of appeal filed is concerned with the error of the Court below. The formulation of the first issue, therefore, did not arise from the ground of appeal filed.

Respondent's second issue, naturally arises from the ground of appeal and raises the same issue as the first issue of the appellant's formulation. Hence it is appropriate for the purposes of this appeal to adopt the 1st issue formulated by the appellant in the determination of this appeal.

In his brief of argument Aluko-Olokun. Esqr. learned counsel to the appellants relied on the decisions of Federal Board of Inland Revenue v. Rezcallah (1962) 1 All N.L.R. 1, (1962) 1 SCNLR 1; Enekebe v. Enekebe (1964) N.M.L.R. 43; Obasi v. Onwuka & anor. (1987) 3 NWLR (Pt.61) 364; (1987) 7 S.C.N.J. 84, for the submissions that a party will only be allowed on appeal to adduce additional evidence, if he can show that the evidence sought to be adduced was not adduced at the trial because it was not available. This is so because the circumstance was such that even with care and diligence no human ingenuity could have foreseen that evidence.

Learned counsel submitted that 1st respondent was negligent in his omission to engage the services of counsel at the trial courts, when he had every opportunity to do so. It was submitted that on the authority of *Attorney-General of the Federal v. Mallam Modu Alkali* (1972) 12 SC. 29.

5 Respondent it was submitted has not shown exceptional circumstances. Failure to engage the services of a legal practitioner, it was contended is not an exceptional circumstance. In his own submission learned counsel to the 1st respondent referred to the facts of
10 the case, and the reason why the application for further evidence was made. It was submitted that 1st respondent did not have counsel appearing on his behalf at the Upper Area Court. He could not have known of the relevance of the evidence now sought to be adduced. The evidence could not in his understanding be said to have existed
15 at the trial. 1st respondent not being aware could therefore not be said to have been negligent in adducing the evidence at the trial.

It was also submitted that failure to engage the services of counsel could not be regarded as negligence in not adducing evidence now sought to be adduced.

20 It was finally submitted that the evidence sought to be adduced is not only incontrovertible, but will also have an important and crucial effect. The High Court was right to have granted the leave sought, and the Court of Appeal for affirming the ruling.

25 A party is expected to adduce all the evidence he relies upon for his case at the trial. Our Courts have always been reluctant to grant leave to adduce new evidence or further or additional evidence on appeal. See *Obasi v. Onwuka* (1987) 3 N.W.L.R. (Pt.61) 364. *Akanbi v. Alao* (1989) 3 N.W.L.R. (Pt.108) 118, *Severino v. Witt & Busch* (1911) 2 N.L.R. 77, *G. Gottschalck & Co. v. Elder Dempster & Co. Ltd.* (1917) 3 N.L.R. 16. There are sound judicial reasons
30 underlying this reluctance. The basic principle is that a person in whose favour a matter is decided is entitled to the benefit of the judgment and is entitled not to be deprived of the benefit without solid and

35

incontrovertible grounds. Again, the proper and just determination of the decision appealed against should be based on the facts on which the case was decided. The introduction of new or further or additional evidence is likely to alter the basis for the decision; and seeks to reopen the decision appealed against on the new or further evidence sought to be adduced, - See *Edie Maud Leeder v. Nancy Ellis* (1953) A.C. 52. 5

Furthermore, it is in the interest of justice to avoid the incidence of protracted proceedings, and hence only new or additional evidence which was not available at the time of trial could be allowed. See *Asaboro v. Aruwaji* (1974) 4 S.C. 119. On the same hypothesis, an appellate court has been granted discretion to grant leave for additional evidence on the fulfillment of certain conditions. 10

I have already in this judgment set out the salient facts of the case. The application before the High Court was for leave to adduce additional evidence in that court. The purpose of the additional evidence was to demonstrate that the trial court lacked the requisite jurisdiction to hear and determine the matter under appeal. 15

The affidavit in support of the application did not deny that the evidence relied upon for this application was available at the time of the trial. The ground relied upon is the novel issue that applicant was not represented in the court of trial by learned counsel, and was therefore not aware of and could not even with reasonable diligence have led the additional evidence now being proposed. This reason learned counsel had submitted was not any of the grounds judicially accepted for the granting of leave to adduce additional evidence. His contention was that failure on the part of the applicant, now 1st respondent to adduce the evidence for which leave is now sought which was available at the trial was negligence on the part of the applicant. 20 25 30

In dismissing the appeal of the appellant, the court below relied on the provisions of section 59(2) of the Area Courts Edict which gave the High Court powers to take additional evidence in appeals before it. Relying on the recent decision of this court in *Obasi & ors. v. Onwuka & ors.* (1987) 3 NWLR (Pt.61) 364 and *Ariran v. Adepoju* (1961) All NLR 722 the court below held that although the evidence now sought to be adduced was available at the time of the 35

trial, respondent was not then in a position to adduce it, and consequently it was not available at the trial.

