

**SUPREME COURT OF NIGERIA**  
6TH FEBRUARY, 1996. SC.300/1989  
**CORAM:- M. L. UWAIS (CJN), A. B. WALI,**  
**S. U. ONU, Y. O. ADIO, A. I. IGUH, JJSC.**

MALCOLM OLUMOLU ..... APPELLANT  
AND  
ISLAMIC TRUST OF NIGERIA ..... RESPONDENT

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***APPEALS*** - Order of retrial - By Appellate Court - Where the order meets justice of the case - Court was perfectly right in making the order

***JUDGMENTS*** - Order of retrial - To resolve material issue in a case where trial court fails to resolve it - Is a means of doing justice to both sides.

***PRACTICE & PROCEDURE*** - Order of court - Land dispute - Where respondent is unable to prove boundary - And where there is a technical hitch - What is the proper Order to be made.

**FACTS**

The plaintiff/respondent, sued the defendant/appellant, in the High Court of Kaduna State, Kaduna claiming possession, damages and injuiu tion. To the respondent's claim, the-appellant in his statement of detenu raised a counter claim. At the end of the trial, the learned Chief Judge entered judgment in favour of the respondent in respect of two reliefs and dismissed the appellant's counter claim.

Against that decision of the trial court, the appellant appealed and the respondent cross-appealed to the Court of Appeal Kaduna Division. The Court of Appeal dismissed the respondent's cross appeal and allow the appellant's appeal and ordered a retrial of the case. The appellant yet aggrieved with this decision, has appealed to the Supreme Court, raising two issues.

**ISSUES FOR DETERMINATION**

1. Whether or not there was a valid counterclaim and whether or not the counterclaim was properly dismissed.

2. Whether or not the Court of Appeal rightly ordered a retrial I the circumstances of this case.

**HELD** (Unanimously dismissing the appeal per lead judgment of **ONU JSC**)

***Proper order to be made***

1. In the instant case, it was not established that the respondent was unable to proof its boundary, in which case the proper order to have been made it striking out or an order of a non-suit where judgment could not be granted because of a technical or legal hitch where, invariably, counsel has been given a prior hearing on its desirability or otherwise. (p. 206 C)

***Order of retrial - Court was perfectly right***

2. As it was not manifest that the respondent had failed in toto nor was he being giving chance for a second bite at the cake or further still, was he being subjected to injustice or a miscarriage of justice, a retrial became inevitable. The court below was perfectly right to have ordered a retrial in the given instances since it will meet the justice of the case and would cause neither hardship nor prejudice on the part of either of the parties. (p. 206 E)

***Order of trial - To resolve material issue***

3. Where however, as in the instant case in which there was a failure to resolve a material issue before the trial court, to wit: where there has been of identity of the land in dispute, it is settled law that a retrial will be ordered. In the light of the above, this is not a case of giving the respondent a second bite at the cherry or another opportunity to make up for lost ground; rather, it is a case of doing justice to both sides who for the improper presentation of their cases are admonished to file a in assist in the identification of the land in dispute. Issue 2 is answered in the affirmative. (p. 206 H)

**NOTABLE POINTS OF INTEREST**

***1. Issues not based on any ground of appeal***

The significant things about the first issue was that it was not based on any ground of appeal. The law is that points not raised in any ground of appeal and for which no leave to argue has been sought and obtained cannot be competently raised in a brief of argument. In order that any issue raised for determination may be considered by the court (appeal court), such issue must be based on and arise from a proper or competent ground of appeal. (p. 207 H)

**IGUH JSC*****2. Order of retrial when to be made***

No doubt, an order of retrial cannot be appropriate in a suit where it is manifest that the plaintiffs case has failed in toto and that no irregularity of a substantial nature is apparent from the records. So, too, before an appellate court may decide to make an order of retrial, it should satisfy itself that the defendant is thereby not being wronged to such an extent that there would be a miscarriage of justice thereby. (p. 210 B)

