

SUPREME COURT OF NIGERIA
29TH MAY, 1998. SC. 268/1991
CORAM: M. L. UWAIS CJN, A. B. WALL, E. O. OGWUEGBU,
U. MOHAMMED, S. U. ONU, JJSC.

EMMANUEL OKPANUM PLAINTIFF/RESPONDENT/APPELLANT
AND
S.G.E. NIGERIA LIMITED DEFENDANT/APPELLANT
RESPONDENT

***APPEALS** - Further evidence - Power to grant leave to adduce new evidence - The principles which an appellate Court must take into consideration.*

***APPEALS** - Further evidence - Exhibits which did not constitute further evidence - The Court of Appeal was wrong to refer to and rely on the exhibits - In arriving at its judgment.*

***APPEALS** - Further evidence - Where the parties did not join issue - And the proposed further evidence was not pleaded - It goes to no issue.*

***APPEALS** - Further evidence - Where the Court was irregularly constituted - The exhibits received as additional evidence were irregularly received - And a decision based on them goes to no issue.*

***EVIDENCE** - Appeals - Additional evidence on appeal - Authenticity thereof was questioned by the other side - And the witness ought to be recalled for cross-examination.*

***JUDGMENTS** - Setting aside trial court's judgment - By relying on irrelevant exhibits and inapplicable English authorities - Is erroneous.*

FACTS

The plaintiff /appellant a motor transporter, by a writ of summons issued in the High Court of Abakaliki claimed against the defendant /respondent, a road construction company as follows:- "N30,000.00 (Thirty thousand Naira) general and special damages from the defendant in negligence." Pleadings were ordered and although the plaintiff filed his statement of claims the defendant failed to file its statement of defence. The plaintiff's witnesses were called in default of the defendant's appearance at the trial following which the learned trial judge entered judgment for him based upon the evidence adduced. Subsequently, the defendant unsuccessfully applied to the High Court to set aside its judgment. The application was accordingly dismissed. It did not appeal against this dismissal by the trial court.

Before the Court of Appeal the defendant applied for leave to adduce further evidence. The application was successful. In the course of its hearing the additional evidence, four documents were tendered and these were admitted as Exhibits CA1, CA2, CA3 and CA4 respectively. The Court of Appeal erroneously considered two other documents as additional evidence but which were not tendered or admitted as such.

They were referred to by the court as Exhibits "C" and 'F'. Relying on all these exhibits, the Court of Appeal allowed the appeal and set aside the decision of the High Court. Dissatisfied, the Plaintiff has appealed to the Supreme Court against that decision raising three issues which were compressed into one by the court.

ISSUE FOR DETERMINATION:

Was the Court of Appeal right in receiving and relying on oral and documentary evidence (vide Exhibits 'C' and 'F') and in consequence setting aside the judgment of the High Court by dismissing appellant's claim when the respondent filed no statement of defence in the case.

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

Power to grant leave to adduce new evidence

1. The principles which an appellate court must take into consideration in

the judicious exercise of its power to grant leave to adduce new evidence⁹ are:-

(a) The evidence sought to be adduced must be such as could not have been, with reasonable diligence, obtained for use at the trial, or are matters which have occurred after judgment in the trial court.

(b) In respect of other evidence other than in (a) above, as for instance in respect of an appeal from a judgment after a hearing on the merits, the court will admit such fresh evidence only on special grounds as provided for in order 1 Rule 20(3) of the Court of Appeal Rules (ibid).

(c) The evidence to be adduced should be such as if admitted, it would have an important, not necessarily crucial effect on the whole case; and

(d) The evidence must be such as apparently credible in the sense that it is capable of being believed and it need not be incontrovertible. See Severino v. Witt & Busch (1912)2 NLR 77; Ariran v. Adepoju (1961) ALL NLR 722; (p. 1333 B)

Exhibits which did not constitute further evidence

2. What the court below referred to as Exhibits "C" and "F" in its judgment delivered on 9th December, 1988, were not tendered in evidence as further evidence when the court heard further evidence in the appeal on 7th October, 1986. When the court below took additional evidence in the appeal, Exhibits CA1, CA2, and CA3, were tendered and another document was ordered to be marked Exhibit CA4 on being certified. What the court below therefore referred to as Exhibits "C" and "F" in its judgment of 9th December, 1988, were parts of the affidavit in support of the defendant's application for leave to adduce further or additional evidence. I take the view that the court below was wrong to refer to and rely on the said Exhibits "C" and "F" in arriving at its judgment in the case as they did not constitute further or additional evidence in the case. (p. 1335 B)

⁹ See also Anyigor v. Owata (1993) 3 KLR 148; for factors that must be considered towards granting an application to give further evidence.