It is this judgment that is challenged.

5 In considering this appeal it is important to set out the provisions of section 59(1) & (2) of the Area Courts Edict under which the High Court in the exercise of its appellate jurisdiction is empowered to hear additional evidence. Section 59 provides as follows -

10 *“(1) Any court exercising appellate jurisdiction in civil matters under the provisions of this Edict may in the exercise of that jurisdiction.*

(a) after hearing the whole case or not, reverse, vary or confirm the decision of the court from which the appeal is brought and may make any such order or exercise any such power as the court of first instance could have made or exercised in such case or as the appeal court shall consider that justice of the case requires;

15 *(b) quash any proceedings and thereupon where it is considered desirable, order such case to be retried before the court of first instance or before any other court of competent jurisdiction.”*

20 Then comes the relevant provision under which courts hearing appeals in civil matters from the Area Courts, in addition to the general powers under subsection (1) above, are empowered in subsection (2) to take additional evidence.

25 *“(2) In the exercise of its powers under this section a court may hear such additional evidence as it considers necessary for the just disposal of the case.”*

30 Sub-section (2) above is clear and unambiguous. The clear and plain words should be given their ordinary meaning and therefore be construed without any glosses or interpolations. See *Orubu v. N.E.C.* (1988) 5 NWLR (Pt.94) 323. Thus, in the exercise of its appellate jurisdiction from Area Courts in civil matters, the High Court is vested with the discretion to hear such additional evidence as it
35 considers necessary, for the just disposal of the case.

The provisions of section 59(2) speak of additional evidence.

It seems to me that for the exercise of discretion to grant leave to adduce additional evidence the court is required by the section to take into consideration factors necessary for the just disposal of the appeal. It is generally recognised that the exercise of judicial discretion must be on the grounds of recognised and accepted principles. See *Williams v. Williams* (1987) 2 NWLR (Pt.54) 66; *Ekwunife v. Wayne (W.A.) Ltd* (1989) 5 NWLR (Pt.122) 422. It is not to be capricious. However, the peculiar facts of each case govern the exercise of discretion in each case.

Learned counsel to the appellants has relied on the principles enunciated in the construction of Order 7 rule 24 of the Rules of the Supreme Court which provide as follows:

"It is not open as of right to any party to an appeal to adduce new evidence in support of his original case; but for the furtherance of justice, the court may, where it thinks fit, allow or require any new evidence to be adduced, such evidence to be either by oral examination in court, by affidavit or by deposition taken before an examiner or commissioner as the case may direct. A party may by leave of the court allege any facts essential to the issue that have come to his knowledge after the decision of the court below and adduce evidence in support of such allegations."

It is quite clear from the words of this rule that it postulates that the court may grant leave to adduce new evidence for the furtherance of justice, if it considers it necessary to do so. It is thus, though similar, different from section 59(2) of the Area Courts Edict which speaks of additional evidence where it considers it desirable and in the interest of justice to do so. It is conceded new evidence could include additional evidence, where evidence has already been led. It is not necessarily so where no evidence has been led in the case as in *Asaboro v. Aruwaji* (supra).

The appellate courts have in the exercise of their discretion to grant leave to adduce new evidence adhered to the following principles:

"(i) The evidence sought to be adduced must be such as

could not have been with reasonable diligence obtained for use at the trial; See Asaboro v. Aruwaji (1974) 4 S.C. 119; Enekebe v. Enekebe (1964) NMLR 43.

(ii) *The evidence must be such that if admitted, would have an important, not necessarily crucial, effect on the whole case;*

and
(iii) *The evidence must be such as apparently credible in the sense that it is capable of being believed and it need not be incontrovertible.*

(iv) *The evidence must be available at the trial- See Ariran v. Adepoju (1961) 1 All NLR 722.*

It appears from the view expressed in Asaboro v. Aruwaji (1974) 4 S.C. 119 at p. 124-125, that the exercise of the discretion
15 *may be refused in respect of additional evidence where no evidence or insufficient evidence was called in the trial court. This is because the court said:*

“We are not unmindful of the fact that it would be a dangerous precedent to allow a person who did not call evidence in the lower court, or who for one reason or another, had called insufficient evidence at the trial, with comparative ease, to bring forward for the first time before this court the evidence which could and should have been adduced before the trial Judge. Such an attitude would be disastrous to the principle of seeing an end to litigation.”

