

SUPREME COURT OF NIGERIA

14TH DECEMBER, 2001. SC.84/1995

**CORAM:- A. G. KARIBI-WHYTE, M. E. OGUNDARE,
S. U. ONU, S. O. UWAIFO, A. O. EJIWUNMI, JJSC.**

OBI EZE (BY HIS ATTORNEY

- UCHE OKAFOR) PLAINTIFF/APPELLANT
AND

1. ATTORNEY -GENERAL, RIVERS STATE

2. S. A. I. OSSAI RESPONDENTS

APPEALS - Exhibits - New issue - On correct interpretation of law to be placed on an exhibit - Ought to be looked into - As Court of Appeal is enjoined - To make a finding on an exhibit omitted by trial court

APPEALS - New grounds or questions - Leave to argue - Will not usually be granted - And where such leave will be granted to prevent miscarriage of justice - The grant will be subject to certain conditions

APPEALS - New issues - Application to raise - Delay in hearing - Is no excuse to deny the application in this circumstance - Court ought to accommodate it subject to the award of costs - In the interest of justice

APPEALS - New point - As the new point raised is a substantial one - That needs no further evidence - The application ought to have been granted

APPEALS - New point - Jurisdiction - As the new point sought to be raised is an issue of jurisdiction - The application ought to be allowed

APPEALS - New points of law - Application to argue - The new points need not be canvassed in the lower court - Provided there is evidence on record to support the new point

COURTS - *Discretion - Leave to argue new points of law - Supreme Court will not interfere with the lower courts exercise of discretion - Except where it is not bona fide*

FACTS

The plaintiff/appellant claimed in the Port Harcourt High Court among other reliefs, a declaration that the purported sale of his building, No.61 Ikwerre Road to the 2nd defendant/respondent is unconstitutional, null and void and an account of any monies received by the 2nd respondent as rents from the premises and payment over to the appellant or in the alternative, N380,000 as the market value of the property. According to the appellant, he had been validly granted the lease of the land in dispute in 1961 and had erected a building thereon in which his family resided and part of which he let out to tenants until he was forced to flee Port Harcourt during the Nigerian civil war. On his return after the civil war, he tried to regain possession of his building but was informed that the 1st Respondent had acquired the premises with all the buildings and sued the tenants to recover possession of the premises. He also found out that the 2nd respondent had paid some deposit for the land which had been sold to him. Appellant then claimed that as he had not been paid any compensation for the land and premises he brought the action. The 1st and 2nd respondents also answered to these assertions of the appellant.

In his judgment the learned trial judge dismissed the main claims of the appellant holding that the Abandoned Properties Implementation Committee has the right to sell every abandoned property and rest good title in the purchaser. He however granted the alternative relief of N380,000.00 as market value of the property in dispute. The 1st and 2nd respondent therefore appealed to the Court of Appeal against the alternative relief and the appellant cross appealed against the order dismissing his main claims.

Sequel to the foregoing the appellant in July 1994 brought an application before the Court of Appeal to argue fresh points of law not argued in the trial court. The court however refused the application.

The appellant has therefore appealed to the Supreme Court against the order refusing the application.

ISSUES FOR DETERMINATION

(i) Did the learned Justices of the Court of Appeal exercise their discretion judicially and judiciously when they refused to allow the Appellant to argue fresh points of law even when it touched on jurisdiction or lack of it to entertain or not to entertain the claims in paragraph 13(a) - (d) of the Appellant's Amended Statement of Claim?

(ii) Did the learned Justices of the Court of Appeal critically examine the Exhibits tendered and accepted in the trial court and applied the principles of law enunciated in A.G. of Oyo State & Anor. v Fairlakes Hotel Limited (1988) 5 NWLR (Part 92) 1?

(iii) Were the Justices of the Court of Appeal right to have held that arguing the two grounds of appeal could have been canvassed in the lower court. or that evidence would have been led whether APIC acted intra vires the powers granted to it under Decree no. 9() of 1979?

