

SUPREME COURT OF NIGERIA
 26TH SEPTEMBER, 1995. SC. 192/1991
CORAM:- M.L. UWAI, A.B. WALI, M.E. OGUNDARE,
E.O. OGWUEGBU, U. MOHAMMED,
S.U. ONU, Y.O. ADIO, JJSC.

CHIEF PHILIP O. ANATOGU & 2 ORS.

(For themselves and as representing OgboAPPELLANTS
 family of Onitsha)

AND

H.R.H. IGWE IWEKA II & 4 ORS.

(For themselves and as representingRESPONDENTS
 Obosi people)

APPEALS - Issue - That was not raised before the lower courts - Supreme Court will grant leave.

EVIDENCE - Documents - Admissibility - Documents sought to be tendered - Whether rightly rejected - For lack of proper foundation. “

EVIDENCE - Newness of evidence - In an action for review of past proceedings - Issue of newness held not significant.

EVIDENCE - Public documents - Proof thereof in court - Is as provided under the Evidence Act.

EVIDENCE - Oath or affirmation - Where not administered on a witness before a court - Consequence thereof.

LEGAL PRACTITIONERS - Appearance - Objecting against appeal of Counsel - Where that counsel is not playing any role in the app Objection dismissed.

FACTS

This case is as a result of a protracted land dispute between the Obosi and Onitsha communities in Anambra State. The respondents, who are representatives of the Obosi community, went to court in 1989 seeking a review of an earlier case between the two communities in 1949. They claimed that the earlier trial was vitiated by fraud. During the trial, respondents sought to tender fresh evidence in respect of their claim. The appellants, who are

representatives of the Ogbo family of Onitsha objected, raising issues of admissibility of evidence and proof of documents. The trial judge upheld their objection.

On appeal, the Court of Appeal, Enugu overturned the ruling of the trial court, citing the need for justice to be done between the parties. The appellants have now appealed to the Supreme Court raising five issues for determination [see p. 1843], which the court reduced to one. The respondents also filed a motion against the handling of the case for the appellants Chief F.R.A. Williams SAN. This is on grounds of his having appeared the respondents' community in an earlier case on the same issue.

ISSUE FOR DETERMINATION

Whether the Court of Appeal was right when it set aside the ruling made by the learned trial judge rejecting the admission of the public documents tendered by the Respondents through their first witness.

HELD (Unanimously allowing the appeal per lead judgment of **UWAIS JSC**)
Objecting against appearance of counsel

1. It is significant that the Appellants' brief of argument before us was prepared by Mr. Balonwu alone and nowhere is Chief Williams being mentioned or shown as counsel for the Appellants. Furthermore, Chief Williams has not put up appearance before us to argue the appeal on behalf of the Appellants. Nor did he sign or prepare the notice of appeal. In the circumstance I consider this application to be merely academic and an exercise in futility since there is not any other role for Chief Williams to perform in the case as it concerns this court. Accordingly, the application is hereby dismissed. (p. 1841 A)

Public documents - Proof thereof

2. "Public documents" have been defined by Section 108 (now section 109) of the Evidence Act to include "(b) Public records kept in Nigeria of private documents." The documents which were intended to be put in evidence in the present case seem to fall under this definition. The manner in which "public documents" are to be proved are stated in sections 110, 111 and 112 (now section 113) are not applicable to this case. (p. 1846 H)

Oath or affirmation - Where not administered

3. What then is the consequence of the failure to administer oath or affirmation on a witness before a court? The answer is given by section 4 subsection (3) of the Oaths Act, 1963, No. 63 of 1963, which provides:- "(3) *the failure to take an oath or make an affirmation, and any irregularity as to form of oath*

or affirmation shall in no case be construed to affect the liability of a witness to state the truth.” Since by these provisions, the evidence of P. W.I. is to be taken to have been given as if under oath; in order words as if he had been sworn, then, no miscarriage of justice had been occasioned by the omission to administer the oath or affirmation. (p. 1849 A)

Issue - Not raised before the lower courts

4. Chief Ikeazor, learned Senior Advocate argued that the omission to administer oath or affirmation on the witness was neither raised by the Appellants in the lower courts nor considered by the Court of Appeal and therefore, should not have been raised in this Court. It is true that the point was not raised in the lower courts and was not considered by the courts. But it is now settled that if the issue raised by such point is fundamental in nature, this court is disposed to give leave for it to be raised and will hear it for that reason. (p. 1849C)

Newness of evidence - In an action for review

5. As to whether the evidence so adduced is “fresh evidence” is of no significance for the purpose of the trial since every evidence before the trial court is suppose to be new to it. It is the decision of the trial court at the end of proceedings that will determine if such evidence is either “new”, “fresh” or “additional” to the evidence adduced in the previous proceedings (P.1850A)

Documents - Admissibility

6. From all the foregoing the learned trial judge was right in his ruling that no proper foundation had been laid to enable him admit the documents sought to be put in evidence. However, he was wrong in holding that his refusal to admit the documents was based on the nature of the case being review case. Also for the reasons aforementioned, the Court of Appeal was wrong to have held that the documents were admissible at the stage they were tendered. (1850E)

NOTABLE POINTS OF INTEREST

UWAIS JSC

1. Documentary evidence - Issue of laying proper foundation

Now if the documents, which the Respondents intended to put in evidence fall under section 90(1), it is clear from the provisions thereof that foundation must be laid before they could be admitted in evidence. No such foundation was established in the trial court to facilitate the admission of the documents before they were tendered for admission. Had the procedure under sections

110 and 111 been adhered to by the Respondents, the certified copies of the documents would have automatically become admitted in evidence by the trial judge without P.W.I giving evidence of them. In other words, the documents would have been directly admissible without any foundation being laid. (p. 1848 A)

2. Review on appeal and by action at first instance distinguished

There is no doubt that a difference exists between a review on appeal and an action for review instituted at first instance. In the former the review can only come up by way of application or as a ground of appeal. In which case, the fresh evidence to be adduced may be deposed in an affidavit since it is not usually the practice of appellate courts to conduct proceedings in which oral evidence is given by witnesses. In the latter case the proceedings are invariably commenced with the issuance of a writ of summons, followed, in the normal course, by pleadings in which issues in controversy are joined between the parties. In that case it is mostly necessary to adduce oral evidence, by calling witnesses to testify and be cross-examined, in proof of the issues in contention. (p. 1849 F)

OGUNDARE.JSC

3. When filing fresh counter affidavit will be necessary

Mr. Balonwu has referred us to Exhibit 'E' to 1st Plaintiff affidavit. This is the counter-affidavit sworn to by Chief Williams when objection was raised to the latter's appearance for the Defendants at the trial court. With respect to learned counsel, I cannot take Exhibit E as an answer to the 1st Plaintiff affidavit. If Chief Williams had wanted to rely, in the present proceedings, on the facts stated therein, he should have filed a fresh counter-affidavit sworn to by him deposing to the same or similar facts. I agree with Chief Ikeazor that as the affidavit evidence before us stands, paragraphs 4-6, 8-14 of the 1st Plaintiff's affidavit of 31st Jan. 1995, remain unchallenged and I find the facts therein proved. (p. 1862 C)

4. Exceptions to the rule that judgment of court cannot be altered

The general rule is that the court has no power under any application in the action to alter or vary a judgment or order after it has been altered or drawn up, except so far as is necessary to correct errors in expressing the intention of the court or under the "*slip rule*" - There are, however, exceptions to this rule some of which are: ... (5) A judgment may be set aside on the ground that fresh evidence has been discovered which, if tendered at the trial, will have an

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opposite effect on the judgment. There is, however, in this area of the law some confusion as to whether a new action need be instituted or that the issue must be one for appeal. (p. 1864 A)

MOHAMMEDJSC

- 5. *Special grounds under which appeal court will permit new evidence***
B The special grounds which will arise before the Appeal Court could permit new evidence or further evidence to be admitted are when such evidence (a) could not have been obtained at the trial with reasonable diligence, (b) would or might, if believed, have a very important effect on the whole case and (c) is of a sort which inherently is not improbable. (p. 1869 H)
C

REPRESENTATION

- P. O. Balonwu, SAN, with A. Williams (Mrs.) G.M. Nwagbogu and
F.R. A Williams, Jnr. for the Appellants.
D Chief C. Ikeazor, SAN with R. Iweka U. Ikeazor (Mrs.); A.O. Okafor and A.N. Iweka (Mrs.) for the Respondents

CASES REFERRED TO

- E Ojo v. Abadie 15 W.A.C.A. 54
Birch v. Birch (1902) p. 62
Ladd v. Marshall (1954) 3 All E.R. 745
Regina v. Medical Appeal Tribunal (North Midland Region) ex parte Humble (1959) 3 All E.R. 40 at p. 47
Obasi v. Onwuka (1987) 3 N.W.L.R. (Part 62) 364 at p. 370
F Turnbull v. Duval (1902) A.C. 429
Udeze v. Chidebe (1990) 1 N.W.L.R. (part 125) 141
Ogunsanya v. Taiwo (1970) 1 All N.L.R. 147 at p. 151
Alhaji Etiko v. Aroyewun (1959) 4 F.S.C. 129 at p. 130
Ogbuinyinya v. Okudo (1979) 6-9 S.C. 32 at p. 43
G Akpene v. Barclays Bank of Nigeria Ltd. (1977) 1 S.C. 47
Djukpan v. Orovuyovbe (1967) 1 All N.L.R. 134
Ejiofodomi v. Okonkwo (1982) 11 S.C. 74
Fawehinmi v. Nigerian Bar Association (No. 2) (1989) 2 NWLR 558, 615 617
Onigbongbo Community v. Minister of Lagos Affairs (1971) NCLR 186, 192;
H (1971) 7 NSCC 136, p. 139
Asiyanbi v. Adeniji (1967) 1 All NLR 82, 89
Umunna v. Okwuraiwe (1978) 6-7 SC. 1

Anatogu v. Iweka (1995) 9 KLR Uwais JSC 1839
Agwunedu v. Onwumere (1994) 1 NWLR 375
Craig v. Kansen(1943) KB256
Forfie v. Seifah (1958) 1 All ER 219 PC.