In Asaboro’s case the defendant sought to call evidence on appeal. At the trial he relied on the evidence of the plaintiff and led no evidence. The application was nonetheless granted on the ground
30 *that the evidence is such as could not have been obtained and produced at the trial with reasonable diligence. Applicant had made a reasonably diligent effort for the evidence now sought to be adduced.*

On the other contention that applicant having not led evidence
35 *at the trial was a relevant consideration in deciding whether or not to exercise its discretion in the particular matter. There is some inconsistency between the general proposition refusing leave where no evidence or insufficient evidence was called at the trial, and the later suggestion of taking the factors into consideration in the exercise*

of discretion. The latter opinion is the better view. This is especially where the evidence sought to be admitted is decisive of the issue.

The court observed that although the rule speaks of new evidence, it has been expanded to involve the production of “further evidence”.

There is however, a clear distinction between the effect of a rule of practice made under a statute as Order 7 r.24 and the effect of the provisions of a statute. Section 59 of the Area Courts Edict, is a statutory provision and superior in status to a rule of court made under a statute. Thus since the words of the provisions of section 59(2) of the Area Courts Edict are unambiguous and by reference to “additional evidence”, the decisions on the construction of the different expression in Order 7 rule 24, which speak of “new evidence” would seem to me not applicable.

Hence, the appellate High Court may in the instant case, in the exercise of its discretion grant leave to adduce additional evidence, as it considers it necessary for the just disposal of the case. It is in my opinion not bound by decisions on Order 7 rule 24 of the Supreme Court Rules, 1961.

In the instant case, the High Court in the exercise of its appellate jurisdiction took into consideration the fact that the purpose of the application was to establish absence of jurisdiction in the trial court, and in such a circumstance, it was in the interest of justice proper and necessary to grant leave to adduce the additional evidence sought.

I consider this a valid reason for the exercise of the discretion. I therefore agree completely with the court below when after quoting section 59(2) of the Area Courts Edict it held:

“.... the High Court in the exercise of its power may entertain the said application and hear such additional evidence as it considers necessary for the just disposal of this case. The application is therefore properly brought and the High Court

was quite right to have granted it.”

Learned counsel to the appellant submitted that the 1st respondent could have employed the services of counsel at the Court of trial; he therefore cannot rely on his negligence for not doing so as a ground of his failure to plead the lack of jurisdiction in respect of the subject
5 matter in the trial court. Consequently, the High Court was wrong to have granted leave to adduce additional evidence on that ground.

It is important to emphasise the fact that the purpose of seeking leave to adduce additional evidence is to establish that the Court
10 of trial lacked the requisite jurisdiction to hear the case. The evidence sought to be adduced was in existence at the time of the trial; and was ordinarily available to the 1st respondent. On this argument the appellate court should have refused leave to adduce the additional
15 evidence sought.

But this case is different. The reason for the failure to adduce the additional evidence in this case was stated to be ignorance on the part of the applicant of the existence of the evidence. Paragraph 7 of
20 the affidavit in support of the application which remains uncontradicted averred that appellant/applicant not being a lawyer could not have envisaged such evidence that is now being sought to be tendered at the High Court of Justice.” This is not such evidence which
25 applicant who is not a lawyer could have discovered with reasonable diligence. Applicant not being a legal practitioner cannot be presumed to have been aware of the evidence. It is not being a layman per se that entitles applicant to the grant of leave to adduce additional evidence. It is the fact that such evidence could not have been discovered
30 even by reasonable diligence.

In any case where the challenge to the decision of the court is founded on lack of jurisdiction, the court is bound to consider such evidence which goes to the root of the matter and to show that the
35 court has acted without jurisdiction. - See *Adeigbe v. Kushimo* (1965) 1 All NLR 248.

A party to litigation cannot be shut out and the court precluded on technical grounds from receiving evidence showing that the decision of a court was given without jurisdiction. The issue of

jurisdiction is fundamental to the proper hearing of a cause -
Madukolu v. Nkemdilim (1962) 2 SCNLR 341: (1962) 1 All NLR
584, There is no doubt that the evidence sought to be adduced, if
admitted, would not only have a crucial but also a decisive effect on
the whole case. In the instant case it is necessary to receive such evi-
dence for the just disposal of the case. To refuse to admit the addi-
tional evidence tantamount to the appeal court endorsing the deci-
sion of the trial court reached without jurisdiction.

The appeal is clearly misconceived and lacks merit. It is ac-
cordingly dismissed with costs assessed at N1.000.00.

KAWU JSC

I have had the advantage of reading, in draft the lead judg-
ment of my learned brother, Karibi- Whyte, JSC which has just been
delivered. I agree entirely with him that there is no substance in this
appeal, and for all the reasons set out in the lead judgment, I too
dismiss the appeal with N 1,000.00 costs against the appellant.