(iv) Were the learned Justices of the Court of Appeal right to hold that in the grounds of appeal no issue of jurisdiction has been raised?

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

New grounds or questions - Leave to argue

1. The Court of Appeal and the Supreme Court will not allow a party on appeal to raise a question not raised in the court of trial or grant leave to a party to argue new grounds not canvassed in the lower court except where the new grounds involve substantial points of law substantive or procedural which need to be allowed to prevent an obvious miscarriage of justice vide Salati v. Shehu (1986) 1 NWLR (Part 15) 198 at page 203. This rule, it must be emphasised. is subject to the condition that:

(a) the Court has before it all the evidence, which is needed to completely support the new contention. In the case of IPD Abave v (I) Ikem Uche Ofili and

(2) Attorney General of Rivers State (1986) 1 NWLR (Part 15) 134, in which one of the issues that arose for the consideration of this

court was the circumstances in which the appellant could raise a new issue in the Supreme Court. It was held by this Court inter alia that it is settled that the Supreme Court will allow a fresh point of law to be raised before it, even if such point was not taken in the Court below on the following conditions:

B (i) There is before the Supreme Court all the evidence, which is needed to completely support the new contention.

(ii) The point of law if argued in the court below would have been decisive.

(p. 3623 G)

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Appeals - New point - Jurisdiction

2. I agree with learned counsel for Appellant's submission that in the instant case the new point raised in ground 1 of the additional grounds of appeal, is an issue

D of jurisdiction/competence or lack of it, to entertain reliefs in paragraphs 13(a) -

(d) of the Amended Statement of Claim hence, the application ought to be allowed. After all, jurisdiction or lack of it can be raised at any stage of the proceedings, even on appeal (see Oloriode & ors. v. Ovebi & Ors. (1984) 5 Se.

E 1 at 33: Salati v. Shehu (supra) at page 205 and even on the point being raised suo motu by the court. (p. 3625 B) decisive. (p. 3623 G)

Appeals - Exhibits - New issue

F 3. In addition, this new issue being on a point of law involving the correct interpretation of law to be placed on Exhibit F. in relation to Section 1 of the abandoned Property Decree No. 90 of 1979. deserves looking into. See Sonekan v Smith (supra) and North Staffordshire Railway Co. v Edge (supra).

G The purpose of this of course, is to further show the invalidity of the said property in dispute and argue that neither Decree No. 90 of 1979 nor any Edict enabled the Rivers State Government to deal with abandoned property by selling and transferring title to the 2nd Respondent. Thirdly, if a trial court has not examined

H an exhibit thoroughly, the Court of Appeal is entitled and is indeed enjoined to do so and make a finding on it vide Iwo Local Government v Adigun (1992) 6 NWLR (Part 133) 494. (p. 3625 D)

As the new point raised is a substantial one

4. Besides, the point raised being a substantial one that needs no further evidence coupled with the fact that the Exhibits tendered in court are enough to canvass the new point of law, the Appellant's application ought surely to have been acceded to. This is the moreso, when it is remembered that it was the Respondents that first raised the issue of jurisdiction and competence of the Court. Cp. 3625 H) B

New issues - Application to raise

5. It is for the above that I do not share the lower court's view that the grounds if allowed to be argued would change the original case the Appellant presented and that it would involve leading fresh evidence. Nor do accept as plausible reason for refusing the application in the circumstances that there would be delay in hearing the appeal if the application was granted. As its grant may and would inevitably turn out to be in the Interest of justice, the court ought to accommodate such application subject to the award of costs. (p. 3626 D) C D E