Where the parties did not join issue

3. Further more the said Exhibits "C" and "F" as well as the whole evidence (oral or documentary of Jibril Amebu Amadu and Propolicap Nnaji vide page 152, 152A and 152B of the Record of proceedings) who both B testified before the court below on 7th October, 1986, went to no issue as the defendant did not join issue with the plaintiff on the averments in the Statement of claim. See Ehimare v. Emhonyon (1995) NWLR (part2) 177 and as such the said Exhibits "C", "F", CA1, CA2, CA3, and C CA4 were not pleaded. See Ferdinand George v. U.B.A. Ltd (1972) and Great Nigeria Insurance Co. Ltd v. Lad Group Ltd (1986) 4 NWLR (part33)72. Even if the defendant had filed its statement of Defence, without its having pleaded the above Exhibits, they would still have gone to no issue unless such a statement of defence was amended to cover the D proposed further or additional evidence. (p. 1335 E)

Setting aside trial court's judgment

4. Parts of the judgment of the court below as can be seen, were based E on Exhibits "C" and "F" and these affected the whole judgment in the case herein; thus leading it (court below) to set aside, erroneously the judgment of the trial court. The reliance by the court below on the two English authorities of Meek v. Flemming (1961)3 All E.R. 148 and F Ferguson v. Welsh & ors. (1987)3 All E.R. 777 is strictly inappropriate to the case in hand, wherein with or without Exhibits "C", "F", CA1, CA2, CA3, CA4, I venture to say, the plaintiff would still have got judgment for the sum claimed viz N30,000.00 damages. (p. 1336 A)

G ***Additional evidence - Authenticity thereof***

5. Irrespective of what the court below said that the Counsel "for the plaintiff did not dispute the authenticity of the said additional evidence" this is not borne out by the record of appeal. On the submission of H learned counsel for the plaintiff that the further evidence could be used for the cross-examination of the plaintiff as to his credit, the court below upheld that submission which, with due respect could not have been so since the defendant filed no defence in the case. What is more, fur-

ther or additional evidence of a witness could only be adduced where on application for a new trial, the witness was recalled by the court for cross-examination and not as done here in which what transpired was no more than adduction of "fresh evidence" at page 152, 152A and 152B of the record respectively. (p. 1336 C) B

Where the court was irregularly constituted

6. In the case in hand, from the way the court below was irregularly constituted, Exhibits "C" , "F" CA1, CA2, CA3, and CA4 constituted documents irregularly received and a decision based on them as additional evidence would appear to me to go to no issue. In other words, courts ought to restrict themselves to the matters put before them by the parties. See Orizu v. Anyaegbunam (1978) LRN 216 at 222. Thus , as this court also had occasion to state in categorical terms in Overseas Construction Ltd v. Creek Enterprises (Nig.) Ltd (1985)3 NWLR (part 13) 407, courts should not adjudicate on matters not put before them by the parties. (p. 1339 A) C D

E

NOTABLE POINTS OF INTEREST

UWAIS CJN

1. Special ground must exist for additional evidence to be admitted F

In the first place the additional evidence has to be in respect of an event that happened after the judgment of the High Court and secondly, it is only under special circumstances or grounds that such additional evidence should be admitted. The additional evidence received by the lower court (Exhibits CA1, CA2 CA3 and CA4) relate to the registration at Asaba Motor licensing Office of the ownership of the vehicle that was involved in the accident which gave rise to the cause of action in this case. The Appellant claimed, at the hearing of the case before the High Court, to be the owner of the vehicle; but the registration of the vehicle H showed the contrary. The question is what is the "matter" that occurred after the date of the hearing of the case by the High Court? Is it the registration of the ownership of the vehicle or the discovery by the Re- G

spondent that the vehicle belonged to a third party? The answer is the latter, that is the discovery by the Respondent. The question that follows is: should the respondent be allowed to adduce additional evidence as to the discovery ? I do not think so. Firstly, under the court of Appeal Rules - Order 1 rule 20 (3) - a special ground must exist for the additional evidence to be admitted. Secondly, for the additional evidence to be relevant to the case, the facts to be admitted as additional evidence must go to the issue in the case. The discovery of the fact that the vehicle was not registered in the name of the Appellant may be important for the purpose of disproving the Appellant's claim; but of what use was it at the stage at which additional evidence was discovered? There were no pleadings by the Respondent to support the admission of the additional evidence since the Respondent did not file statement of defence at the hearing of the case to aver that the vehicle did not belong to the Appellant. There were, therefore no special circumstances or grounds for the Court of Appeal to admit Exhibits CA1, CA2, CA3 and CA4 as additional evidence. The only use which the Respondent could have made of the new evidence would be to cross-examine the Appellant at the hearing before the High Court as to his ownership of the vehicle. This could not have happened before the court of Appeal. The court should not, therefore, have admitted the additional evidence. Furthermore, could the evidence discovered by the Respondent be properly referred to as "further evidence" since the Respondent did not adduce any evidence at the hearing in the court below? It could be additional to the evidence adduced by the Appellant but certainly not to the Respondent which did not call any evidence at all at the High Court. (p. 1341 D)