BELGORE JSC

To my mind the principles in Obasi & Ors v. Onwuka & Ors.
(1987) 3 NWLR (Pt.61) 364 and Attorney General v. Alkali (1972)
12 S.C. 29 are being over-extended by learned counsel for the ap-
pellant. Most of our customary courts (including the Area Courts of
Northern States and Customary Courts of Southern States) have in
their statutes provisions in this vein:

*“Subject to the provisions of this law and any other written
law and to any rules which may be made the practice and
procedure of native courts in civil causes and matters shall be regu-
lated in accordance with native law and custom.”*

This presupposes that these grassroot courts are not condemned
to procedural straight jackets of Common Law Courts whereby tech-
nicality rather than fuller justice of a matter supersedes. The native
courts are inundated with simple cases whereby access is afforded

every litigant and despite the fact that some of them are now manned by legally qualified persons, the procedure should not be cumbersome or technical so that the purport of informality of the trial process therein which accord with norms of the culture of the people should not be vitiated.

5 I am in full agreement with my learned brother Karibi-Whyte, JSC, that this appeal has no merit and should be dismissed. For the same reasons contained in the said judgment and my reasons above, I also dismiss this appeal with N1000.00 costs to the respondent.

NNAEMEKA-AGU JSC

15 This appeal arose from a ruling of the Kaduna State High Court, coram: S.U. Mohammed, C.J. (as he then was) and Donli, J. whereby they gave leave to the 1st respondent to adduce further evidence in an appeal before the High Court.

20 In the substantive suit, the 1st respondent as, plaintiff, sued the appellant and the 2nd respondent claiming for a declaration of title to two plots of land situate at Ungwar Sunday, Kaduna South before the Upper Area Court, Daura Road, Kaduna. The plaintiff and the 2nd respondent appeared in person while the appellant was
25 represented by counsel. The court entered judgment for the appellant and the 2nd respondent. So, the 1st respondent appealed to the High Court. In the High Court, the 1st respondent was for the first time in the suit represented by counsel who filed on his behalf an
30 application for leave to call additional evidence to show that under Kaduna State Legal Notice No.8 of 1980, made for the delineation of boundaries of Kaduna Urban Area Court under the Land Use Act, the land in dispute lay outside the territorial jurisdiction of the Upper Area Court, Daura Road, Kaduna, and so was a judgment delivered
35 without jurisdiction.

The High Court after hearing the parties granted the application. The appeal by the appellant to the Court of Appeal against the order was dismissed; hence the further appeal to this court.

The summary of appellant's argument before us is that the grant of the application was contrary to one of the principles laid down in *Obasi & Anor v. Onwuka & Ors.* (1987) 3 NWLR (Pt.61) 364 and *Attorney-General v. Alkali* (1972) 12 S.C. 29, in that the evidence now allowed to be tendered was available at the time of trial of the case in the Upper Area Court and could, with reasonable diligence have been tendered. 5

One important point which learned counsel for the appellant failed to advert to was that both *Attorney-Gen. v. Alkali* and *Obasi v. Onwuka* (supra) were cases commenced and conducted in the High Court whereas the instant case was an Upper Area Court case, conducted by the two present respondents without the assistance of counsel. One clear principle which flows through all the proceedings before all our so-called "native tribunals" and appeals therefrom is that they must aim at doing substantial justice. To that intent, technicalities of strict rules of practice and procedure in English types of courts are not applicable. See: *Okuma v. Tsutsu* (1944) 10 WACA 89. *Ohene Abuagyi III v. Gyebu* (1936) 3 WACA at p.66. Applying this principle to this case, it appears to me that it would have been gross injustice if the learned Judges of Appeal had refused the 1st respondent who was not a lawyer and could not be expected to appreciate the technicalities of delineation of territorial boundaries of urban areas the leave he sought. I am of the view that the rules in *Obasi v. Onwuka* (supra) and other cases decided in the High Court must be applied to Area and Customary Court, with great caution, as strict adherence to them may have the effect of driving an illiterate and uninformed litigant from the seat of justice. To my mind, there is no difference in principle between a man who knew that a particular piece of evidence was necessary at the time of trial of his case at first instance but could not, with reasonable, diligence, find it and a man who was not in a position to know or appreciate that that piece of evidence was necessary at all, particularly in a system of courts designed to protect such an ignorant litigant. 20 25 30 35

Conceded, as it must be, that an issue of jurisdiction is most fundamental and that if it turns out that the land in dispute lay outside the territorial area of jurisdiction of the Upper Area Court, Daura Road, Kaduna, any judgment delivered by it in the case would be a

nullity, I am satisfied that the High Court exercised its discretion correctly and that the Court of Appeal was right to have said so.

For these reasons and the fuller reasons contained in the judgment of my learned brother, Karibi-Whyte, JSC, with which I am in
 5 agreement, the appeal has no substance. It is hereby dismissed with N 1,000.00 costs against the appellant.

OMO JSC

10

For the reasons fully set in the judgment of my learned brother, Karibi-Whyte JSC, which I have had a preview of. I hereby also dismiss this appeal with N 1,000.00 costs to the respondent.
 15 Appeal dismissed.

20

25

30

35