Discretion - Leave to argue new points of law

6. It is noteworthy, however, that this Court in its appellate jurisdiction will very rarely interfere with the exercise of its discretion by the lower court vide Bank of Baroda v Mercantile Bank Limited (1987) 3 NWLR (Part 60) 233 except where such exercise is based on extraneous issues or where the exercise of such discretion is not bonafide. See Haruna v Ladeinde (1987) 4 NWLR (Part 67) 941 at 943. Significantly, the grant of leave to argue points of law as denoted in the two additional grounds of appeal is discretionary, but as earlier pointed out, the discretion has to be exercised both judicially and judiciously and the Supreme Court will not interfere with such decision of a lower court unless the exercise of such discretion is "manifestly wrong arbitrary, reckless or injudicious." See per Nnamani. JSC in University of Lagos v Olaniyan (1985) 7 NWLR 156 at 163. (p.3626 G) F G H

The new points need not be canvassed in the lower court

7. Indeed, the points of law raised in the said grounds need not be canvassed in the lower Court, provided there is evidence on the Record to support the new point. This is the essence of all the cases from Sonekan v. Smith (supra) B culminating in Atoyebi v Governor of Oyo State (1994) 5 NWLR (Part 344) 290 at 305 C - F. It may be that it was not taken in the lower court owing to some inadvertence on the part of counsel. For, as Agbaje, JSC in the Fairlakes Hotel Ltd's case (supra) at page 23 C - E, the rationale is always to prevent an obvious C miscarriage of justice. (p. 3627 C)

NOTABLE POINT OF INTEREST

OGUNDARE JSC

D 1. *Issues for which leave was sought - Could he be challenged as of right*

The issues raised by the proposed additional grounds of appeal rather than being new issues not canvassed at the trial, in fact arose out of the judgment of the trial court. They formed the basis on which the trial Court dismissed the main claims E of the Plaintiff/Appellant. The Appellant was entitled, as of right, to challenge on appeal, this basis. He does not need any special leave to argue the proposed additional grounds since the interpretation of section 1 of the Abandoned Properties Decree 1979 was the basis upon which trial court came to its F conclusion to dismiss the Appellant's main claims. (p. 3646 B)

REPRESENTATION

C. O. Akpamgbo Esq., S. A. N., with him Perpetua Adimekwe (Miss) and e. A. G Chuks-Nnadi Esq, for the Appellant.
E. B. Ukiri Esq., for the 2nd Respondent.
1st Respondent absent. Has not been participating.

H CASES REFERRED TO

Salati v. Shehu (1986) 1 NWLR (Part 15) 198 at page 203
K. Akpene v Barclays Bank of Nigeria Limited & Anor. (1977) 1 Se.47 Rc
Cowburn Exparte Firth (1881 - 85) All E.R. 987, 1991

Agnes Deborah Ejiofodomo v H.C. Okonkwo (1982) 11 SC 97, 108

United Marketing Co. Ltd v Kura (1963) 1 WLR 52

Sonekan v Smith (1964) All NLR 168

A.G. of Oyo State v Fairlakes Hotels Ltd. (1988) 5 NWLR (Pt. 92) 1

Oloriode & ors. v. Oyebe & Ors. (1984) 5 Sc. 1 at 33

B

Oloba v Akereja (1988) 3 NWLR (Part 84) 508 at 519 and 520

Asiyanbi v Adeniji (1967) 1 All NLR 82

George Nwabia v Adiri & Ors. (1958) 3 FSC. 112

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STATUTE REFERRED TO

Abandoned Properties Decree No. 90 of 1979

LEAD JUDGMENT BY ONU JSC

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This is an appeal against the Ruling of the Court of Appeal (Port Harcourt Division) hereinafter referred to shortly as the court below, dated 24th May, 1995, refusing the Plaintiff/Appellant's application to argue new points of law not hitherto argued in the High Court.

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The facts of this case which are straight forward enough, may be summarised briefly as follows:

The Plaintiff/Appellant claimed in Suit PHC/139/83 in the Port Harcourt (Rivers State) High Court among other reliefs, a declaration that the purported sale of his buildings situate at Plot 2, Block 260 - Wobo Layout, Diobu known as No. 61 Ikwerre Road, and registered as No. 36 at page 36 in volume 280 at the Lands Registry, Enugu now kept at Port Harcourt, to the 2nd Defendant (herein 2nd Respondent) is unconstitutional, and null and void, and an account of any monies received by the 2nd Respondent as rents from the tenants of the premises and payment over to the Appellant or in the alternative, N380,000.00 as the market value of the said property.