2. *Additional evidence in the possession of the respondent*

On the whole this appeal succeeds. The only question that remains is: what is to be done with the additional evidence in the possession of the Respondent with regard to the ownership of the vehicle in question, which the Appellant claimed at the trial to be his? It will appear on the face of Exhibits CA1, CA2, CA3, and CA4 and the evidence of the two witnesses called before the lower court that fraud by the Appellant could be

assumed. Should the case then be remitted to the High Court so that the presumed fraud can be proved? I find it difficult to make such an order in the circumstances of this case, although the Court of Appeal had in fact so ordered after wrongly allowing the appeal before it. I think the overriding fact is that the Respondent failed to file a statement of defence in the case and so will not be able to adduce the additional evidence which it called in the court below. It could of course apply to the lower court for leave to file pleadings if the case is remitted to that court. But then the respondent had applied to the lower court for the default judgment obtained against it, to be set aside on the ground that it was not served with the writ of summons, the statement of claim, hearing notice and other processes in the case. The learned trial judge did not find this proved and, therefore, dismissed the application. As I pointed out earlier in this judgment the Respondent did not deem it necessary to appeal to the court below against the dismissal of the application, and so in the circumstances the default judgment stands unaffected. In my view, therefore, the justice of this case does not favour an order for the case to be remitted to the lower court to be heard *de novo*. The Respondent slept over its right for not contesting the case in the High Court or appealing against the refusal of the learned trial judge to set aside his judgment. (p. 1343 A)

OGWUEGBU JSC

3. Need to be cautious in allowing further evidence

Exhibits "C", "F", "CA1", "CA2" and "CA3" were not pleaded by the defendant and no issue was joined on them by the parties. The court below was in error to have admitted them as further evidence and used them not only to deprive the appellant of his judgment in the trial court but also to dismiss his claim against the respondent. The court below should have been cautious when it acted under this rule. The exercise of the discretion under the rule should be strictly guarded. Even though a court is always anxious to arrive at the truth, there are rules governing trials of actions. These rules lead to the conclusion that when once the trial take place, *prima facie* further evidence should not be allowed to be called unless a strong case had been made out for so doing, See Asaboro v.

Aruwaji & Ors (1974) 4 S.C. 119. However, where the Court of Appeal is of the opinion that the case has been decided on insufficient grounds, it will exercise its discretion to allow further evidence. See Dawodu .v. Danmole (1962) 1 All N.L.R.702. (p. 1345 B)

B

REPRESENTATION

Parties absent and not represented

C

CASES REFERRED TO

Severino v. Witt & Busch (1912)2 NLR 77.

Ehimare v. Emhonyon (1995) NWLR (part 2) 177

D George v. U.B.A. Ltd (1972)

Meek v. Flemming (1961)3 All E.R. 148

Ferguson v. Welsh (1987)3 All E.R. 777

Orizu v. Anyaegbunam (1978) LRN 216 at 222.

E Overseas Construction Ltd v. Creek Enterprises (Nig.) Ltd (1985)3 NWLR (part 13) 407

Asaboro v. Aruwaji (1974) 4 S.C. 119

Dawodu .v. Danmole (1962) 1 All N.L.R.702

F

RULES REFERRED TO

Court of Appeal Rules, 1981 as amended, Order 1 Rule 20(3)

G

LEAD JUDGMENT BY ONU JSC

This is an appeal against the decision of the Court of Appeal of H the Enugu judicial Division sitting in Enugu. The decision dated 9th December, 1988 leading to the setting aside of the judgment of Abakaliki High Court delivered in suit No. AB/12/81 on the 22nd day of March, 1982 culminated in the dismissal of the plaintiff/respondent /appellant's

case. For ease of reference, the plaintiff/respondent/appellant shall in the rest of this judgment be referred to as plaintiff while the defendant/appellant/respondent shall hereinafter be referred to as defendant.

Facts relevant to this appeal may be stated briefly as follows:-

The plaintiff, a motor transporter, by writ of summons issued in the High Court, Abakaliki, of the former Anambra State of Nigeria (later Enugu State but now Ebonyi State) claimed against the defendant, a road construction company in paragraph 6 of his statement of claim as follow:-

"6. *Whereof the plaintiff has suffered damage and claims.*

(a) *N30,000.00 (Thirty Thousand Naira) general and special damages from the defendant in negligence.*

Special Damages: (a) Value of the Mercedes Benz Lorry completely damaged beyond repairs..... N14,4000.00 (Receipt for vehicle purchase will be founded upon.)

(b) *Cost of towing the vehicle from Ogbala, scene of accident to Urunebo Village, Enugwu-Ukwu500.00*

(c) *Cost of labour hired to watch the vehicle for 3 days (night and day) at N40.00..... N120.00*

(d) *Loss of use of vehicle from date of accident up to date of judgment at N100.00 per day*

(e) *General damages N15,600.00.*

Whereof the plaintiff claims per writ."