***3. Judge's role in visit to locus in quo***

I think the point must be emphasized that a trial Judge should under no circumstance put his personal observations at a locus in quo in place of the evidence before the court. The main purpose of a view or a visit to the locus in quo is to assist the court to understand fully the question in issue in a case, to appreciate and follow the evidence before it and properly to apply such evidence in arriving at its decision. It is imperative that a Judge must, on such inspections, avoid placing himself in the position of a witness, which he is not, and arriving at conclusions based upon his personal observations of which there is no evidence on record. (p. 210 F)

**REPRESENTATION**

M. O. Oluwole for the Appellant

Respondent absent. Not represented

**CASES REFERRED TO**

Aromire v. Awoyemi (1972)1 All N.L.R. (Part 1) 101 at 113

Odesanya v. Ewedemi (1962)1 All N.L.R. (Part 2) 320

Ekwere v. Iyiegbu (1972)6 S.C. 116 at 138

Ejiofor v. Onyeku (1972) 12 S.C. 171 at 185

Anyakwo v. A.t.B. Ltd. (1976) 2 S.C. 41 at 54-62 G Ikoro v. Safrap Ltd. (1977) 2 S.C. 123

Atanda v. Ajani (1989)3 NWLR (Part 111) 511 at 536

Mogaji v. Odofin (1978)4 S.C. 90

Onifede v. Olayiwola (1990)11 SCNJ. 10 at 20.-(1990)7 N.W.L.R. (Part 1610 130

Nwosuv. Udeaja(1990) 1 N.W.L.R. (Pt. 125) 188

Onyido v. Ajemba (1991) 4 N.W.L.R. (Pt. 184) 203

Nwokoro v. Onuma (1990) 3 N.W.L.R. (Part 136) 22 at 35

Attorney-General of Anambra State v. Onuselogo Enterprises Ltd.

(PT 38) 200

(1987) 4 N.W.L.R. (Part 66) 547

Oniah v. Onyia (1989) 1 N.W.L.R. (Part 99) 514 at 529

University of Lagos v. Olaniyan (1985) 1 N.W.L.R. (Part 1) 156 at 165

### **STATUTE AND RULES REFERRED TO**

Evidence Act Cap 112 L.F.N. 1990 s.77(2)

High Court (Civil Procedure) Rules 1977 of Kaduna State Order 10, Rule 14

### **LEAD JUDGMENT BY ONU JSC**

By its Writ of Summons dated November 29, 1984 the respondent herein, then as plaintiff, sued the appellant who was the defendant, in the High Court of Kaduna State holden in Kaduna, for possession, damages for mesne profits and injunction. Appellant, among others, counter-claimed against the respondent in his Statement of Defence that:

*"It be declared that the defendant's Certificates of Occupancy No. 004755 of 4/8/78 and No. 003434 of 11/12/78 are still subsisting."*

The trial court (Coram S.U. Mohammed, C.J., as he then was, of blessed memory) after ordering pleadings and hearing the evidence of both parties, delivered its judgment in favour of the respondent to whom it accordingly granted only the reliefs for possession and injunction but not its claim for damages for trespass. For the appellant's claim in his counter-claim that *"the two certificates of occupancy issued by the Zaria Local Government are still valid and subsisting"* on the other hand, it dismissed it.

The appellant's appeal and the respondent's cross-appeal against the decision of the trial court to the Court of Appeal sitting in Kaduna (hereinafter in the rest of this judgment referred to as the court below) were each allowed and dismissed respectively. In respect of the former, a retrial was accordingly ordered.

Being further dissatisfied with this decision, the appellant has appealed to this court on a Notice of Appeal containing two grounds.