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By his 13 paragraph Amended Statement of Claim, he (Appellant), averred that by a deed of lease dated 30th March, 1961 and registered as No. 69 at page 69 in Volume 260 of the Lands Registry, Enugu now Port Harcourt, Messrs George Ezeikpe, Sunday Agwu, Anagha Ezeikpe and Agu Trading under the name and style of George Ezeikpe Brothers and

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Sons, were granted lease of the property in dispute by the then Minister of Town Planning, Eastern Nigeria. Further, that by a deed of assignment dated 7th December, 1964 and registered as No. 36 at page 36 in Volume 380 in the same registry the lessees assigned the unexpired term to the Appellant, who took possession of the same, B erected a building thereon consisting of two buildings of three floors in front of the premises and another house of three floors behind. Further still, that on completion of the building, he and his family resided in part of it and let the other rooms between 1965 and 1968 though forced to flee Port Harcourt in the wake of the Nigeria civil C war.

On the cessation of the Nigerian civil war, the Appellant said he returned to Port Harcourt and tried to regain possession of the buildings but was informed that 1st Respondent had acquired the premises with all the buildings thereon. He thereupon stated that on 25/ D 8/80, he discovered that the 2nd Respondent in Suits No. PMC/62/80, PMC/63/80 and PMC/64/80 had sued all the tenants occupying the premises for recovery of the premises. Wherein he also applied and was on 3/10/90 joined as co-defendant in a suit adjourned sine E die by the Chief Magistrate Court. On a further inquiry at the Lands Office and Abandoned Property Office in Port Harcourt, the Appellant stated that he discovered that the 2nd Respondent had paid a deposit of six thousand Naira for the land, house and premises sold to the 2nd Respondent for a consideration of Sixty thousand Naira. F Appellant then averred that as he had not been paid any compensation for the land, buildings and premises, hence he brought this action.

The 1st Respondent countered by a 10 paragraph Amended Statement of Defence wherein he admitted that the property in dispute is State land and that the lease of 30th March, 1961 was for a G term of 40 years commencing from 1st January, 1959 and registered as No. 69 at page 69 in Volume 260 of the Land Registry Enugu. He averred that the partners trading under the name and style of Ezeikpe H Bros & Sons indeed granted an irrevocable power of attorney registered as No. 73 page 73 in Volume 255 of the Lands Registry to the Appellant which was effected without the prior consent of the Governor. Further, the 1st Respondent admitted the deed of assignment of the unexpired lease of 10 years in favour of the

Appellant registered as No. 36, page 36 in Volume 380 of the Lands, but stated that the same was without the prior consent of the Governor. In further answer, the 1st Respondent averred that by virtue of the provisions of the Abandoned Property (Custody and Management) Edict 1969), the property became abandoned property lawfully leased to the 2nd Respondent and the same registered as No. 99, page 99 in Volume 79 of the Lands Registry, Port Harcourt. Finally, the 1st Respondent averred that by virtue of the Public Officers Protection Law, and the Abandoned Properties Decree, No. 90 of 1979 Laws of the Federal Republic of Nigeria, the action is statute-barred, and the court has no jurisdiction to entertain the Suit. B
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The 2nd Respondent, a policeman, in his 19 paragraph Amended Statement of Defence, whilst admitting the property in dispute to be 61 Ikwerre Road, Port Harcourt, averred that the property was not assigned to him but leased to him by Rivers State Government under the State Land Law as per Deed of Building Lease dated 19th March, 1979 and registered as No. 99 at page 99 in Volume 79 of the Lands Registry, Port Harcourt further stated that the property being State land subject to State Land Law, on 18th July, 1979, the Abandoned Properties Implementation Committee (APIC for short) offered and he accepted, to buy the property in dispute by paying a purchase price of N6,800.00 after securing a loan of N61, 200.00 from the Federal Mortgage Bank for its development. He further stated that upon completion of the purchase, the Rivers State Government granted him a lease of the property per Deed of Building Lease dated 19th March, 1979 and registered as No. 99 at page 99 Volume 79 of the Lands Registry, Port Harcourt. Finally, he admitted that he told the tenants to attorn tenant to him and that he had been collecting rents from them. He relied on Section 1 (1) of the Abandoned Properties Decree (No. 90) of the 1979 by contending that any interest the Appellant has in the property is compensation as advertised in the Nigerian Tide Publication of Monday 15th July, 1985. Except where necessary, little will be said henceforth about the 1st Respondent in the rest of this judgment. D
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Be that as it may, first attempt was made by the 1st Respondent to