Pleading were ordered and although the plaintiff filed his statement of claim, the defendant failed to file its statement of defence. The plaintiff's witnesses were called in default of the defendant's appearance at the trial, following which the learned trial judge entered judgment for him based upon the evidence adduced. Thereafter, the defendant unsuccessfully applied to the High Court to set aside its judgment. Accordingly, the application was dismissed. There was no appeal against the dismissal. Later, however, the defendant appeal against the judgment of the trial court dated 22nd March, 1982 to the Court of Appeal Enugu, (hereinafter in the rest of this judgment referred to as the court below). In the course of hearing the Appeal, the defendant with the leave of the court

below adduced further or additional evidence.

The court below in its judgment set aside the decision of the trial court and consequently dismissed the plaintiff's case. The appeal herein is against that decision premised on five grounds.

B The plaintiff alone filed a brief of argument in which he submitted three issue as arising for the determination of this court, to wit

"1. Was the court of Appeal right in relying on the additional evidence, and on what it referred to as Exhibit 'C' and F' in its judgment and on matters which were not before it , to wit, cause for an Insurance
C Company to assess the value of a vehicle and questions as to the services of the writ of summons, the statement of claim and other processes in the case, to set aside the judgment of the high court and to dismiss the plaintiff/respondent/appellant's claim when the defendant /appellant/respondent filed no statement of defence in the case.

2. Had the decisions in Meek v. Flemming (1961) 2 Q.B 366 and Ferguson v. Welsh and Ors. (1987)3 All E.R. 77 any application to this case?

E 3. Was the court of Appeal right in holding that the evidence called by the plaintiff/respondent/appellant did not sustain his claim?"

The three issues formulated above, in my view, may be compressed into one issue which is capable of disposing of the matter in controversy' thus:

F Was the Court of Appeal right in receiving and relying on oral and documentary evidence (vide Exhibits 'C' and F') and in consequence setting aside the judgment of the High Court by dismissing appellant's claim when the respondent filed no statement of defence in the case.

G For a clearer appraisal of my treatment of the lone issue, it is pertinent firstly to consider what additional evidence is all about and when it is receivable by an appellate court. Undoubtedly, the Court of Appeal has power to receive further evidence on questions of fact, either
H by oral examination in court, by affidavit or by deposition taken before an examiner or commissioner. See Order 1 Rule 20(3) Court of Appeal Rules, 1981 as amended and the Court of Appeal decision in Michael Odiase v. Vincent Omele (1985) 3 NWLR (Part 11) 82 at 85. See also

Enekebe v. Enekebe (1964) NMLR 42. However, the conditions for admitting such fresh evidence on appeal are so stringent that there are very few cases if any, in our courts where such evidence was admitted. But see the English cases of Ladd v. Marshall (1954)1 WLR 1489 and 1491; Skone v. Skone (1971)1 WLR 812; (1971)2 ALL E.R. 582.

The principles which an appellate court must take into consideration in the judicious exercise of its power to grant leave to adduce new evidence are:-

(a) **The evidence sought to be adduced must be such as could not have been, with reasonable diligence, obtained for use at the trial, or are matters which have occurred after judgment in the trial court.**

(b) **In respect of other evidence other than in (a) above, as for instance in respect of an appeal from a judgment after a hearing on the merits, the court will admit such fresh evidence only on special grounds as provided for in order 1 Rule 20(3) of the Court of Appeal Rules (ibid).**

(c) **The evidence to be adduced should be such as if admitted, it would have an important, not necessarily crucial effect on the whole case; and**

(d) **The evidence must be such as apparently credible in the sense that it is capable of being believed and it need not be incontrovertible. See Severino v. Witt & Busch (1912)2 NLR 77; Ariran v. Adepoju (1961) ALL NLR 722; Federal Board of Inland Revenue v. J. Rezcallah (1962)1 ALL ALL NLR 1 at page 5; Dawodu v. Danmole (1962) 1 ALL NLR 702; Atswaga v. Agena (1966) NNLR 122; Enekebe v. Enekebe (supra) and Atunrase & ors. v. Federal Commissioner for Works and Housing (1975) ALL NLR (part 1) 331 at pages 334 - 337.**

In the first place, Order 1 Rule 20(3) of the Court of Appeal Rules as amended (ibid) provides as follows:-

"(3) The Court shall have power to receive further evidence on question 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 hear-

ing 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." (Underlining is mine for comments).

B Be that as it may, instances for such applications (for the receipt of additional or further evidence in this court have arisen in some cases, prominent among which is Comfort Asaboro v. M.G.D. Aruwaji & Anor. (1974)4 SC. 119 following Attorney General of the Federation v. Mallam Modu Alkali (1972)12 SC. 29. In Asaboro v. Aruwaji (supra), this court C (per Coker, JSC) stated the legal position succinctly as follows:-

"Before the argument on the appeal, learned counsel for the defendant sought to adduce further evidence by putting in evidence of certified true copies of company forms lodged with the Registrar of companies in connection with the company known as Thomas Associates Ltd, and to show that on the 10th June, 1970 or thereabouts when one of the forms was signed, the 2nd plaintiff was a Director of that company, We allowed the application and as we had written the ruling on the application at the appropriate time, we do not propose to discuss that issue at any length in this judgment. It is apposite to point out, however, that at the same time learned counsel for the plaintiffs applied to us to put in another certified copy of company form in connection with the same company, showing that on the 4th July, 1970, the 2nd plaintiff resigned from the directorate of that company, and we allowed it."