STATUTES AND RULES REFERRED TO

Court of Appeal Rules, 1981, 0. 1 r.20(3)
Evidence Act, Cap 112 LFN 1990, ss 112, 39, 91, 111, 112, 113, 180, 192, 193, 198. B
High Court Rules of Eastern Nigeria; 0. XII r. 5
Oaths Act, No. 63 of 1963; s. 3

LEAD JUDGMENT BY UWAIS JSC

In this appeal a motion on notice was filed by the respondents on the direction of this Court praying for:-

“(a) AN ORDER for restraining of CHIEF F.R.A. WILLIAMS from appearing or further appearing or acting or further acting as counsel for the appellants, having appeared for the opposing side (i.e. the respondents/applicants) in an earlier chapter of the subject matter of this appeal.

(b) For such further order or other orders as this Honourable Court may deem fit to make in the circumstances.”

When the motion came before this court on the 27th day of February, 1995 it was adjourned to the 3rd day of July, 1995 for hearing and the parties were directed to file briefs of argument in respect of the application. This was done. As the appeal was also adjourned for hearing on the same day as the motion, we heard both and decided that the ruling on the application and the judgment in the appeal would be delivered today. I intend to dispose of the ruling on the motion first.

Chief Williams, learned Senior Advocate, against whom the motion is directed did not appear in person in respect of the motion but he filed a brief of argument in his private capacity in reply to that filed on behalf of the respondents herein. It is pertinent to say that the appellants were not represented at the hearing of the appeal by Chief Williams nor did he prepare the appellants' brief of argument in the appeal. All that was done by Mr. Balonwu, learned Senior Advocate.

In moving the motion on notice, Chief Ikeazor, learned Senior Advocate, for the respondents, indicated that it has been brought pursuant to rules 10 and 22 of the Rules of Professional Conduct in the Legal Profession which were made by the General Council of the Bar in 1967 and were amended by the Council on the 15th of January, 1979. The Rules were published in the Federal Republic of Nigeria Official Gazette No.5 of 18th January, 1980 Volume 67. Rules 10 and 22 thereof provide-

“10. ADVERSE INFLUENCES AND CONFLICTING INTERESTS

(a) *It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with controversy which might influence the client in the selection of counsel.*

(b) *It is unprofessional conduct to represent conflicting interests, except by express consent of all concerned given after a full disclosure of facts. Within the meaning of this rule, a lawyer represents conflicting interests when in respect of client for whom he presently contends the interests of that client touch or concern confidences of another client to whom the lawyer, at the same time, owes a duty of service.”*

“22 JUSTIFIABLE AND UNJUSTIFIABLE LITIGATIONS

The lawyer must decline to conduct a civil cause or to make a defence when convinced that it is intended merely to harass or to injure the opposite party or to insist upon the judgment of the Court as to the legal merits of his client’s claim. His appearance in Court should be deemed equivalent to an assertion on his honour that in his opinion his client’s case is one proper for judicial determination.”

Chief Ikeazor contends that on the 5th of May, 1982, the respondents herein brought an application in the High Court of Anambra State sitting at Onistsha, asking for an order of the court - *“restraining the defendants/respondents from briefing, hiring, consulting and/or further briefing, hiring or consulting Chief F.R.A. Williams from further acting for the said defendants/respondents as their solicitor or appearing in this Honourable Court on their behalves having appeared for the opposing side that is to say the plaintiffs/applicants in an earlier chapter of the subject-matter of this suit.....”* The Court (Chukwuani J.), in its ruling delivered on 10th June, 1982, ordered as prayed, thereby barring Chief Williams from appearing in the case for the defendants. There was no appeal against the ruling. Learned Senior Advocate states that in the meanwhile Chief Williams filed an originating summons on the 1st day of June, 1982 against the respondents’ people. The originating summons was heard by Umezinwa J. on 17th September, 1982. In the present case Chief Williams together with Mr. Balonwu, learned Senior Advocate for the appellants, jointly signed the Statement of defence filed by the appellants on the 26th March, 1982, hence the application by the respondents for Chief Wiliams to be restrained from further appearing or acting as counsel for the appellants.

In his brief of argument Chief Williams contends that the application by the respondents should be dismissed because Umezinwa J. dealt with the issue in his ruling given on 17th September, 1982 and that he had the jurisdiction to do so. There was no appeal against his ruling allowing Chief Williams to appear for the appellants.

It is significant that the appellants' brief of argument before us was prepared by Mr. Balonwu alone and nowhere is Chief Williams being mentioned or shown as counsel for the appellants. Furthermore, Chief Williams has not put up appearance before us to argue the appeal on behalf of the appellants. Nor did he sign or prepare the notice of appeal. In the circumstance I consider this application to be merely academic and an exercise in futility since there is no any other role for Chief Williams to perform in the case as it concerns this court. B

Accordingly, the application is hereby dismissed.

I will now turn to the appeal. In the High Court, the respondents brought an action against the appellants in which they claimed as follows, as per their Further Amended Statement of Claim;- C

"(a) A review of the judgment of the Onitsha High Court in suit No. 0/3/49 Philip Akunne Anatogu and Anor v. Chief J. M. Kodilinye & Ors.

(b) An order setting aside the said judgment of the Onitsha High Court in suit No. 0/3/49.

(c) A declaration confirming the plaintiff's (sic) entitlement to the statutory and/or customary rights of occupancy under the Land Use Act and to possession of the said disputed land. D

(d) Any, and all compensation received by the defendants from the Government in respect of the disputed property.

(e) Mense profits and/or damages. E

(f) Costs.

(g) Such further or other relief as may be just."

The appellants filed a Further Amended Statement of defence. When the trial began before Nwazota, J. (as he then was) on 25th May, 1989 the respondents called their first witness, one Mr. Olatunji Adeyemi, who was an Assistant Investigation Officer, in the Land Registry of Lagos State. The witness testified that he was served with a subpoena to produce some documents in his custody, namely, volumes 1 and 2 of Niger Lands Agreement and Volumes 2 and 3 of Treaty of Cession. The documents were tendered for admission in evidence. Mr. Balonwu, learned Senior Advocate, who was for the appellants, as defendants at the trial raised objection to the documents being admitted in evidence. In his ruling, upholding the objection the learned trial Judge stated thus:- F

"I have heard and considered the points raised in the objections of P.O. Balonwu, Esq., SAN, opposing the admission as evidence of the documents listed in the statement of Chief C. Ikeazor, Esq., SAN, in reply to these objections. I am very mindful of the age old statements of the law in various Court of the land.....as to the conditions in which a party seeking to adduce fresh evidence in court must satisfy before such evidence can be G H

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received, and it is my considered view that on the strength of the statements made by P.W.1, I cannot reasonably hold that the plaintiffs have satisfied any or all those conditions as are aptly stated in the various authorities cited by P. O. Balonwu, Esq., SAN. of Counsel in support of his objections..... I am satisfied that the objections taken are sound in law and well taken, and do, in the absence of further materials being placed before me by the learned

B *Senior Advocate for the plaintiffs to justify my acceding to them as right in law. Accordingly, I rule that the documents now sought to be tendered as Evidence for the plaintiffs cannot without more be admitted at this stage as it is my considered view that the plaintiffs have failed to satisfy me that they constitute Fresh Evidence within the meaning and intendment of the phrase*

C *in law. It is my considered judgment that issue of Fresh Evidence in Court must be determined and disposed of before the Court can be in a firm position to determine whether or not fraud as alleged in the pleadings of the plaintiffs can be discovered in the Listed Documents now sought to be tendered as Evidence having regard to the state of the pleadings of the Parties.*

D *I accordingly sustain the objection.....*
and rule that the listed documents as contained in the statements of P.W.1 cannot be received in Evidence at this stage. Listed Documents produced, tendered and rejected as marked accordingly.”

E The respondents felt aggrieved and therefore appealed against the ruling to the Court of Appeal. In its judgment allowing the appeal, that Court (Katsina-Alu, Oguntade and Uwaifo, JJ.C.A.) stated as follows as per Oguntade, J.C.A. :”

F The lower court in its ruling reproduced earlier in this judgment was of the view that the plaintiffs ought first to show why the documents which were sought to be tendered had not been tendered in the previous case before they could be tendered in the current one. With respect, that approach betrays a misconception on the part of the lower court about the true nature of plaintiffs’ suit

G
It seems to me however that the better guide to the court on a matter as this are the pleadings of the parties. The plaintiffs pleaded that the judgment was obtained by fraud; the defendants deny this. The parties having joined issues on the point, the matter fell to be determined by evidence. And

H it would not be justice if the plaintiffs were to be stopped from leading evidence in proof of the fraud which they alleged
.....
Whichever way one looks at the matter, the conclusion is inescapable that the lower court had been, in error to have rejected the documents

produced by the plaintiffs for no other reason than that the plaintiffs had not first shown why the documents were not tendered in the previous suit. The approach of lower court is wrong and the decision of the court must do a, grave injustice to the plaintiffs.” In their appeal before us the appellants have raised the following 5 issues for determination in their brief of argument - . B

“(i) *Whether the documents sought to be tendered in evidence as fresh evidence satisfied the conditions precedent to the admission of such evidence as laid down by law.*

(ii) *Is the Court of Appeal right to have held that fresh evidence sought to be adduced on appeal is different from the instant case where fresh evidence is sought to be adduced in a fresh or new matter but which had been litigated before by the same parties?* C

(iii) *Was the Court below right in holding that since the parties had joined issues on fraud and discovery of fresh evidence, it was not necessary for the plaintiffs/respondents to explain why the documents sought to be tendered as fresh evidence were not tendered in the former trial.* D