abort, rather prematurely, the Appellant's claim by the plea that the latter's action commenced in 1983 was statute-barred since both Respondents are public officers having regard to the Public Officers Protection Law Cap. 106, Laws of Eastern Nigeria, applicable to Rivers State. After arguments were proffered before the trial Court (Con-
B ram D.G. Douglas, C.J.), that court ruled by dismissing the applica-
tion.

The case then commenced with the evidence of the Appellant through whom Exhibit A (power of attorney) and the proceedings of
C the Magistrate Court in Suits PMC/62/80, PMC/63/80, and PMC/64/80 respectively vide Exhibit B, were tendered and received in evidence. Also tendered through the Appellant were the Deed of assignment between Ezeikpe & Bros and Obi Eze vide Exhibit D, tax
D receipt and assignment of lease etc. (Exhibit C) and the Valuation Report of the house (Exhibit E).

For the defence, the one and only witness called on 1st Respondent's behalf was the Chief Lands Officer in the Ministry of Lands and Housing, Port Harcourt, namely DW. 1. Through this
E witness the lease granted to the 2nd Respondent was received as Exhibit F. Thereafter DW. 2, the Estate Surveyor of the 2nd Respondent, testified. He tendered Exhibit G., the Valuation Report. Next, he testified through his Attorney, a brother-in-law as DW.3. The latter tendered the power of attorney - Exhibit H, Followed by Exhibit
F J - the letter of offer from APIC, and Exhibit K - the receipt for the purchase price of the property paid for in 1983 for N61, 200.00 while DW. 4 was the Librarian attached to the Rivers State Newspaper Corporation who tendered the Nigerian Tide of 15/7/88 which
G was later received and marked as Exhibits M. and H. respectively before 2nd Respondent addressed the trial court.

In his judgment dated 7th October, 1988, the learned trial Chief Judge dismissed the claims in paragraph 13 (a) - (d) of the Amended Statement of Claim, holding that by virtue of Section 1 of
H the Abandoned Properties Decree 1979, the APIC has the right to sell every abandoned property and vest a good title in a purchaser. The learned trial Chief Judge however granted the alternative relief, to wit: N380,000.00 as market

value of the property in dispute. Thus, while both the 1st and 2nd Respondents have appealed against the alternative relief, the appellant has cross-appealed against the order dismissing the reliefs claimed in paragraph 13 (a - d) of the Amended Statement of Claim.

Sequel to the foregoing, on 29th July, 1994 the Appellant brought B an application before the Court below to argue fresh points of law not argued or canvassed in the trial court and to incorporate same in the Appellant's Brief of Argument in the following terms:

"(i) To argue points of law not argued nor canvassed in the court below captioned as "Additional Grounds of Appeal" and marked as Ex- C hibit A.

(ii) Incorporate Exhibit A in Appellant's Brief of Argument exhibited as Exhibit B.