As I had pointed out earlier on in this judgment, while the plaintiff filed his statement of claim and upon it obtained judgment in default, the defendant did not file a statement of defence in the case. At the hearing, the plaintiff gave evidence as P.W1; his driver testified as p.w2 while the police Sergeant who investigated the accident testified as p.w.3. At the end of the hearing the learned trial judge entered judgment for the plaintiff in the sum of N30,000.00 with N300 costs. There is visibly no appeal H against that decision.

On the 5th of April, 1982, the defendant filed an application at the High Court, Abakaliki, for an order of court to set aside the judgment delivered on the 22nd of March, 1982, but the application was dismissed

and there was ostensibly no appeal against the dismissal either.

It is incontrovertible therefore, that the defendant did not join issue with the plaintiff on his averments in the statement of claim as it did not file a statement of defence in the case. Not only did the defendant not join issue with the plaintiff on his averments upon being moved, the court below on 19th April, 1985 granted the defendant leave to adduce further or additional evidence. **What the court below referred to as Exhibits "C" and "F" in its judgment delivered on 9th December, 1988, were not tendered in evidence as further evidence when the court heard further evidence in the appeal on 7th October, 1986.**

When the court below took additional evidence in the appeal, Exhibits CA1, CA2, and CA3, were tendered and another document was ordered to be marked Exhibit CA4 on being certified. **What the court below therefore referred to as Exhibits "C" and "F" in its judgment of 9th December, 1988, were parts of the affidavit in support of the defendant's application for leave to adduce further or additional evidence. I take the view that the court below was wrong to refer to and rely on the said Exhibits "C" and "F" in arriving at its judgment in the case as they did not constitute further or additional evidence in the case. Further more the said Exhibits "C" and "F" as well as the whole evidence (oral or documentary of Jibril Amebu Amadu and Propolicap Nnaji vide page 152, 152A and 152B of the Record of proceedings) who both testified before the court below on 7th October, 1986, went to no issue as the defendant did not join issue with the plaintiff on the averments in the Statement of claim. See Ehimare v. Emhonyon (1995) NWLR (part2) 177 and as such the said Exhibits "C", "F", CA1, CA2, CA3, and CA4. were not pleaded. See Ferdinand George v. U.B.A. Ltd (1972) and Great Nigeria Insurance Co. Ltd v. Lad Group Ltd (1986) 4 NWLR (part33)72. Even if the defendant had filed its statement of Defence, without its having pleaded the above Exhibits, they would still have gone to no issue unless such a statement of defence was amended to cover the proposed further or additional evidence. See Bello Akanbi & ors. v. Mmadu Alao & Anor. (1989)3**

NWLR (part 108) 118 at 191.

Parts of the judgment of the court below as can be seen, were based on Exhibits "C" and "F" and these affected the whole judgment in the case herein; thus leading it (court below) to set aside, erroneously the judgment of the trial court. The reliance by the court below on the two English authorities of Meek v. Flemming (1961) 3 All E.R. 148 and Ferguson v. Welsh & ors. (1987) 3 All E.R. 777 is strictly inappropriate to the case in hand, wherein with or without Exhibits "C", "F", CA1, CA2, CA3, CA4, I venture to say, the plaintiff would still have got judgment for the sum claimed viz N30,000.00 damages.

Irrespective of what the court below said that the Counsel "for the plaintiff did not dispute the authenticity of the said additional evidence" this is not borne out by the record of appeal. On the submission of learned counsel for the plaintiff that the further evidence could be used for the cross-examination of the plaintiff as to his credit, the court below upheld that submission which, with due respect, could not have been so since the defendant filed no defence in the case. What is more, further or additional evidence of a witness could only be adduced where on application for a new trial, the witness was recalled by the court for cross-examination and not as done here in which what transpired was no more than adduction of "fresh evidence" at page 152, 152A and 152B of the record respectively.

In Atunrase & ors. v. Federal commissioner for Works & Housing (supra) this court appropriately granted one of the plaintiffs/appellants permission on appeal, to tender in evidence a letter in which one of the defendants had, contrary to two affidavits which his family had sworn to, written to the Federal Government that he had sold the piece of land to him (plaintiff/appellant), and the reply from the Federal Government acknowledging the situation. After this court had admitted these documents as additional evidence, the plaintiff/appellant contended firstly that the trial courts finding of fraud was wrong because fraud was neither pleaded nor mentioned by the parties in the proceedings before the lower

court and secondly, that trial judge erred in holding that the mere issuing of acquisition Act automatically vests the ownership of the land in the Government. It was held inter alia:

(a) That the order of the lower court, awarding compensation in respect of the area of land concerned to the Oloto Chieftaincy Family is hereby set aside; and B

(b) That the compensation due should be paid to the appellant instead.