(iv) *Whether the issue of fraud as set out in the pleadings could be determined in a review case by merely admitting documents in evidence without the court first of all deciding or determining whether the said documents pleaded as “fresh evidence” is admissible in law.* E

(v) *Whether the issue of P.W.1 giving his evidence without being sworn was a substantial issue of procedure; if the answer is in the affirmative, whether there was a miscarriage of justice in the Court of Appeal” because it failed to determine the said issue.”*

and the respondents formulated 4 issues for determination, as follows:- F

1(a) *Whether the rules governing the admission of fresh evidence on appeal would apply to regulate the production and/or reception of evidence (in an original action of review of an earlier judgment on grounds of fraud and/or fresh evidence) when the High Court is sitting as a court of first instance?* G

If the answer to (a) above is in the negative, then;

(b) *Whether the Court of Appeal was right when it set aside the decision of the trial court which was informed by its (i.e trial court’s) reliance on rules governing the admission of fresh evidence on appeal? .*

2. *Does a plaintiff in a case for a review of a previous judgment on grounds of fraud and/or undue influence need to firstly prove or establish that the documents (which he has pleaded and intends to rely on) constitute fresh evidence before the said documents could be admitted in evidence?* H

3. Whether the (alleged) failure of the Court of Appeal to make a decision on the issue whether or not the documents which form the subject-matter of this appeal could be tendered through the P.W.1 (an unsworn witness who was merely subpoenaed to produce documents) had occasioned such a grave miscarriage of justice as to warrant its judgment being set aside when that said issue does not flow from the decision of the trial court which did not base its decision thereon?"

I think the simple issue here to be determined is whether the Court of Appeal was right when it set aside the ruling made by the learned trial Judge rejecting the admission of the public documents tendered by the respondent through their first witness.

The thrust of the appellants' case is that P.W.1 was summoned to produce the public documents in his possession in accordance with the provisions of section 191 and 192 of the Evidence Act, (now sections 192 and 193 respectively of Cap. 112 of the Laws of the Federation of Nigeria, 1990) and not to testify as a witness. If even he was properly called as a witness, his evidence was vitiated by his failure to take oath at the beginning of his testimony as mandatorily required by section 179 (now section 180) of the Evidence Act. It is argued further that the respondents' action; being a review case by nature, foundation must be laid to show that the evidence, to be adduced, was not available to the party in need of it and it could not be produced with reasonable diligence during the hearing of the previous case either at trial or appeal level. The laying of the foundation is a condition precedent without which a trial court in the review case cannot satisfy itself that the evidence being sought to be adduced amounts to fresh evidence. This requirement cannot be dispensed with on the ground that the evidence to be adduced had been pleaded in the pleadings of the parties to the case. The learned trial Judge was right to have relied on the cases cited to him by the appellants in reaching its decision. The cases are as follows. *Ojo v. Abadie*, (1955) 15 WACA 54; *Birch v. Birch*, (1902) p. 62; *Ladd v. Marshall*, (1954) 3 All E.R. 745; *Regina v. Medical Appeal Tribunal (North Midland Region) ex parte Humble*', (1959) 3 All E.R. 40 at p. 47; *Obasi v. Onwuka*, (1987) 3 NWLR (Pt. 61) 364 at p. 370 and *Turnbull v. Duval*, (1902) A.C. 429. In addition the case of *Brown v. Dean & Anor* (1910) A.C. 373 was cited to us. That where fraud or forgery of a document is alleged in a review case, the nature of the fresh evidence to be adduced is the same as that which could be adduced when the same issues of fraud and forgery are raised in a case on appeal. That is, that the condition precedent must be satisfied for the fresh evidence to be admissible. A review case is not a new action, like any fresh case; for if this were

otherwise, a plea of *res judicata* can apply to stultify the review case. It is then

concluded that the Court of Appeal failed to advert in its judgment to the fact that the testimony given by P.W; 1 was not given on oath and that had given rise to a miscarriage of justice.

The case for the respondents is as follows. Relying on the judgment of the Court of Appeal and an article reported in the Law Quartely Review Volume 77, published in July, 1961, it is submitted that a review case is different from a case on appeal; and that a review case is always brought in the trial court that gave the first judgment to be reviewed. Thus there is a difference between a case on appeal and a review case and the learned trial Judge failed to understand this. The res in a review case is the judgment in the 1949 case, whereas the res in the 1949 case was the land in dispute then. The new evidence; to be produced in the review case to prove fraud, will have to be received by the High Court so long as they come from proper custody. It is after that that the trial Judge can look at the new evidence produced to determine whether there is fraud or not. Since the review case happens to be a fresh case, the roles of admissibility of evidence in a fresh case apply. It is submitted that all the authorities cited before the trial court (supra) were not directly relevant to the issue before it. This is because the cases of Ladd and Obasi dealt with and considered conditions in which fresh evidence or additional evidence can be adduced on appeal. The case of Regina v. Medical Appeal Tribunal etc, was also a case on appeal and the decision therein turned on the meaning of the phrase "fresh evidence" in the context of section 40(i) of the National Insurance (Insurance Injuries) Act, 1964 of England which is not statute of general application, to apply to Nigeria. The case of Ojo decided the issue of res judicata only. Therefore, the High Court, in the present case, based its decision on conditions laid down by authorities which were not relevant to the case before it. The authorities in question cited imported into the present case practice and procedure which regulate the admission of fresh evidence on appeal. The learned trial Judge was therefore wrong to follow them since he was not sitting on appeal. The case of Tojumade A. Clement v. Bridget J. Iwuanyanwu (1989) 3 NWLR (Pt. 107) 39 at p. 51, per Oputa J.S.C. was cited in support. A party in a case does not first prove a point in issue to the satisfaction of a trial Judge before the evidence in support of the case is produced. In the present case it would be futile for the respondents to have led evidence on why the documents, sought to be produced in evidence, were not tendered in the 1949 case, without first placing the documents before the trial court. The nature of the documents, their contents and the circumstances were all matters that the trial court must consider in its judgment, and not ruling, before it could arrive at a conclusion whether or not the documents constitute fresh evidence.

On whether P.W.1 was sworn before he testified, it is argued that the ruling of the trial court was not based on the point. The trial court did not consider the provisions of section 197 (now section 198) of the Evidence Act, on which the appellants based their submission that P.W.1, who was merely subpoenaed to produce the documents could not, after producing them, seek to tender them in evidence. The reason on which the ruling was based was that the respondents had not established that the documents constitute fresh evidence in law. This, it is argued, was the principle and major issue on which the ruling of the trial court revolved. This is why the Court of Appeal failed to consider the fact that P.W.1 was not sworn before he testified. Therefore the failure, if even it was necessary for the Court of Appeal to do so, has not occasioned any miscarriage of justice, since the point was not an issue before it, Reliance is placed on the case of Udeze v. Chidebe, (1990) 1 NWLR (Pt. 125) 141 which decided that it is not every slip made by a court that will result in its judgment being over-turned by the Supreme Court. It is only slips or mistakes which strike at the root of the matter that are material. It is contended that the omission to administer oath on P.W.1 does not strike at the root of the judgment of Court of Appeal.

It is clear from the foregoing that the parties in this case predicated their cases in both lower courts on the promise that this case is a review case and therefore the evidence which was not adduced in the 1949 case and is to be adduced in the present case must be produced in a special manner. The lower courts also considered the issues involved in that light. With respect, this is not right. The parties have not succeeded in showing that there is a special, or express or an extraordinary procedure of putting documents in evidence which is peculiar or applicable to cases on review. The procedure which in fact applies is to be found in the provisions of the Evidence Act, Cap. 112 (which was formerly Cap. 62 of the Laws, of the Federation of Nigeria, 1963). Section 39 thereof provides:-

“39. An entry in any public or other official book, register or record, stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact.”

These provisions have the effect of making public documents relevant where a party intends to reply on them by pleading them. “Public documents” have been defined by Section 108 (now section 109) of the Evidence Act to include “(b) Public records kept in Nigeria of private documents.” The documents which were intended to be put in evidence in the present case seem to fall under this definition. The manner in which “public documents” are to be proved are stated in sections 110, 111 and 112 (now

sections 111, 112 and 113) of the Evidence Act. The provisions of section 112 (now section 113) are not applicable to this case. However the other section provide as follows:-

“110(1) Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorised by law to make use of a seal, and such copies so certified shall be called certified copies.

(2) Any officer who, by ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

111. Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.”

This is not the procedure followed by the respondents. Instead they called for the public registers in their original form to be produced. There is no provision of the Evidence Act which specifically applies to the production of the original copies of public documents. However, section 90 (now section 91) of the Evidence Act provides:-

“90(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied:-

(a) if the maker of the statement either -

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) Where the document is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had or might reasonably be supposed to have personal knowledge of those matters; and

(b) if the maker of the statement is called as a witness in the proceedings: Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.....

.....

Now if the documents, which the respondents intended to put in evidence, fall under section 90(1), it is clear from the provisions thereof that foundation must be laid before they could be admitted in evidence - See *Ogunsanya v. Taiwo* (1970) 1 All NLR 147 at p. 151, and *Alhaji Etiko v. Aroyewun*. (1959) 4 F.S.C. 129 at p. 130 (1959) SCNLR 308. No such foundation was established in the trial court to facilitate the admission of the documents before they were tendered for admission.

In my opinion, the documents could only be admitted in evidence if they satisfied the provisions of section 90 subsection (1) or section 111 of the Evidence Act, quoted above. The latter section allows for the certified copies of the documents to be produced; , but even then, what were sought to be tendered in this case were not certified copies but the original public documents. Had the procedure under section 110 and 111 been adhered to by the respondents, the certified copies of the documents would have automatically become admitted in evidence by the trial Judge without P.W.1 giving evidence of them. In other words, the documents would have been directly admissible without any foundation being laid - See *Ogbunyiya v. Okudo*. (1979) 6-9 S.C. 32 at p. 43.