(iii) Deem Exhibit B filed in Court on 29/7/94 as duly filed upon payment of the prescribed fees. D

In refusing the application, the court below (per Onalaja, J.C.A.) on 24th May, 1995, held inter alia as follows:

"The Respondents fought the case in the lower court on the case put up by the applicant who as Plaintiff sued the Respondents as Defendants. The present application is to change completely the case fought in the lower court, it is in the interest of justice not to allow a party especially a Plaintiff to change its case from court to court Exhibit F was not made an issue in the Court below to meet the new point of law. Respondents would have to lead evidence by production of other documents antecedent to Exhibit F. The Applicant was in error and it is misconceived that no further F evidence would be led. He associated himself and relied on the authorities cited by the 1st Respondent that the application be dismissed. Finally, the application shall cause a delay of the hearing of this appeal, which had been ripe since 1989. So, for the above reasons court should dismiss this application....." G

Concluding, the learned Justice of Appeal whose opinion was concurred in by Edozie and Rowland, J.J.C.A., held:

"After a careful consideration of the application acting judicially and judiciously and all the circumstances of the case the application is refused." H

The Appellant being dissatisfied with the said Ruling and pursuant to the leave of Court he sought and was granted on 7/6/95, has appealed to this Court.

The four issues submitted at the Appellant's instance for determi-

nation in this appeal are:

(i) Did the learned Justice of the Court of Appeal exercise their discretion judicially and judiciously when they refused to allow the Appellant to argue fresh points of law, even when it touched on jurisdiction or lack of it to entertain or not to entertain the claims in paragraph 13 (a) - (d) of the Appellant's Amended Statement of Claim?

(ii) Did the learned Justices of the Court of Appeal critically examine the Exhibits tendered and accepted in the trial court and applied the principles of law enunciated in *A.G. of Oyo State & Anor. v. Fairlakes Hotel Limited* (1988) 12 S.C. (Pt. 1) 1 (1988) 5 NWLR C (Part 92) 1?

(iii) Were the Justices of the Court of Appeal right to have held that arguing the two grounds of appeal could have been canvassed in the lower court, or that evidence would have been led whether APIC acted *intra vires*, the powers granted to it under Decree No. 90 of 1979? (iv) Were the learned Justices of the Court of Appeal right to hold that in the grounds of appeal no issue of jurisdiction has been raised?

On behalf of the 2nd Respondent, the following two issues were submitted as arising for our determination, viz:

(i) Whether the learned Justices of the Court were right in holding that (further) evidence would be required for the determination of the new points of law sought to be raised by the Appellant.

(2) Whether or not the learned Justices of the Court of Appeal F rightly exercised their discretion in refusing the Appellant's application.

In my consideration of this appeal, I wish to adopt the Appellant's four issues to wit, issues (ii) and (iv) and (i) and (iii) predicated on grounds 1 and 2 of the grounds of appeal and grounds 3 G and 4 respectively to the effect that the gravaman of the Appellant's claim in the trial court is that the sale of his property and premises, situate at No. 61 Owerri Road, now Ikwerre Road and registered as No. 36 at page 36 in Volume 380 of the Lands Registry Enugu, now Port Harcourt by the Rivers State Government to the 2nd Respondent, is unconstitutional, null and void.

TREATMENT OF ISSUES (II) AND (IV)

It appears to me clear that to prove the validity of his title the Appellant tendered Exhibit A,B,C and D. The 1st Respondent in order to

prove that the lease to the 2nd Respondent is valid and lawfully issued to the latter, tendered Exhibit F and contended that by virtue of the provisions of the Abandoned Properties Decree No. 90 of 1979 Laws of the Federation, the Court has no jurisdiction to entertain the suit in as much as it affects the validity of the sale by APIC. The 2nd Respondent's contention is to the effect that the property is State land, was bought by him (2nd Respondent) and the same denoted by Exhibit F. He also relied on the Abandoned Properties Decree No. 90 of 1979. The trial Court alluding to the said Decree held:

"Both Counsels (sic) for the defence are relying on Sections 3 (2) of the Abandoned Properties Decree No. 90 of 1979, which provides as follows:

..... to any such question."

and later down below held as follows:

"By Section 1 of the Abandoned Properties Decree 1979, the APIC has the right to sell abandoned property and vest a good title on a purchaser. I would hold therefore that the claim in paragraph 13 (a) - (d) of the Plaintiff's statement of claim is untenable in law."