The parties thereafter exchanged briefs of argument in accordance with the rules of court. The two issues formulated for our determination by the appellant, both of which the respondent has respectfully adopted, are:

1. Whether or not there was a valid counterclaim and whether or not the counterclaim was properly dismissed.

2. Whether or not the Court of Appeal rightly ordered a retrial in the circumstances of this case.

At the hearing of the appeal on 6th November, 1995, while the

learned counsel for the appellant was present, learned counsel for the respondent was absent. That notwithstanding, since briefs had hitherto been filed and exchanged and there was proof of service of the hearing notice on the respondent, the appeal proceeded there and then to hearing. Learned counsel for the appellant M.O. Oluwole, Esq., after adopting his brief dated  
 B 22nd January, 1990 and explaining that he had nothing further to add thereto, asked that appellant's appeal be allowed.

I shall now proceed to consider the two issues founded upon as appellant's complaint in their order of sequence as follows:-

Issue 1:

C There is no ground of appeal in support of this issue whose purport is whether or not there was a valid counterclaim and whether or not the counterclaim was properly dismissed. This is because, the only ground of appeal out of the two contained in the appellant's Notice of Appeal dated the 14th day of June, 1988 from which this issue could possibly be  
 D distilled, namely ground one, states that –

*"1. The learned Justices of the Court of Appeal erred and misdirected themselves in law in not giving judgment in favour of the appellant herein when the respondent herein did not file a defence to the counterclaim."*

E Particulars of error and misdirection in law

(i) It is wrong to hold that the plaintiff at the High Court had joined issue with the defendant when the plaintiff did not file a reply to the counterclaim.

(ii) Order 10 Rule 14(3) of the High Court (Civil Procedure) Rules,  
 F 1977 of Kaduna State is unambiguous and must be complied with before a plaintiff can be held to join issues with a defendant in respect of a counterclaim.

(iii) The Supreme Court decision in Nigerian Housing Development Society Ltd. & Anor. Y. Mumuni (1977) 2 S.C. 57 is binding."

G Issue 1 being unrelated to ground one set out above is, in my view, incompetent and should be struck out. I accordingly hereby strike it out.

Issue 2:

The question posed by issue 2 is whether or not the court below rightly ordered a retrial in the circumstances of this case. The appellant's  
 H contention in the argument of this issue is firstly that once the court below had held that the evidence at the locus in quo was inadmissible as it was obtained contrary to section 76 proviso 2 of the Evidence Act, that court was under a duty to have dismissed his case and to have given judgment in favour of the respondent as per his counterclaim. Secondly, the above holding, the appellant next contended, has the effect of the appellant fail-

in his duty to establish that the respondent's land was within its own land. There was no half-way house since the respondent averred that his own land was outside the appellant's land through paragraph 1 of the Statement of defence/counterclaim which denied paragraph 2 of the amended statement of claim and all other paragraphs of the amended statement of claim.

Thirdly, it was argued, it is important to note that the appellant/counter-claimant was not claiming more than his parcel of land which he bought from Alhaji Sanda Palladan and over which he obtained two Local Government Certificates of Occupancy. Consequently, it is submitted, the claim of the respondent to that piece of land totally failed once the inadmissible evidence obtained at the locus in quo had to be expunged. The facts of this case, it was submitted, were therefore distinguishable from those in

(i) Yesufu Abodundu & Ors. v. The Queen (1959) SCNLR 162; (1959) 4 F.S.C. 70 at 73.

(ii) Okafor v. The State (1976) 6-9 S.C. 3

(iii) Ikhane v. C.O.P (1977) 6 S.C. 119

(iv) Okpara v. The Republic (1977) 4 S.C. 54

(v) Eyorokoromo & Anor. v. The State (1979) 6-9 S.C. 3

(vi) Ayoola v. Adebayo (1969) 1 All NLR 159 and

(vii) Ajayi v. Olu Fisher (1956) SCNLR 279; (1956) 1 F.S.C. 90,

92.