There is another dimension to the attempt made by the respondents to put the documents in evidence. By section 191 (now section 192) of the Evidence Act:

"Any person whether a party or not, in a cause may be summoned to produce a document without being summoned to give evidence and if he cause such document to be produced in court the court may dispense with his personal attendance."

P.W.1, by the nature of the subpoena served upon him, falls under the provisions of this section, the respondents could have asked the trial court to release him on bringing to the Court the documents he was summoned to produce. For section 192 (now section 193) of the Evidence Act provides:-

"192. A person summoned to produce a document does not become a witness by the mere fact that he produces it and cannot be cross-examined until he is called as a witness."

However, it appears from the record of appeal that the respondents confused the role of P.W.1 and had wanted him to testify as a witness. This contradicts the provisions of section 192. Now suppose the step so taken were even right, which is not, section 197 (now section 180) of the Evidence Act requires that P.W.1 should testify on oath or affirmation. The section states:-

"179. Save as otherwise provided in sections 181 and 182 all evidence given in any proceedings must be given upon oath or affirmation administered in accordance with the provisions of the Oaths and Affirmation Act."

Again this condition was not complied with. The word “must” in the section is, in ordinary usage, imperative. What then is the consequence of the failure to administer oath or affirmation on a witness before a court? The answer is given by section 4 subsection (3) of the Oaths Act, 1963, No. 63 of 1963, which provides:-

“(3) *The failure to take an oath or make an affirmation, and any irregularity as to form of oath affirmation shall in no case be construed to affect the liability of a witness to state the truth.*”

Since by these provisions, the evidence of P.W.1 is to be taken to have been given as if under oath; in other words as if he had been sworn, then, no miscarriage of justice had been occasioned by the omission to administer the oath or affirmation.

Chief Ikeazor, learned Senior Advocate argued that the omission to administer oath or affirmation on the witness was neither raised by the appellants in the lower courts nor considered by the Court of Appeal and, therefore, should not have been raised in this Court. It is true that the point was not raised in the lower courts and was not considered by the courts. But it is now settled that if the issue raised by such point is fundamental in nature, this Court is disposed to give leave for it to be raised and will hear it for that reason - see Akpene v. Barclays days Bank of Nigeria Ltd. (1977) 1 S.C. 47; Diukpan v. Orovuyovbe & Anor (1967) 1 All NLR 134; Ejiofodomi v. Okonkwo (1982) 11 S.C. 74; Salati v. Shehu (1986) 1 NWLR (Pt. 15) D 198; Raimi v. Akintoye (1986) 3 NWLR (Pt. 26) 97; Plateau Publishing Co. Ltd. v. Adophy (1986) 4 NWLR (Pt. 34) 205 and Dweye v. Iyomahan. (1983) 2 SCNLR 135.

There is no doubt that a difference exists between a review on appeal and an action for review instituted at first instance. In the former the review can only, come up by way of application or as aground of appeal. In which case, the fresh evidence to be adduced may be deposed in an affidavit since it is not usually the practice of appellate courts to conduct proceedings in which oral evidence is given by witnesses. In the latter case the proceedings are invariably commenced with the issuance of a writ of summons, followed, in the normal course, by pleadings in which issues in controversy are joined between the parties. In that case it is mostly necessary to adduce oral evidence, by calling witnesses to testify and be cross-examined, in proof of the issues in contention. The rules of evidence must be observed in accordance with the provisions of section I subsection (2) of the Evidence Act, Cap. 112 which states:-

“(2) *This Act shall apply to all judicial proceedings in or before any court established in the Federal Republic of Nigeria.....*”

As to whether the evidence so adduced is “*fresh evidence*” is of no significance for the purpose of the trial since every evidence before trial the court is supposed to be new to it. It is the decision of the trial court at the end of the proceedings that will determine if such evidence is either “*new*”, “*fresh*” or “*additional*” to the evidence adduced in the previous proceedings. I think the dicta of James L.J. In *Flower v. Llody* (No.1). (1877) 6 Ch. D. 297 at p. 301 describes succinctly the course to be followed in a review case, when he said of a review for fraud:-

“I agree with what has been said by the Master of the Rolls that in the case of a decree (or judgment as we call it now) being obtained by fraud there always was power, and there still is power, in the Courts of Law in this country to give adequate relief. But that must be done by a proceeding putting in issue that fraud, and that fraud only. You cannot go to your adversary and say, ‘You obtained the judgment by fraud, and I will have a rehearing of the whole case until that fraud is established. The thing must be tried as a distinct and positive issue; ‘You’ the defendant ‘Or ‘you’ the plaintiff “obtained that judgment or decree in your favour by fraud; you bribed the witnesses, you bribed my counsel, you committed some fraud or other of that kind, and I ask to have the judgment set aside, on the ground of fraud.’ That would be tried like anything else by evidence properly taken directed to that issue, and wholly free from and unembarrassed by any of the matters originally tried.” (Italics mine).

From all the foregoing the learned trial Judge was right in his ruling that no proper foundation had been laid to enable him admit the documents sought to be put in evidence. However, he was wrong in holding that his refusal to admit the documents was based on the nature of the case being a review case. Also for the reasons aforementioned, the Court of Appeal was wrong to have held that the documents were admissible at the stage they were tendered.

In the result, the appeal succeeds and it is hereby allowed with N1,000.00 costs to the appellants. The case is hereby remitted to the High Court of Anambra State holden at Onitsha for the proceedings to continue.

WALI JSC

I have read in advance the lead judgment of my learned brother Uwais, J.S.C. and I agree with his reasoning and conclusion for allowing the appeal. I adopt them as mine and also hereby allow the appeal.

I adopt the consequential orders in the lead judgment.

OGUNDARE JSC

There has been a long drawn legal battle between the parties hereto over a large tract of land claimed by both parties. In suit 0/3/49 in the Supreme Court (as the High Court was then known) holden at Onitsha, Philip Akunne Anatogu and Anor, representing the Ogbo Family of Onitsha had sued Chief J.M. Kodilinye and Anor, representing the Obosi people claiming title to the land in dispute between the parties and an injunction. The action was tried by Albert Geoffrey Borrodail Manson, Puisne Judge who, in a judgment delivered on 1st October 1949, found for the Ogbo Family (the plaintiffs) and declared title to the land in dispute in them and granted them the injunction sought. The Obosi people (the defendants) were dissatisfied with the judgment and appealed to the now defunct West African Court of Appeal. They lost. They further appealed to Her Majesty's Privy Council in London in Suit No. 30 of 1951 and again lost.

Thirty nine years after, the Obosi people, now represented by H.R.H. Igwe Iweka II, the Eze Obosi and four others - the plaintiffs in the present proceedings - in Suit No. 0/246/80 in the High Court of the Onitsha Judicial Division sued Chief Philip O. Anatogu and two others as representing the Ogbo Family claiming, as per their 140 paragraph - Further Amended Statement of Claim that covers 134 pages, as hereunder

"(a) A review of the judgment of the Onitsha High Court in Suit No. 0/3/49 Philip Akunne Anatogu and Anor v. Chief J.M. Kodilinye & Ors.

(b) An order setting aside the said judgment of the Onitsha High Court in suit No. 0/3/49.

(c) A declaration confirming the plaintiffs' entitlement to the statutory and/or customary rights of occupancy under the Land Use Act and to possession of the said disputed land.

(d) Any, and all compensation received by the defendants from the Government in respect of the disputed property.

(c) Mesne profits and/or damages.

(f) Costs.

(g) Such further or other relief as may be just."

On completion of pleading the action proceeded to trial. One Olatunji Adeyemi, an Assistant Investigation Officer, Lagos State Land Registry was called by the plaintiffs; he was on subpoena to produce and tender volumes 1 - 2 of the Niger Lands Agreement and Volume 1 - 3 Treaty of Cessions. When called into the witness stand, Chief Ikeazor, SAN, learned leading counsel for the plaintiffs informed the court that the witness was called "for the sole purpose of producing documents." He was not sworn. He stated.

"I am in this court in obedience to a subpoena addressed to my office. The subpoena is dated May, 1989. This is the subpoena I refer to Civil subpoena dated May, 1989 tendered. No objection and admitted and marked Exhibit' A'. These are the documents as listed at the back of Exh. 'A' which I am subpoenaed to produce -

- B (1) Volumes 1 and 2 of Niger Lands Agreement;
 (2) Volumes 2 and 3 of the Treaty of Cessions;

I do not have with me the Volume 1 of the Treaty of Cession because it was misplaced in my office at the time of my journey".

C An attempt was then made to tender, in evidence, the documents produced by the witness.

 Balonwu Esqr. SAN, learned leading counsel for the Defendants promptly objected to the documents being received "*as evidence*" on the ground essentially that the documents sought to be tendered were not fresh evidence and foundation had not been laid for their admission in evidence. He D relied on Ladd v. Marshal (1954) 3 All E.R. 745, 748; Regina v. Medical Appeal Tribunal (North Midland Region) Ex parte humble (1959) 3 All E.R. 40, 47; S.D. Ojo v. Jean Abadie. (1995) 15 WACA 54 and Obasi & Anor. v. Eke Onwuka & Ors. (1987) 3 NWLR. (Pt. 61) 364 on the condition that must be fulfilled before the receipt of fresh evidence. He submitted that the conditions stipu- E lated in these authorities for the admission of fresh evidence had not been satisfied by the plaintiffs.