In Odiase v. Omele (supra) the court of Appeal adumbrating and underlining the applicable principles unanimously refused the application brought by the appellant to adduce further evidence (in that case a layout plan that was in existence at the trial of the action) stating inter alia that - C

"1. Order 1 Rule 20(3) of the court of Appeal Rules 1981 as amended sets out the conditions under which further evidence may be admitted on hearing an appeal against the decision of a lower court. D

2. Where as in this case, the application is to adduce further evidence on the hearing of an appeal from the judgment given at the lower court after a trial or hearing of any cause or matter on the merits, further evidence can only be adduced in respect of matters which have occurred after the date of the trial or hearing. E

3. In this case, the certified true copy of the original layout plan which is sought to be tendered in evidence, is a copy of an original which came into existence in 1973; therefore, the document is not a matter which has occurred after the date of hearing. F

4. Further evidence means evidence which is complementary to evidence already adduced at the trial and which may be taken together with it, to prove or defeat a claim. A piece of evidence which contradicts the evidence of the applicant at the court below cannot be said to be further evidence but really a substitutional evidence. G

5. Where however, a witness made a mistake on a most important matter and wished to put it right, and the circumstances were so well explained that his fresh evidence were (sic) presumably to be believed, there would be ground for a new trial. H

6. *An Appellate court is not a trial court and as such once a case has been tried and concluded , the case should not be reopened on appeal, to enable a party to improve on his case at the trial court by allowing him to adduce further evidence, unless such evidence could not have been obtained for use at the trial by the exercise of reasonable diligence."*

Irregularities attendant to this instant case in its peregrination through the courts may be demonstrated as follows-

Firstly, on 30th January, 1985 when the plaintiff's application to adduce additional evidence was brought before the court below the composition of the court was Coram:

"HON, MR.. JUSTICE S.M.A.BELGORE JUSTICE,COURT OF APPEAL.

HON, MR. JUSTICE O.O. OLATAWURA JUSTICE,COURT OF APPEAL.

HON, MR. JUSTICE S. S. AIKAWA JUSTICE COURT OF APPEAL."

On the 15th day of April, 1985, the composition of the court remained the same. However, by 7th October, 1986 when the purported additional evidence of the two witnesses called by the defendant was proffered leading to the ruling complained of the court's composition changed to:

"HON, MR. JUSTICE A.I. ASEME PRESIDING JUSTICE

HON, MR. JUSTICE S. S AIKAWA JUSTICE,COURT OF APPEAL.

HON,MR.. JUSTICE A. I.KATSINA-ALU JUSTICE,COURT OF APPEAL"

It has been decided by this court in Gabriel Madukolu and Ors v. Johnson Nkemdilim (1962) ANLR 581 that a court is competent when:

- (1) It is properly constituted with respect to the number and qualification of its members;
- (2) The subject-matter of the action is within its jurisdiction;
- (3) The action is initiated by due process of law;and
- (4) Any condition precedent to the exercise of its jurisdiction has been fulfilled. (Underlining is mine.)

In the case in hand, from the way the court below was irregularly constituted, Exhibits "C", "F" CA1, CA2, CA3, and CA4 constituted documents irregularly received and a decision based on them as additional evidence would appear to me to go to no issue. In other words, courts ought to restrict themselves to the matters put before them by the parties. See Orizu v. Anyaegbunam (1978) LRN 216 at 222. Thus, as this court also had occasion to state in categorical terms in Overseas Construction Ltd v. Creek Enterprises (Nig.) Ltd (1985)3 NWLR (part 13) 407, courts should not adjudicate on matters not put before them by the parties.

In the result, the lone single issue formulated by me is answered in the affirmative and the decision cannot be allowed to stand.

Consequently, this appeal succeeds and it is accordingly allowed by me. The decision of the court below is set aside while that of the trial High Court is accordingly affirmed. There shall be no order as to costs.

UWAIS CJN

I have had the opportunity of reading in draft the judgment read by my learned brother Onu, J.S.C. I entirely agree that the appeal has merit and that it should be allowed.

In High Court of erstwhile Anambra State holden at Abakaliki, the Respondent, as Defendant, failed to file statement of Defence in answer to the Appellant's statement of claim, nor did it appear at the hearing of the case. Consequently, the Appellant was called upon, by the trial judge, to prove his case. He testified as P.W.1 and called two other witnesses. At the end of the case judgment was entered in favour of the Appellant and both general and special damages amounting to N30,000.00 were awarded in his favour. This was the position on the 22nd day of March, 1982-the date of the decision. Later the Respondent unsuccessfully applied, by motion on notice, to the trial court for the judgment to be set aside. It did not appeal against the dismissal of the application but appealed against the judgment of the lower court.