We were therefore urged to set aside the order of retrial and substitute therefore an order of dismissal as decided in

(i) Ajide Arabe v. Ogunbiyi Asanlu (1980) 5-7 S.C. 78

(ii) Anyaoke v. Adi (1986) 3 NWLR (Pt.31) 731 at 744

(iii) Ogbechie v. Onochie (1988) 1 NWLR (Pt.70) 370 at 395, and

(iv) Ezeoke & Ors. v. Nwagbo & Anor. (1988) 1 NWLR (Pt.72) 616; (1988) 3 SCNJ 337

It was argued in conclusion that no doubt, the appellant gave satisfactory evidence which entitled him to judgment; that the court below ought to have dismissed the respondent's case and to have held that the counter-claim succeeded; that the respondent did not deserve to be given chance for a second bite at the cherry having woefully failed to establish that the appellant had trespassed into the land and that the decision of the court below which had the unintended effect that a plaintiff who failed to prove his or its case must be given another chance neither represented the law nor could it be good law, adding that there was no justification for an order of retrial since the respondent's case against the appellant had totally failed and the appellant gave satisfactory

evidence to entitle him to judgment on the merit.

It may be appropriate before proffering an answer to the points raised in this issue to ask the following two pertinent questions.

(a) Has the respondent's case failed in toto thus rendering an order of retrial improper?

B (b) Will an order of retrial visit appellant's case with miscarriage of justice or injustice?

I will set about answering these two questions by first of all surmising that had the learned trial Judge not gone to the locus in quo to see things for himself, the respondent's case would have ended in being dismissed. Be that as it may, the visit was a saving grace in that because the C court below did not find the case before the trial court established to its satisfaction for failure on the part of the respondent to identify it with certainty, it proceeded to order a retrial. See *Aromire v. Awoyemi* (1972) 1 All NLR (Pt.1) 101 at 113 and *Odesanya v. Ewedemi* (1962) 2 SCNLR 23; (1962) 1 All NLR (Pt.2) 320. In the instant case, it was D not established that the respondent was unable to prove its boundary, in which case the proper order to have been made was a striking out - See *Joseph Ekwere & Ors. v. Nakmakosi Iyiegbu & Ors.* (1972) 6 S.C. 116 at 138 or an order of a non-suit where judgment could not be granted because of a technical or legal hitch where, invariably, E counsel has been given a prior hearing on its desirability or otherwise. See *Okwo Ejiofor v. Eze Onyekwu & anor.* (1972) 12 S.C. 171 at 185; *John Orekie Anyakwo v. A.C.B. Ltd.* (1976) 2 S.C. 41 at 54-62 and *Ikoro v. Safrap Ltd.* (1977) 2 S.C. 123.

In the instant case, as it was not manifest that the respondent F had failed in toto nor was he being given chance for a second bite at the cake or further still, was he being subjected to injustice or a miscarriage of justice, a retrial became inevitable. The visit to the locus in quo having been wrongly conducted, had the parties been made to address the court below, non-suiting them would, in my opinion, have been the appropriate order to make. Be that as it may, in the instant case, the court below was G perfectly right to have ordered a retrial in the given circumstances since it will meet the justice of the case and would cause neither hardship nor prejudice on the part of either of the parties. See *Atanda v. Ajani* (1989) 3 NWLR (Pt.111) 511 at 536; *Mogaji v. Odojin* (1978) 4 S.C. 91 and *Solomon v. Mogaji* (1982) 11 S.C. 1 at 24. Be it noted on the question of identity of H the land in dispute what the learned trial Chief Judge said, to wit:

*"....this lack of sufficient identity is not the fault of either party, the fault lies with the format the certificates take."*

The cases cited to us are inapposite and unhelpful to the appellant. Where, however, as in the instant case in which there was a failure to

resolve a material issue before the trial court, to wit: where there has been insufficiency of identity of the land in dispute, it is settled law that a retrial will be ordered. See *Onifade v. Alhaji Olayiwola* (1990) 11 SCNJ 10 at 20; (1990) 7 NWLR (Pt.161) 130. In the light of the above, this is not a case of giving the respondent a second bite at the cherry or another opportunity to make up for lost ground; rather, it is a case of doing justice to both sides who for the purpose of the proper presentation of their cases are admonished to file a plan or plans to assist in the identification of the land in dispute. B

Issue 2 is accordingly answered in the affirmative.