 Chief Ikeazor, in reply to Mr. Balonwu's objection, observed that the plaintiffs had not tendered the disputed documents as evidence. He did not stop there. He went on to submit that "*P.O. Balonwu's objection relate to the F weight to be attached to the evidence now sought to be tendered.*"

 There appears to be an apparent contradiction in the intention of the plaintiffs in tendering those documents. Learned counsel went on to submit that the purpose for which the plaintiffs sought to tender the documents as evidence related principally to fraud and not necessarily as fresh evidence. G Learned counsel pointed out that plaintiffs' case was based "*on the issue of Fresh evidence and/or Fraud*" and contended that there was no way the court could determine plaintiff' case for a Review without seeing the documents sought to be tendered in evidence. He observed that the documents were pleaded in paragraphs 18, 30 and 135 of the Further Amended Statement H of Claim. He opined that what the court should concern itself with, at that stage, was admissibility and relevancy of evidence and submitted that the disputed documents were not only relevant but also admissible in evidence.

In a short reply, Mr. Balonwu submitted that the issue of fraud could not be divorced from that of admission of fresh evidence as the documents allegedly founding the issue of fraud (that is, the disputed documents) were in existence at all material times of the hearing of the substantive suit that is, Suit No. 0/3/49, the judgment of which is the subject matter of plaintiffs' current action for a review. In his ruling sustaining the objection, Nwazota, J. (as he then was), observed:

"I am very mindful of the age old statements of the law in various courts of the land, (in the Colonial Era, and also in an Independent Nigeria) as to the conditions in which a party seeking to adduce fresh evidence in court must satisfy before such evidence can be received, and it is my considered view that on the strength of the statements made by P.W.1, I cannot reasonably hold that the plaintiffs have satisfied any or all of those conditions as are aptly stated in the various authorities cited by P.O. Balonwu, Esq., SAN of counsel in support of his objections. I readily endorse Mr. Balonwu's statements that the issue of fraud cannot in the circumstances of the instant case be divorced from the basic issue of Fresh Evidence, as the court at least on the statements of learned counsel on either side when considered alongside the pleadings of the parties as laid before me raise or/define the issue of fraud allegedly contained in the documents now sought to be tendered as Evidence in these proceedings.

It is equally my considered view that I cannot, without more, subscribe to Chief Ikeazor's statements that the plaintiffs have not sought to tender as evidence through P.W.1 or at this stage of the proceedings the documents the admissibility of which have resulted in the elaborate addresses of learned counsel on either side & bull; It is my considered view that the entire purpose of producing P.W.1 for the purpose stated by the witness is to tender the documents as evidence in aid of plaintiffs' case and P.O. Balonwu, Esq., SAN is well within his legal rights to object as he has done. I am satisfied that the objections taken are sound in law and well taken, and do, in the absence of further materials being placed before me by the learned Senior Advocate (Counsel) for the plaintiffs to justify my acceding to them as right in law, Accordingly, I rule that the documents now sought to be tendered as Evidence for the plaintiffs cannot without more be admitted at this stage as it is my considered view that the plaintiffs have failed to satisfy me that they constitute Fresh Evidence within the meaning and intentment of that phrase in law."

Being dissatisfied with this Ruling, the plaintiffs appealed to the Court of Appeal. The arguments put forward by learned counsel for the parties in that court ran essentially along the same line as advanced in the trial

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court. The defendants however added a new twist. For in their brief it was argued thus:

B *“From the list of witnesses which the plaintiffs/appellants intend to call and from the opening address of their counsel, it is clear that what plaintiffs/appellants want to do will be to call witnesses to produce all the documents enumerated at page 263/264 of the Records and to tender them through the witnesses without the said Witnesses being sworn. It must be pointed out there is a difference between producing a document in court and tendering the document so produced in evidence. Section 191 of the Evidence Act states ‘Any person, whether a party or not, in a cause may be summoned to produce a document without being summoned to give evidence and if he cause such document to be produced in court the court may dispense with his personal attendance’. Section 192 states: ‘A person summoned to produce a document does not become a witness by mere fact that he produces it and cannot be cross-examined unless and until he is called as a witness.’*

D *The plaintiff/appellants’ trouble started when he produced in court. This alone is enough to make the trial Judge reject the documents. However, the issue in this appeal is not merely of an unsworn witness trying to tender documents in evidence, but the admissibility of evidence not shown to be a fresh evidence in a Review case.”*

E The plaintiffs in their Reply Brief submitted that the above arguments were idle and extraneous as they did not form part of the reasons for the defendants’ objection to the admissibility of the disputed documents and were not pronounced upon by the trial court. They urged the appellate court to discountenance defendants’ arguments as going to no issue in the appeal.
F They finally submitted

G *“In view of the foregoing, it is submitted that it is not open to the respondents to (as they seek to do in their Brief supra) justify the rejection of the documents - subject-matter of this appeal on grounds different from that raised and argued in the trial court and upon which the High Court did not rule when they have neither sought leave of court to do so nor cross-appealed nor filed a respondents’ Notice as required by the Order 3 Rule 14 of the Court of Appeal Rules. It is clear, upon the most cursory examination, that the issues raised in the above-quoted passages of the respondents Brief of Argument do not arise from the Grounds of Appeal filed before this Court.*
H *Yet, it is the law that the argument and issues for determination must be confined to the grounds of appeal filed.”*

The Court of Appeal allowed the appeal, set aside the decision of the trial Judge and ordered that

“The said documents are to be received in evidence if not otherwise

inadmissible.”

The Court did not pronounce on the defendants’ new argument on why the disputed documents could not be tendered through Olatunji Adeyemi who was subpoenaed to produce them. The defendants have made this failure a ground of complaint in their appeal to this Court.

In his judgment, with which the other justices that sat on the appeal agreed, Oguntade J.C.A. observed:

“It is manifest from the pleading of the parties that issues had been joined as to (1) whether the previous judgment given between the parties was obtained by fraud or deceit and (2) whether the documents the plaintiffs were seeking to rely on in their current suit were in existence at the time of the previous action.”

He further observed:

“The issues as formulated by the counsel for the parties are no doubt a reflection of the standpoints taken by each of them when it was sought to tender the documents which are the subject-matter of this appeal in evidence. It seems to me that counsel have merely projected their different arguments on the point as issues. The only issue in so far as I can see is whether or not the trial Judge correctly rejected the documents in evidence.

In answering the question raised by this appeal, I think it is important to understand the nature of the action brought by the plaintiffs. The plaintiffs had fully taken part in the hearing of Suit No. 0/3/49 against the defendants. Evidence was led in that suit by the two parties to it. Judgment was given against the plaintiffs. The plaintiffs have brought the current suit in order to set aside the judgment previously given against them. They averred in their pleadings that much of the evidence on which the judgment against them was based, was falsified, forged and generally fraudulent. In some way the plaintiffs would also appear to be saying that they now have fresh evidence which they could not with diligence have produced before the court in Suit No. 0/3/49. If indeed the plaintiffs had reasons to believe that the judgment on 0/3/49 was obtained by fraud, they would have to bring an action to set aside the judgment.”

Later in the judgment, the learned Justice of Appeal Court observed:

“Again a party against whom judgment has been given in a previous action can bring an action to rescind the judgment on the ground of discovery of new evidence which would have had a material effect upon the decision of the Court.”

After a review of some English authorities and observing that these authorities are of appellate courts where fresh evidence was sought to be

“The position before a court of first instance before which an action is brought to set aside a judgment on the ground of fraud or on the discovery of fresh evidence is or ought to be different from the position in the Court of Appeal. A court of first instance cannot ask a plaintiff suing that a judgment be set aside on the ground of fraud to show that indeed fraud had been committed before the material in proof of the fraud is received in evidence. It would be like putting the cart before the horse.....”

If a litigant alleges as the plaintiff has done in this case that some of the documents used in the previous case were forgeries, it is clear that in order to prove such allegation the plaintiff would need to tender the two sets of documents i.e. the set of documents used in the previous case which the plaintiffs alleged were forgeries and the set of documents which the plaintiffs claimed were the authentic ones.”

The learned Justice was of the view that none of the authorities relied on by the trial Judge for his (latter’s) decision was directly helpful *“in determining the approach of a court of first instance sitting over a suit to set aside a judgment said to have been obtained by fraud.”*

It is against the judgment of the Court of Appeal that the defendants have now appealed to this Court upon eight grounds of appeal. In their appellants’ brief they set out five questions as calling for determination, to wit -

“(i) Whether the documents sought to be tendered in evidence as fresh evidence satisfied the conditions precedent to the admission of such evidence as laid down by law.

(ii) Is the Court of Appeal right to have held that fresh evidence sought to be adduced on appeal is different from the instant case where fresh evidence is sought to be adduced in a fresh or new matter but which had been litigated before by the same parties.

(iii) Was the Court below right in holding that since the parties had joined issues on fraud and discovery of fresh evidence, it was not necessary for the plaintiffs/ respondents to explain why the documents sought to be tendered as fresh evidence were not tendered in the former trial.

(iv) Whether the issue of fraud as set out in the pleadings could be determined in a review case by merely admitting documents in evidence without the court first of all deciding or determining whether the said documents pleaded as ‘fresh evidence’ is admissible in law.

(v) Whether the issue of P.W.1 giving his evidence without being sworn was a substantial issue of procedure; if the answer is in the affirmative, whether there was a miscarriage of justice in the Court of Appeal be

The plaintiffs for their part, set out the following questions in their own Brief of argument:

“1(a) Whether the rules governing the admission of fresh evidence on appeal would apply to regulate the production and/or reception of evidence (in an original action of review of an earlier judgment on grounds of fraud and/or fresh evidence) when the High Court is sitting as a court of first instance?” B

“(b) Whether the Court of Appeal was right when it set aside the decision of the trial court which was informed by its (i.e. trial court’s) reliance on rules governing the admission of fresh evidence on appeal?”