Before the court of Appeal, the Respondent herein applied for

leave to adduce further evidence. This was granted. In the course of its hearing the additional evidence, four documents were tendered to show that the Appellant was not the registered owner of the vehicle - the subject of the action; and these were admitted as Exhibits CA1, CA2, CA3 B and CA.4 respectively. The court of Appeal erroneously considered two other documents as additional evidence, but which were not tendered or admitted as such. They were referred to by the court below as Exhibits "C" and "F" Relying on these pieces of evidence, namely all the afore-mentioned exhibits, the court of Appeal allowed the Respondent's appeal C and set aside the decision of the High Court which was in favour of the Appellant herein.

It is against this background that the Appellant appealed to this court raising the following issues for determination in his brief of argu- D ment:

"1. Was the court of Appeal right in relying on the additional evidence, and on what it referred to as Exhibit 'C' and 'F' in its judgment and on matters which were not before it, to wit, cause for an insurance E company to assess the value of a vehicle and questions as to the service of the Writ of summons, the statement of claim and other processes in the case, to set aside the judgment of the High court and to dismiss the plaintiff/respondent/appellant's claim when the defendant/appellant/re- F spondent filed no statement of defence in the case.

2. Had the decisions on Meek v. Flemming, (1961) 2 Q.B. 366 and Ferguson v Welsh & Ors, (1987) 3 All E.R. 77 any application to this case?

3. Was the court of Appeal right in holding that the evidence G called by the plaintiff/ respondent /appellant did not sustain his claim?"

The Respondent failed to file Respondent's brief of argument nor appeared at the hearing before us.

I think this appeal can be determined on issue No. 1 if it is more H elegantly framed to read thus:-

"Was the court of Appeal right to allow the Respondent to ad- duce additional evidence and to act on the additional evidence when the Respondent failed to file statement of Defence in the High Court to join

issue with the Appellant on his statement of Claim?"

I will proceed to answer this question briefly, The power of the court of Appeal to receive additional evidence on appeal is stated in order 1 rule 20 sub-rule (3) of the Court of Appeal Rules, cap.62 of the Laws of the Federation of Nigeria, 1990 which provides-

"20. (3) *The court shall have power to receive further evidence on questions of facts, either by oral examination in court by affidavit, or by deposition taken before an examiner or commissioner and 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.*"

It is quite clear that it is the second limb of the sub-rule, as underlined that is applicable to the present case. In the first place the additional evidence has to be in respect of an event that happened after the judgment of the High Court and secondly, it is only under special circumstances or grounds that such additional evidence should be admitted. The additional evidence received by the lower court (Exhibits CA1, CA2 CA3 and CA4) relate to the registration at Asaba Motor licensing Office of the ownership of the vehicle that was involved in the accident which gave rise to the cause of action in this case. The Appellant claimed, at the hearing of the case before the High Court, to be the owner of the vehicle; but the registration of the vehicle showed the contrary. The question is what is the "matter" that occurred after the date of the hearing of the case by the High Court? Is it the registration of the ownership of the vehicle or the discovery by the Respondent that the vehicle belonged to a third party? The answer is the latter, that is the discovery by the Respondent. The question that follows is: should the respondent be allowed to adduce additional evidence as to the discovery ? I do not think so. Firstly, under the court of Appeal Rules - Order1 rule 20 (3) - a special ground must exist for the additional evidence to be admitted. Secondly, for the additional evidence to be relevant to the case, the facts to be admitted as additional evidence must go to the issue in the case. The discovery of the fact that the vehicle was not registered in the name of

the Appellant may be important for the purpose of disproving the Appellant's claim; but of what use was it at the stage at which additional evidence was discovered? There were no pleadings by the Respondent to support the admission of the additional evidence since the Respondent did not file
B statement of defence at the hearing of the case to aver that the vehicle did not belong to the Appellant. There were, therefore no special circumstances or grounds for the Court of Appeal to admit Exhibits CA1, CA2, CA3 and CA4 as additional evidence. The only use which the Respon-
C dent could have made of the new evidence would be to cross-examine the Appellant at the hearing before the High Court as to his ownership of the vehicle. This could not have happened before the court of Appeal. The court should not, therefore, have admitted the additional evidence.

Futhermore, could the evidence discovered by the Respondent
D be properly referred to as "further evidence" since the Respondent did not adduce any evidence at the hearing in the court below? It could be additional to the evidence adduced by the Appellant but certainly not to the Respondent which did not call any evidence at all at the High Court.

E With regard to Exhibits C and F referred to by the Court of Appeal in its judgment as additional evidence, the Appellant complained that these exhibits were not produced by the two witnesses called by the Respondent to tender the additional evidence, that is Exhibits CA1, CA2,
F CA3 and CA4. Exhibits C and F were part of the affidavit sworn to in support of the earlier application by the Respondent for leave of the Court of Appeal to allow it to adduce further evidence. This confusion arose because the panel of the Court of Appeal which heard and granted the application for leave to adduce additional evidence (Belgore and
G Olatawura, J.J.C.A. as they then were, and Aikawa J.C.A) was different from that which heard and determined the appeal (Katsina-Alu, Macaulay and Uwaifo, J.J.C.A) . There is no doubt that the Court of Appeal was wrong to treat Exhibits C and F as additional evidence whilst they were
H not. One ancillary question that has arisen from this is: Was the Court of Appeal properly constituted by the panel that heard the appeal when the additional evidence they acted upon was not produced before them or admitted by them? This point is not part of the appeal before us and since

we have not had the advantage of address by the parties I will refrain from saying anything further about it.