In the result, this appeal fails and it is accordingly dismissed. C

The case shall be remitted to the High Court, Kaduna for hearing *de novo*. Costs are assessed in favour of the respondent in the sum of N1,000.00 only.

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**UWAIS CJN**

D

I have had the opportunity of reading in draft the judgment read by my learned brother Onu, J.S.C. I agree with the judgment. I, therefore adopt it as mine. I abide by the consequential order therein.

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**WALI JSC**

E

I have read before now the lead judgment of my learned brother Onu, J.S.C. and I am in agreement with his reasoning and conclusion that the appeal has no merit.

For these same reasons I also dismiss the appeal and affirm the judgment and order for hearing *de novo* before another Judge of the Kaduna State High Court. F

Costs of N1,000.00 is awarded in favour of the respondent.

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**ADIO JSC**

G

I have had a preview of the judgment just delivered by my learned brother Onu, J.S.C., and I agree that the first issue should be struck out and that there should be a retrial in the circumstances of this case.

I, however, wish to make some comments. The facts have been fully set out in the lead judgment of my learned brother, Onu, J.S.C. The appellant identified two issues for determination in his (appellant's) brief. The significant thing about the first issue was that it was not based on any ground of appeal. The law is that points not raised in any ground of appeal and for which no leave to argue has been sought and obtained cannot be H



competently raised in a brief of argument. See: *Osinupebi v. Saibu* (1982) 7 S.C. 104. In order that any issue raised for determination may be considered by the court (appeal court), such issue must be based on and arise from a proper or competent ground of appeal. See *Nwosu v. Udejaja* (1990) 1 NWLR (Pt.125) 188; and *Onyido v. Ajemba* (1991) 4 NWLR (Pt.184) B 203.

For the foregoing reasons, where any issue framed for determination does not arise from the grounds of appeal filed both the issue and the argument in support set out in the brief of argument would be struck out or discountenanced. See *Ogunlade v. Adeleye* (1992) 8 NWLR (Pt.260) 409. Consequently, the first issue and the argument in support of it are hereby struck out.

With reference to the claim itself, it did not fail in toto. An order for retrial was a proper order in the circumstance. See *Onifade v. Olayiwola* (1990) 7 NWLR (Pt.161) 130.

It is for the foregoing reasons and for the detailed reasons given in the lead judgment of my learned brother, Onu, J.S.C. that I agree that the first issue should be struck out and that there should be a retrial in the circumstances of this case. The appeal, in this connection, fails and it is dismissed. I abide by the order for costs.

### E IGUH JSC

I have had the privilege of reading in draft the lead judgment just delivered by my learned brother, Onu, J.S.C. and I agree with him that there is no merit in this appeal.

The facts that gave rise to this appeal have been fully set out in the lead judgment and no useful purpose will be served by my repeating them all over again. It suffices to state that the learned trial Chief Judge at the conclusion of trial dismissed the defendant's counter-claim and entered judgment for the plaintiffs against the defendant as follows:-

*'The net result is that judgment is entered for plaintiffs against defendant for possession and injunction; plaintiffs' claim for damages in trespass is dismissed and the declaration sought by the defendant in his counterclaim that the two Certificates of Occupancy issued to him by the Zaria Local Government are still valid and subsisting is also dismissed.'*

The defendant's appeal to the court below was on the 9th June 1988 allowed and a retrial of the case was ordered. The defendant being further dissatisfied with this judgment of the Court of Appeal lodged an appeal to this court. The two issues distilled by the parties for the determination of this court are as follows:-

(i) Whether there was a valid counter-claim in the suit and whether the same was properly dismissed and

(ii) Whether the Court of Appeal rightly ordered a retrial in the circumstances of the case.

I will now briefly dispose of these issues.