2. Does a plaintiff in a case for a review of a previous judgment on grounds of fraud and/or undue influence need to firstly prove or establish that the documents (which he has pleaded and intends to rely on) constitute fresh evidence before the said documents could be admitted in evidence?” C

3. Whether the (alleged) failure of the Court of Appeal to make a decision on the issue whether or not the documents which from the subject-matter of this appeal could be tendered through the P.W.1 (an unsworn witness who was merely subpoenaed to produce documents) had occasioned such a grave miscarriage of justice as to warrant its judgment being set aside when that said issue does not flow from the decision of the trial court which did not base its decision thereon?” D E

When this appeal came before the Court for hearing on the 28th day of November 1994, Chief F.R.A. Williams SAN appeared as leading counsel for the defendants. Chief Ikeazor learned leading counsel for the plaintiffs objected to Chief Williams appearing for the defendants on the ground that Chief Williams had once appeared for the plaintiffs in the Federal Supreme Court (as this Court was then known) in the same matter and between the same parties. He stated what happened in the trial High Court when he raised a similar objection. F

Chief Williams gave his own version of what happened at the trial court when a similar objection was raised. He then submitted that if Chief Ikeazor still wanted to pursue his objection in this Court he should come by way of a motion to the effect and this course would give him the opportunity of replying thereto. G

With the consent of both counsel, we adjourned hearing of the appeal and intimated that Chief Ikeazor should raise his objection by way of motion or written preliminary objection. H

By a motion dated 31st day of January 1995 and filed on 1/2/95, the plaintiffs/respondents pray this Court for -

“An Order for the restraining of Chief F.R.A. Williams from appearing

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or further appearing or further acting as counsel for the appellants, having appeared 'for the opposing side (i.e. the respondents/applicants) in an earlier chapter of the subject matter of this suit."

The motion is supported by a 31 paragraph-affidavit sworn to by the 1st plaintiff in which he averred, inter alia, as follows:

B "3. That the respondents/applicants are the Obosis where as the applicants/respondents are the Onitshas and shall be so referred hereunder.

C 4. That the motion for stay of execution in FSC.185/1960 in which Chief Williams appeared for us the Obosis concerns the same piece of land. Otu Obosi/Ugbo Orimili Land which is the subject matter of this very matter/appeal before this Honourable Court in which Chief Williams now want to appear for the Onitshas.

D 5. That I hereby in further support of the facts deposed to in paragraph 4 above, exhibit and marked 'A' the proceedings in which Chief Williams appeared for the Obosis against the Onitsha before the Federal Supreme Court (as it then was) on the 20th day of November, 1960 suit No: FSC/185/1960 between Anachuna Nwakohi & Ors. v. Eugene Nzekwu & Anor....Philip Anatogu & Anor.

E 6. That still in further support of the facts deposed to in paragraph 4 above, I hereby exhibit marked 'B' the ruling of the Federal Supreme Court delivered in the motion for stay of execution filed by the Obosis and argued by Chief Williams in which the Federal Supreme Court dismissed the Obosis application for stay of execution.

F
8. That suit No. SC./192/91 is an appeal arising from the review case filed by the Obosis in suit No. 0/246/80.

G 9. That suit No. 0/246/80 is a review case of suit No. 0/3/49 which was a case between the Obosis and Onitshas over the same piece of land Otu-Obosi/Ugbo Orimili; (0/3/49 is the genesis of many cases including the motion argued by Chief Williams in FSC/185/1960, and also this appeal SC/192/91).

H 10. That the consolidated suits FSC/185/1960 in which Chief Williams appeared for the motion for stay concerns 'possession' litigation of the same piece of land which the Privy Council permitted the parties to relitigate when suit No. 0/3/49 went to the Privy Council.

H 11. That I and my people (Obosis) gave Chief Williams all the documents/court judgments over the land in dispute (including the judgment in 0/3/49) to enable him effectively conduct the matter for us.

12. That I and my Obosi people trusted Chief Williams and gave him documents and our confidences in the belief and trust that he would use

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them to our benefit and never for the benefit of the Onitshas i. e. the Appellants/respondents.

13. *That in 1980 we filed a review action suit No. 0/246/80 Chief Ernest Agu & Ors. v. Chief Philip Anatogu & Ors. over the same piece of land.*

14. *That when the case was to commence, we the Obosis were surprised on hearing and receiving a copy of a letter written to the judge handling the case and also on receiving the statement of defence jointly settled by P.O. Balonwu Es. SAN and by Chief F.R.A. Williams, SAN (including the filing of a motion for demurer for our opponents) and realising that the self same counsel Chief F.R.A. Williams who was our counsel over a forerunner (FSC/185/1969) of this appeal at hand was then seeking to appear for our opponents, the Onitshas in 1982, we were then constrained to file a motion on notice to restrain the Onitshas from briefing him (which would also have the effect restraining him from appearing for them)."*

Chief Williams did not himself react to this affidavit. There is, however, a counter-affidavit sworn to by Samuel Chukwuemeka Balonwu, a legal practitioner in the Chambers of P.O. Balonwu & Co. In it, the deponent deposed:

"2. *That I am familiar with the facts of this case by virtue of my position in the Chambers.....*

4. *That it is trite in our jurisprudence that there is only one High Court in each State in Nigeria, thus there is only one High Court in Anambra State.*

5. *That it is also trite that a Court has the jurisdiction to vary or discharge an order it has made where the court subsequently finds out that the said order is a nullity especially on grounds of lack of jurisdiction.*

6. *That upon the grant of the prayers made by T. C. Umezina J. on the 17/9/82 upholding the prayers of Chief Rotimi Williams SAN (See B Exhibit 'K' attached to the motion paper now before the Court) the earlier injunction restraining Chief Rotimi Williams SAN as granted by F.N. Chukwuani J. on 10/6/82 became discharged and vacated.*

7. *That there was no appeal against the ruling of T.C. Umezina J. of 17/9/82.*

8. *That the principal case 0/246/80 continued thereafter with Chief Rotimi Williams appearing for the Respondents and without any objection by them. See the Ruling of T.C. Umezina J. of 9/5/84.*

9. *That the applicants cannot approbate and reprobate.*

10. *That the applicants have waived their right if any to protest the appearance of Chief Rotimi Williams S.A.N. as counsel for the respondents.*

11. *That the present application by the applicants was brought in bad faith.*”

B When the appeal and the motion came up for hearing on 27/2/95 both were adjourned to 3/7/95 for hearing. It was ordered that written briefs be filed in respect of the motion to restrain. Both parties filed and exchanged their respective briefs of argument on the motion.

C At the resumed sitting on 3/7/95, Chief Ikeazor moved the plaintiffs’ motion. He relied on the affidavit in support. He drew our attention to Rules 10, 22 and 26 of the Rules of Professional Conduct in the Legal Profession by the General Council of the Bar pursuant to section 1 of the Legal Practitioners Act. He adopted and relied on the Brief in support of the application. He observed that the main averments in the affidavit in support of the motion have not been challenged in the counter-affidavit. Citing *Fawehinmi v. Nigeria Bar Association & Ors. (No.2) (1989) 2 NWLR (Pt. 105) 558, 615-617*, he urged us to grant the prayer sought.

D Mr. Balonwu, learned leading counsel for the defendants opposed the application. He too adopted and relied on the Brief of the defendants. He referred to the counter-affidavit of Mr. S.C. Balonwu and the counter-affidavit of Chief Williams in the trial High Court annexed to the 1st plaintiff’s affidavit in support of the motion under consideration as Exhibit’ E’. Learned counsel urged E the Court to allow Chief Williams continued appearance for the defendants.

F That this court has power to grant the prayer sought is in no doubt. The Rules of Professional conduct apart, there are principles that guide the court in the exercise of this power. In *Onigbongbo Community v. Minister of Lagos Affairs & Ors. (1971) NCLR 186, 192, (1971) 7 NSCC 136, p. 139*, a case F the facts of which are very similar to the present application, the Rt. Hon. Sir Ademola, C.J.N. setout the principles-in these words.

G *“It is of course clear that every case must be considered on its own facts. There are, however, broader principles which the courts must observe in cases of this kind. On the one hand, the courts are not to prevent litigants from employing the services of counsel of their own choice; on the other hand, a person must not be allowed to employ the services of counsel, nor should counsel accept a brief, where it is clear that the services to be rendered flow out of or are closely connected with the previous services he had rendered to the opposing side: See Little v. Kingswood Collierires Co. (1882) H 20 Ch.D. 733 51 L.J. Ch. 498.*

Clearly, the jurisdiction to restrain counsel from acting for the antagonist of his former client stems from the principle that a man ought to be restrained from doing any act contrary to the duty that he owes to another;

and that the Jurisdiction will be exercised at the instance of the former client. Admittedly, it is difficult sometimes to find a dividing line, but it is wrong to think or to suggest that counsel may not act against someone whom it had been his privilege to serve or act for at one time, in a matter bearing no semblance or unconnected with the new case. In the instant case, where counsel was employed as a senior to lead in an appeal, the subject-matter of which was purely one of title to land, we see nothing wrong in appearing on the other side on another occasion on a matter which was manifestly a matter for the court to determine which of the two sides is entitled to compensation in respect of the same land in an acquisition, or the extent of compensation payable to each side.

Cases of this kind are more complex in this country where the professions of barrister and solicitor are fused. Most of the cases in England, and certainly the cases to which we have referred, dealt with solicitors. Referring to what was the practice at the Bar, Eldon, LC. said in Bricheno v. Thorp (1821) Jac. 300 at 304; 37 E.R. at 866):

'I know that formerly at the bar, if a counsel was employed, and a retainer was offered him on the other side, he first gave those for whom he had been employed, the option of retaining him, but if they would not, there was no difficult in going over to the other side, notwithstanding all that he might know. If that be the rule at the bar, we must not lay it down differently for solicitors. I have no conception that we are to give ourselves liberties that we refuse to others.'

We refrain from stating categorically in this case whether a senior counsel employed to argue as a leader in the Supreme Court is acting only as a barrister or as a solicitor as well."