On the whole this appeal succeeds. The only question that remains is: what is to be done with the additional evidence in the possession of the Respondent with regard to the ownership of the vehicle in question, which the Appellant claimed at the trial to be his? It will appear on the face of Exhibits CA1, CA2, CA3, and CA4 and the evidence of the two witnesses called before the lower court that fraud by the Appellant could be assumed. Should the case then be remitted to the High Court so that the presumed fraud can be proved? I find it difficult to make such an order in the circumstances of this case, although the Court of Appeal had in fact so ordered after wrongly allowing the appeal before it. I think the overriding fact is that the Respondent failed to file a statement of defence in the case and so will not be able to adduce the additional evidence which it called in the court below. It could of course apply to the lower court for leave to file pleadings if the case is remitted to that court. But then the respondent had applied to the lower court for the default judgment obtained against it, to be set aside on the ground that it was not served with the writ of summons, the statement of claim, hearing notice and other processes in the case. The learned trial judge did not find this proved and, therefore, dismissed the application. As I pointed out earlier in this judgment the Respondent did not deem it necessary to appeal to the court below against the dismissal of the application, and so in the circumstances the default judgment stands unaffected. In my view, therefore, the justice of this case does not favour an order for the case to be remitted to the lower court to be heard de novo. The Respondent slept over its right for not contesting the case in the High Court or appealing against the refusal of the learned trial judge to set aside his judgment.

In conclusion, I too in concurrence with my learned brother Onu, JSC, allow the appeal and set aside the decision of the lower court, thus affirming the decision of the High Court against the Respondent. I make no order as to costs since neither party appeared at the hearing of the appeal.

WALI JSC

I have read before now, the lead judgment of my learned brother Onu JSC and I entirely agree with his reasoning and conclusion which, I also hereby endorse as mine.

Having nothing more useful to contribute, I also for the same reason given in the lead judgment, allow the appeal and endorse the consequential orders contained therein.

OGWUEGBU JSC

I had the advantage of reading in draft the judgment just read by my learned brother Onu, J.S.C. I agree with his reasoning and conclusion on the lone issue formulated by him.

On the correctness of the reception of further evidence by the court below and the reliance placed on Exhibits "C" and "F" by the said court in setting aside the judgment of the learned trial judge and dismissing the plaintiff's claim, I only wish to add that the court of Appeal wrongly applied the power conferred on it by virtue of Order 1 Rule 20(3) of the court of Appeal Rules, 1981, as amended. Rule 20(3) reads:-

"20(3) The court shall have power to receive further evidence on questions of fact, either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner as the court may direct, but in 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."

The above rule gives the court of appeal the discretion and power to receive fresh /further evidence in appropriate case. The issue in respect of which the court below received Exhibits CA1, CA2, and CA3 in evidence was not pleaded by the defendant. In fact, the defendant/respondent failed to file his statement of defence even though he was served with the writ of summons and the statement of claim.

In receiving the said exhibits as further evidence which were not

pleaded, the plaintiff/appellant did not have the opportunity of meeting them, See A.G v. Alkali (1972)12 S.C 29, Onibudo .v. Akibu (1982) 7 S.C.60 Akanbi & Ors. v. Alao & Ors (1989) 3 N.W.L.R. (part.108) 118 and Roe & Ors .v. McGregor & Sons Ltd. (1968)2 All E.R. 636.

Exhibits "C", "F", "CA1", "CA2" and "CA3" were not pleaded by B the defendant and no issue was joined on them by the parties. The court below was in error to have admitted them as further evidence and used them not only to deprive the appellant of his judgment in the trial court but also to dismiss his claim against the respondent.

The court below should have been cautious when it acted under C this rule. The exercise of the discretion under the rule should be strictly guarded. Even though a court is always anxious to arrive at the truth, there are rules governing trials of actions. These rules lead to the conclusion that when once the trial takes place, prima facie further evidence D should not be allowed to be called unless a strong case had been made out for so doing, See Asaboro v. Aruwaji & Ors (1974) 4 S.C. 119.

However, where the Court of Appeal is of the opinion that the case has been decided on insufficient grounds, it will exercise its discretion to allow further evidence. See Dawodu .v. Danmole (1962) 1 All N.L.R.702. E

For the above reasons and the reasons contained in the lead judgment of my learned brother Onu, J.S.C., I too would allow the appeal. F
I make no order as to costs.

MOHAMMED JSC

I too agree to allow the appeal for the reasons given in the lead G judgment of my learned brother, Onu, JSC. My learned brother has considered all the issues canvassed before this court for the prosecution of this appeal and I have nothing more to add. The appeal is allowed and the judgment of the Court of Appeal is set aside. I agree with all the consequential H orders made in the lead judgment.

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