The first issue, in the main, questions the validity of the defendant's counterclaim in the suit. A close study of the record of proceedings in this appeal reveals in no uncertain terms that the question, whether or not the defendant's counterclaim in the suit was valid or defective was neither raised throughout the trial before the learned Chief Judge nor was it an issue before that court. It was also neither an issue before the Court of Appeal nor was any argument raised in that regard before that court. It was in the judgment of the Court of Appeal that this issue first emerged when that court suo motu cast some doubt on the validity of the said counterclaim, stating inter alia as follows -

*"It is therefore palpably obvious that the alleged counterclaim, was not in fact and effect an independent action. The hood does not make the monk; just as a wig and gown do not make the lawyer."*

The point cannot be over-emphasized and this court has warned times without number against decisions of courts of law being founded on any ground in respect of which they have neither received argument from or on behalf of the litigants before them, nor even raised by or for the parties or either of them. See: Shitta-Bey v. Federal Public Service Commission (1981) 1 S.C. 40; Saude v. Abdullahi (1989) 4 NWLR (Pt.116) 387; (1989) 7 S.C.NJ. 216 at 229; Chief Ebba v. Chief Ogodo & Anor (1984) 1 SCNLR 372; (1984) 4 SC 84 at 112; Florence Olusanya v. Olufemi Olusanya (1983) 1 SCNLR 134; (1983) 3 S.C. 41 at 57.

Similarly it is well settled that it is not right for an appellate court to formulate suo motu or, single handedly to raise issues for the parties and decide the matter on those issues without hearing the parties on such issues so formulated. See: Nwokoro v. Onuma (1990) 3 NWLR (Pt.136) 22 at 35; Ugo v. Obiekwe (1989) 1 NWLR (Pt.119) 556; Anie v. Uzorka (1993) 8 NWLR (Pt.309) 1 at 16 etc. The Court of Appeal was therefore in error to have appeared to decide on the invalidity of the said counter-claim when the same was not raised as an issue before it.

More importantly, is the fact that the said issue number one in this appeal which questions the validity of the defendant's counter-claim can not be said to arise, whether directly or indirectly, from any of the two grounds of appeal filed by the appellant in the present appeal. In this regard, it must be restated that an appellate court can only hear and decide on issues raised on the grounds of appeal filed before it and an issue not covered by any ground of appeal is incompetent and will be struck out. See Management Enterprises Ltd v. Otusanya (1987) 2 NWLR (Pt.55) 179; Attorney-General of Anambra State v. Onuselogu Enterprises Ltd

210 Olumolu v. Islamic Trust of Nig. (1996) 2 KLR Iguh JSC  
(1987) 4 NWLR (Pt.66) 547; Oniah v. Onyia (1989) 1 NWLR (Pt.99)  
514 at 529 and Adelaja v.

Fanoiki and Another (1990) 2 NWLR (Pt.131) 137 at 148. Issue number one not being covered by any of the two grounds of appeal filed before this court is accordingly pronounced incompetent and is hereby struck out.

B The contention of the appellant in respect of the second issue is  
that there was no justification for an order of retrial since the plaintiff's  
case against the defendant had, according to him, totally failed. With re-  
spect, I cannot accept this submission as well founded. No doubt, an order  
of retrial cannot be appropriate in a suit where it is manifest that the plain-  
tiffs' case has failed in toto and that no irregularity of a substantial nature  
C is apparent from the records. So, too, before an appellate court may decide  
to make an order of retrial, it should satisfy itself that the defendant is  
thereby not being wronged to such an extent that there would be a miscar-  
riage of justice thereby. See Ayoola v. Adebayo (1969) 1 All NLR 159.