Now the Rules 10 and 26 of the Rules of Professional Conduct to which our attention has been drawn provide:

"10 ADVERSE INFLUENCES AND CONFLICTING INTEREST:

(a) It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

(b) It is unprofessional conduct to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this rule, a lawyer represents conflicting interests when in respect of one client for whom he presently contends the interest of that client touch or concern confidences of another client to whom the lawyer, at the same time, owes a duty of service."

"26. CONFIDENCE OF A CLIENT:

(a) *It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment and it extends as well to his employees; and none of them should accept employment which involves or may involve the disclosure or use of these confidence, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without the client's knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to former or to his new client.*"

I cannot see the relevance of Rule 22 to the issue at hand.

Mr. Balonwu has referred us to Exhibit 'E' to 1st plaintiff's affidavit. This is the counter-affidavit sworn to by Chief Williams when objection was raised to the latter's appearance for the defendants at the trial court. With respect to learned counsel, I cannot take Exhibit E as an answer to the 1st plaintiff's affidavit. If Chief Williams had wanted to rely, in the present proceedings, on the facts stated therein, he should have filed a fresh counter-affidavit sworn to by him deposing to the same or similar facts. I agree with Chief Ikeazor that as the affidavit evidence before us stands, paragraphs 4-6, 8-14 of the 1st plaintiff's affidavit of 31st Jan. 1995 remains unchallenged and I find the facts therein proved.

A lot of argument has been proffered by both learned counsel which, in my respectful view, is not relevant to the resolution of the application before us. The prayer sought is to restrain "*Chief F.R.A. Williams from appearing or further appearing or acting or further acting as counsel for the appellants.*" The application is not about resolving the conflict, if any, in the decision of Chukwuani, J. on the one hand and that of Umezina, J. on the other hand. It concerns the question whether Chief Williams after having appeared for the plaintiffs in an earlier chapter of their dispute with the defendants in respect of the same subject-matter, can now appear for the defendants in the present proceedings which are a later chapter of the same matter.

Coming now to the plaintiffs' prayer, the fact stands clear and that is that Chief Williams did not appear for the defendants at the hearing of the appeal on 3/7/95. Indeed he has ceased to make appearance in the matter since 28/11/94. Of what use then is any restraining order to the plaintiffs when the present proceedings with this judgment remain closed. I do not understand the plaintiffs' prayer to be that we restrain Chief Williams not only from appearing in this Court in this appeal but also from appearing in any other court. We were not addressed to that effect but to the effect that he should be restrained from appearing for the defendants/appellants in this appeal. As he

Anatogu v. Iweka (1995) 9 KLR Ogundare JSC 1863
has now not done so, the matter becomes academic. And this Court does not make it a practice of pronouncing on academic matters *Peenok Investments Ltd. Ltd. Presidential Hotels Ltd. (1982) 12 S.C. 1.*

In the circumstance I hold that this application has been overtaken by events. It is accordingly stuck out. It is believed that Chief Williams will, in the light of the facts and the Rules, take the right step if requested again by the defendants to appear for them in the later chapter(s) of the matter between the parties over the same subject matter. Having disposed off plaintiffs' motion, I now turn attention to the appeal itself. The main question, in my respectful view, for consideration in this appeal is: whether the disputed documents were admissible in evidence at the stage they were tendered at the trial. All the questions as formulated in the parties' briefs revolve around this main question. Consequently I will consider all the questions together (except Question 5 which will be considered separately). In determining this appeal it must be borne in mind that the main case is yet to be tried. Care will, therefore, be taken not say more than it is necessary for the purpose of the issue under consideration. The submissions made on behalf of the parties run essentially along the respective position taken by them at the trial. I need not go over these submissions again.

The further Amended 'Statement of Claims is as unique as the claims; it consists of 140 paragraphs covering some 134 pages. The entire case, however, revolves on two issues:

(1) That years after the dismissal of their appeal to the privy council in the proceedings initiated by Suit No. 0/3/49, they have since discovered fresh evidence Which if available and tendered at the trial of Suit No. 0/3/49, the decision in that case would have been different;

(2) That the decision in the said suit was obtained by fraud.

They, therefore, seek to set aside the judgment in Suit No. 0/3/49. I am not unaware that there are claims (c) to (e) for determination, compensation and mesne profits. Unless either or both of the first two claims succeed and the judgment in Suit No.0/3/49 is set aside, those other claims would seems unsustainable in view of the plea of *res judicata* raised by the defendants in paragraph 19 of their amended Statement of defence.

The main thrust of defendants' objection to the admissibility of the disputed documents sought to be tendered in evidence by P.W.1 is that no foundation has been laid for their admissibility at the stage they were tendered in evidence. Being fresh evidence certain pre-conditions must be satisfied before the documents could be admitted in evidence and these were not established, they submit. The plaintiffs countered by saying that the docu

ments are relevant to their claim for fraud and are pleaded in paragraphs 18, 30 and 35 of their Further Amended Statement of Claim.

The general rule is that the court has no power under any application in the action to alter or vary a judgment or order after it has been uttered or drawn up, except so far as is necessary to correct errors in expressing the intention of the court or under the “*slip rule*” - See *Asiyanbi v. Adeniji* (1967) 1 All NLR 82, 89; *Umunna v. Okwuraiwe* (1978) 6-7 SC. 1; *Agwunedu v. Onwumere* (1994) 1 NWLR (Pt.321) 375. There are, however, exceptions to this rule some of which are:

(1) A judgment or order which is a nullity owing to failure to comply with an essential provision such as service of process, can be set aside by the court which gave the judgment or made the order - See: *Skenconsult (Nig.) Ltd v. Ukey* (1981) 1 SC. 6; *Craig. v. Kanssen* (1943) KB 256; *Forfie v. Seifah* (1958) 1 All ER 219 P.c.

(2) A judgment or order made against a party in default may be set aside and the matter reopened - see: e.g. Order XLI, rule 5 of the High Court Rules of Eastern Nigeria.

(3) There is jurisdiction to make upon proof of new facts an order supplemental to an original order, e.g. a supplemental order to an order for specific performance that there be an inquiry as to damages sustained by reason of the defendant’s delay in completing the agreement, at any rate from the date of the original order for specific performance - see: *Ford-Hunt v. Singh* (1973) 2 All E.R. 700; (1973) 1 WLR 738.

(4) If a judgment or order has been obtained by fraud, a fresh action will lie to impeach the judgment.

In Halsbury’s Laws of England (4th edition) Volume 26 at paragraph 560 the learned authors have this to say:

“560 Setting aside judgment obtained by fraud:

A judgment which has been obtained by fraud either in the court or of one or more of the parties may be impeached by means of an action, which may be brought without leave, and is analogous to the former chancery suit to set aside a decree obtained by fraud. In such an action it is not sufficient merely to allege fraud without giving any particulars, and the fraud must relate to matters which prima facie would be a reason for setting the judgment aside if they were established by proof, and not to matters which are merely collateral. The Court requires a strong case to be established before it will set aside a judgment on this ground, and the action will be stayed or dismissed as vexatious unless the fraud alleged raise a reasonable prospect of success and was discovered since the judgment.:’

See also: Jonesco v. Beard (1930) AC 298, 300 HL; Olufunmise v. Falana (1990) 3 NWLR. (Pt. 136) I.S.C; Kennedy v. Dandrick (1943) 2 All E.R. 606.

(5) A judgment may be set aside on the ground that fresh evidence has been discovered which, if tendered at the trial, will have an opposite effect on the judgment. There is, however, in this area of the law some confusion as to whether a new action need be instituted or that the issue must be one for appeal. For instance the learned authors of Halsbury's Laws of England' (4th edition) Volume 26 at paragraph 561 state:

"561. *Setting aside judgment on fresh evidence*

An action will lie to rescind a judgment on the ground of the discovery of new evidence which would have had a material effect upon the decision of the court. It must be shown (1) that the evidence could not have been obtained with reasonable diligence for use at the trial; (2) that the further evidence is such that, if given, it would have an important influence on the result of the trial, although it need not be decisive; and (3) that the evidence is such as is presumably to be believed."

See also Ladd v. Marshall (1954) 3 All ER 745, 748; McPherson v. McPherson (1936) AC 177 PC, a Canadian case where a respondent in a divorce suit brought an action, after the expiry of the time for appealing against the decree absolute, seeking to have the decree nisi and absolute rescinded and set aside on the ground (inter alia) that the trial of the divorce action in the Judges' law library had not been a trial in open court according to law and that the resultant decrees nisi and absolute were null and void. Yet there are authorities to the contrary view. See Ojo v. Abadie, (1955) 15 WACA 54; Re Barrell Enterprises & Ors. (1972) 3 All ER 631 (where it was stated, per incuriam, that a High Court Judge has no jurisdiction to set aside an order of another High Court Judge on the ground that fresh evidence has been obtained; the Court of Appeal alone has jurisdiction to do so). I do not intend, for the purpose of this judgment, to discuss this issue further as it may arise in the substantive action.

As stated above, the plaintiffs seek, in their present action, to set aside the judgment in Suit No. 0/3/49 on the grounds of (a) fresh evidence and (b) fraud. If they succeed in either case, they can only obtain an order of retrial of that suit. Their Further Amended Statement of Claim is drafted in such a way that the two issues are interwoven that there is no clear cut division between the two. Indeed, it appears that they rely on the fresh evidence in proof of their allegations of fraud.

Now what is "fresh evidence" and in what circumstances can it be given? A definition of the expression is given by Morris L.J. in R. v. Medical Appeal Tribunal (North Midland Region), Ex parte Hubble (1959) 3 All E.R. 4047 thus:

“Fresh evidence” it seems to me, must have the quality of newness, or the feature of having become newly available and obtainable.”

The learned Lord Justice cited, with approval, the dictum of Sir Francis Jeune, P. in Johnson (1900) pp. 19-20 to the effect:

“The question raised in this case is of general interest, but ‘to my mind, absolutely free from doubt. The Summary Jurisdiction (Married Women) Act, 1895, s.7, provides that a court of summary jurisdiction, acting as therein specified, may upon fresh evidence, alter, vary, or discharge an order previously made. But it is necessary that magistrates should clearly understand what ‘fresh evidence’ means, though, in my view, there is no real doubt about it. It means practically the same sort of evidence as that upon which a new trial would, In the ordinary course, be granted: it must relate to something which has happened since the former hearing or trial, or it must be evidence which has come to the knowledge of the party applying since that hearing or trial, and which could not by reasonable means have come to his knowledge before that time. It must amount to what was called in the old forms of pleading *res noviter ad notitiam perventa*. It is altogether a mistake to suppose that ‘fresh evidence,’ within the meaning of the Act of 1895, means or includes evidence which could have been called, but which was not in fact adduced, at the first hearing. It would be monstrous to suppose that a party could abstain from calling evidence, and could thereafter proceed to make application upon application, based on evidence which might have been tendered in the first instance. I have no hesitation in saying that to the words ‘fresh evidence’ in s.7 must be assigned the limited meaning and scope which I have indicated.”

The principles that guide the admissibility of fresh evidence are laid down in Ladd v. Marshall (1954) 3 All E.R. 745, 748 where Denning, LJ. (as he then was) observed:

“The principles to be applied are the same as those always applied when fresh evidence is sought to be introduced. In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have obtained with reasonable diligence for use at the trial: second, the 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: third, the evidence must be such as is H presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.” (Italics mine)

Ladd v. Marshall (supra) was cited, and followed, by this Court in Obasi & Ors v. Onwuka & Ors. (1987) 3 NWLR 364. Contrary to the conclusion reached by the Court below, it is my respectful view, that whether on appeal or

in a new action to set aside on ground of fresh evidence, the above conditions must be fulfilled before new evidence can be admissible. In this respect, I agree with the learned trial Judge. It will, in my respectful view, be monstrous to suggest that where it is sought on appeal to impeach a judgment by fresh evidence those conditions must be fulfilled, but they are unnecessary when such fresh evidence is to be adduced in an action to rescind a judgment already obtained and affirmed at all levels of appeal. That cannot accord with common sense. To allow the views of the court below to prevail is to suggest that a party seeking to rescind a judgment against him on the ground of discovery of fresh evidence has a lesser burden to bear if he institutes a new action to rescind than he impeaches the judgment on appeal. With profound respect to their Lordships of the court below, that view cannot be right.

In conclusion, I hold that at the stage the plaintiff sought to tender the disputed documents without having fulfilled the conditions necessary for the reception of such evidence, the learned trial Judge was right in rejecting them in evidence.

I will not touch briefly on Question 5 posed in the appellants' Brief. It was not defendants' ground of objection that there was non-compliance with section 179 of the Evidence Act. They did not file a respondents' Notice in the court below as required by the Rules of that Court. Their new argument based, as it were on section 179 of the Evidence Act, was a non-issue before that court. I therefore, see no merit in their complaint that that court made no pronouncement on it.

It is for the foregoing reasons that I, too, allow this appeal, set aside the judgment and consequential orders of the court below and restore the decision of the learned trial Judge rejecting the disputed documents in evidence. In doing so, I have reached the same conclusion (though for different reason) as my learned brother Uwais, J.S.C. a preview of those judgment I had the privilege ere now of reading. I abide by the order for costs made by my learned brother Uwais, J.S.C.

OGWUEGBU JSC

I had a preview of the judgment just read by my learned brother Uwais, J.S.C. and I agree completely with his reasoning and conclusions. I also will allow the appeal.

The issue whether Chief F.R.A. Williams, S.A.N. can still appear for the appellants having appeared or acted for the respondents in the earlier chapter of the subject matter of this appeal is no longer potent in view of the

fact that Chief F.R.A. Williams, S.A.N. has not appeared before this court to

prosecute this appeal. The application is accordingly dismissed. The only issue for determination in this appeal is whether the rejection of the documents in evidence by the learned trial Judge was proper in law.

There is no doubt that the respondents herein who are the plaintiffs in the High Court took the irregular procedure of attempting to tender public documents through P.W.1 who was on subpoena for the sole purpose of producing them. The documents were inadmissible at the time they were sought to be tendered.

The Niger Lands Agreements and the Treaty of Cessions sought to be tendered through P.W.1 are public documents as defined in section 109 of the Evidence Act Cap. 112, Laws of the Federation of Nigeria, 1990. The respondents summoned P.W. 1 to produce the said documents without more. See section 192 of the Evidence Act, Laws of the Federation of Nigeria, 1990. Sections 109 and 192 of the Evidence Act provide as follows:

- "109. The following documents are public documents -*
- (a) documents forming the acts or records of the acts -*
 - (i) of the sovereign authority,*
 - (ii) of official bodies and tribunals, and*
 - (iii) of public officers, legislative, judicial and executive, whether of Nigeria or elsewhere;*
 - (b) private records kept in Nigeria of private documents.*
- 192. Any person, whether a party or not, in a cause may be summoned to produce a document without being summoned to give evidence, and if he cause such document to be produced in court the court may dispense with his personal attendance."*

When the learned counsel for the respondents sought to tender the said documents through P.W.1, he converted him into a witness, in which case, he would be subject to cross-examination. It was an unusual procedure and the objection was well taken.

The claim of the respondents in the trial court is for *"Review and Setting Aside of the judgment in the then Supreme Court of Onitsha Suit No. 0/3/49; Philip Akunne Anatogu and another v. Chief I. M. Kodilinye and anor, which was subsequently confirmed on appeal in Suit No. 3323 of the W.A.C.A.;and in the Privy Council in Suit No. 39 of 1951The grounds of the plaintiffs' claim are based on (a) Fraud and or (b) New Evidence."*

The claim is a new and independent action. Actions of this nature do not invite the High Court to rehear the case upon the old materials. Fresh facts are brought forward and the action is regarded as new and not appellate.

“*Fraud is an insidious disease, and if clearly proved to have been used so that it might deceive the Court, it spreads to and infects the whole body of the judgment*” per Lord Buck-Master in *Jonesco v. Beard* (1930) A.C. 298 at 301. In such a new trial, the burden of proof is in no way abated and all the strict rules apply. Those rules do not permit short-cuts whereby documents are dumped with the court as was the case in the proceedings which gave rise to this appeal. This course taken by the respondents’ counsel was irregular. B

The court below erred when it held that the documents were admissible in evidence. The respondents failed to lay proper and sufficient foundation for their admissibility. See *Cole v. Langford* (1898) 2 Q. B. 36. The court below misconceived the true nature of an action which impeaches a completed judgment on ground of fraud. The particulars of the fraud must be exactly given and the allegation established by strict proof. C

For these and the fuller reasons contained in the judgment of my learned brother Uwais, J.S.C. I too will allow the appeal and set aside the decision of the court below. I endorse the orders contained in the said judgment. D

MOHAMMED JSC

I agree to allow this appeal. The learned trial Judge, Nwazota, J., was right to hold, in his ruling, that the plaintiffs/respondents ought first to show why the documents which were sought to be tendered, in the present action, had not been tendered in the previous suit. E

The issue of receiving fresh evidence or new evidence is ordinarily a matter to be applied for in an appeal court, because once a trial High Court signs its judgment and has it enrolled it becomes *functus officio*. Such a judgment could only be reviewed by an Appeal Court. Hence, under Order 1, Rule 20(3) of Court of Appeal Rules 1981 it is provided thus: F

“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 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.” G

The special grounds which will arise before the Appeal Court-could permit new evidence or further evidence to be admitted are when such evidence (a) could not have been obtained at the trial with reasonable diligence, H

see *Skone v. Skone* (1971) 2 All E.R. 582, (b) would or might, if believed, have a very important effect on the whole case and (c) is of a sort which inherently is not improbable - See *Roe v. Robert McGregor and Sons Ltd* (1968) 1 WLR 925. See also *Ladd v. Marshall* (1954) 1 WLR 1489 at 1491.

B In their statement of claim the respondents pleaded that they had discovered fresh evidence which were not discoverable with due diligence at the time of the trial in 1949. The appellants in their statement of defence denied that the respondents had any new evidence now which they could not produce during the trial in suit of 1949. Since this new action is based on the discovery of fresh or new evidence the respondents had to satisfy the court, through the guiding principles, for the admission of such evidence. In the cases of *Federal Board of Inland Revenue v. Joseph Rezcallah and Sons Ltd.* (1962) 1 SCNLR 1; (1962) All NLR 1 and *A-G Federation v. Alkali* (1972) 12 SC 29 (1972) NSCC. 680 this court refused to grant application to adduce further evidence because the applicants had failed to establish convincing reason for such a grant.

D In the case in hand, the main reason for re-opening this suit, which went up to the Privy Council is, according to the respondents the discovery of fresh evidence. It is therefore incumbent on the respondents to establish special grounds through the enunciated guiding principles before such new evidence could be admitted. I agree that at the stage those documents were sought to be tendered the proper grounds have not been laid for their admission in evidence.

E For these reasons and other fuller reasons in the judgment of my learned brother, Uwais, J.S.C., I allow this appeal and remit the case back to the High Court of Anambra State for the continuation of the proceedings. I abide by the order on costs, in the lead judgment.

F _____

ONU JSC

G Having had the privilege of a preview of the judgment of my learned brother Uwais, J.S.C. just delivered, I agree with his reasoning and conclusions that this appeal is meritorious and ought to succeed. Accordingly, I too, allow the appeal and abide by the consequential orders inclusive of those as to costs.

ADIO JSC

H I have had a preview of the judgment just delivered by my learned brother, Uwais, J.S.C., and I agree with it. I too allow the appeal and I abide by the consequential orders, including the order as to costs.