D In the present case, however, it cannot be seriously argued that the  
plaintiffs' case failed in toto. It is also crystal clear that the basis upon  
which the learned Chief Judge entered judgment for the plaintiff and dis-  
missed the defendant's counterclaim was his personal observations during  
the court's visit to the locus in quo. It was from these personal observa-  
tions, as a result of which he appeared to have placed himself in the posi-  
E tion of a witness and arrived at conclusions based thereupon with no sup-  
porting evidence on record that he erroneously reached his decision in the  
case. I am in complete agreement with the court below when it held that  
the case made by the learned Chief Judge from his personal observations  
at the locus in quo unsupported by any evidence on record, is without  
F doubt totally irregular and unsupportable.

I think the point must be emphasized that a trial Judge should  
under no circumstance put his personal observations at a locus in quo in  
place of the evidence before the court. The main purpose of a view or a  
visit to the locus in quo is to assist the court to understand fully the ques-  
G tions in issue in a case, to appreciate and follow the evidence before it and  
properly to apply such evidence in arriving at its decision. It is imperative  
that a Judge must, on such inspections, avoid placing himself in the posi-  
tion of a witness, which he is not, and arriving at conclusions based upon  
his personal observations of which there is no evidence on record. See  
H Olubode v. Salami (1985) 2 NWLR (Pt.7) 282 at 297 and Chief Nwizuk v.  
Chief Eneyok (1953) 14 WACA 354 at 355. Indeed in Ejidike v. Obiora 13  
WACA 270 at 273, Verity, Ag. P. succinctly put the matter as follows:-

*"When there is conflicting evidence as to physical facts, I have no  
doubt that he may use his own observations to resolve the conflict,  
but I do not think it is open to him to substitute the result of his own*

*the sworn testimony nor to reach conclusions upon something he has observed in the absence of any testimony on oath to the existence of the facts he has observed. Should he do so, he would, in my view, be usurping the position of the witnesses, and if his decision is materially affected by conclusions drawn from facts of which there is no evidence upon the record this may result in the reversal of his judgment or the order of a new trial."*

I therefore endorse the view of the court below to the effect that the visit to the locus in quo and the personal observations recorded by the learned trial Chief Judge instead of recording evidence in relation thereto was in gross violation of section 76 of the Evidence Act and clearly rendered the entire trial procedurally irregular.

An appellate court will generally order a retrial where there has been such an error in law or an irregularity in procedure which neither renders the trial a nullity nor makes it possible for the appellate court to say that there has been no miscarriage of Justice. See *Duru v. Nwosu* (1989) 7 S.C.N.J. 154 at 159; *Okoduwa v. The State* (1988) NWLR (Pt.76) 333; *Yesufu Abodundu & Ors. v. The Queen* (1959) SCNLR 162; (1959) 4 F.S.C. 70 and 73 etc. So, too, where to refuse an order for a retrial would occasion a greater miscarriage of justice than to grant it, it should be ordered. See *Yesufu Abodundu & Ors, v. The Queen* (supra) and *Ayoola v. Adebayo* (1969) 1 All NLR 159 etc.

In the present case, the discretion whether or not to order a retrial was that of the Court of Appeal and unless this court comes to the conclusion that this exercise was manifestly wrong, arbitrary, reckless, injudicious or contrary to justice, it cannot interfere even if it might have exercised the discretion differently if the discretion were that of this court. See *University of Lagos v. Olaniyan* (1985) 1 NWLR (Pt.1) 156 at 165; *University of Lagos v. Aigoro* (1985) 1 NWLR (Pt.1) 143; *Nwabueze v. Nwosu* (1988) 4 NWLR (Pt.88) 257 at 260; *Anyah v. African Newspapers of Nigeria Ltd.* (1992) 6 NWLR (Pt.247) 319 at 334. As I have already indicated, this is not a case where the plaintiffs case failed in toto. There was also a definite irregularity in procedure as a result of the visit by the court to the locus in quo that it is impossible for this court to say that there had been no miscarriage of justice in the trial. I think the court below was entirely right to make an order of retrial in this case. Issue two is accordingly answered in the affirmative.

It is for the above and the more detailed reasons contained in the lead judgment of my learned brother, Onu J.S.C. that I too dismiss this appeal. I abide by the order for costs contained in the lead judgment.