The purport of the judgment is that by virtue of Section 1 of the Abandoned Properties Decree No. 90 of 1979, the court has no jurisdiction to entertain the reliefs in paragraph 13 (a) - (d) of the Amended Statement of Claim- reliefs which tried to invalidate the sale to the 2nd Respondent. The effective date of Decree No. 90 of 1979 is 28th September, 1979 while Exhibit F, the instrument of title of the 2nd Respondent is effective from 19/3/79. The point raised in the Appellant's ground 1, in my view, is one of interpretation to show that the Abandoned Property Decree cannot have retrospective effect and that the transaction culminating in Exhibit F, is not affected by the Decree. In other words, that the trial court has jurisdiction to entertain claims/reliefs in paragraph 13 (a) - (d) of the Amended Statement of Claim.

It is settled law that:

(i) *The Court of Appeal and the Supreme Court will not allow a party on appeal to raise a question not raised in the court of trial or grant leave to a party to argue new grounds not canvassed in the lower court except where the new grounds involve substantial points of law substantive or procedural which need to be allowed to pre*

vent an obvious miscarriage of justice vide Salati v. Shehu (1986) 1 NWLR (Part 15) 198 at page 203; K. Akpene v. Barclays Bank of Nigeria Limited & Anor. (1977) 1 SC. 47. Debesi Djukpan v. Rhorhadjor Orovuyovbe & Anor. (1967) 1 All NLR 134; Re Cowburn Exparte Firth (1881 - 85) All E.R. 987, 1991; Agnes Deborah Ejiofodomo v. H.C. Okonkwo (1982) 11 SC. 97, 109; United Marketing Co. Ltd. v. Kura (1963) 1 WLR 523. This rule, it must be emphasised, is subject to the condition that:

(a) the Court has before it all the evidence which is needed to completely support the new contention. In the case of I.P.D. Abaye v. (1). Ikem Uche Ofili and

(2) Attorney - General of Rivers State (1986) 1 NWLR (Prt 15) 134, in which one of the issues that arose for the consideration of this court was the circumstances in which the appellant could raise a new issue in the Supreme Court. It was held by this Court inter alia that it is settled that the Supreme Court will allow a fresh point of law to be raised before it, even if such point was not taken in the Court below on the following conditions:

(i) There is before the Supreme Court all the evidence, which is needed to completely support the new contention.

(ii) The point of law if argued in the court below would have been decisive.

See also Sonekan v. Smith (1964) All NLR 168; Lawrence Oredoyin & Ors. v. Arowolo & Ors. (1989) 4 NWLR (Part 114) 172 at 190; A.G. of Oyo State v. Fairlakes Hotels Ltd. (1988) 12 S.C. (Pt. 1) 1; (1988) 5 NWLR (Part 92) at page 23, 48 - 49 per Karibi-Whyte, JSC.

“(b) Even where there is merely an omission to raise a legal proposition which can be supported by the facts as found by the Court of trial without the assistance of additional evidence, the Appellate Court will in the exercise of its discretion and in the interest of justice and finality, not ignore the argument to raise the point at that stage: See Oredoyin’s Case (supra) at page 205 per Karibi-Whyte, JSC and Adisa & Anor. v. Soleh Boneh Nigeria Ltd. (1975) NMLR 364.

(d) However, where the new points will give a totally different

character to the case fought by the parties in the court below, or the new points cannot be resolved without the benefit of additional evidence, the court will refuse leave. So held this Court in *Udza Uor & Ors. v. Paul Loko* (1988) 2 NWLR (Part 77) 430, 438.

I agree with learned counsel for Appellant's submission that in the instant case the new point raised in ground 1 of the additional grounds of appeal, is an issue of jurisdiction/competence or lack of it, to entertain reliefs in paragraphs 13 (a) - (d) of the Amended Statement of Claim hence, the application ought to be allowed

After all, jurisdiction or lack of it can be raised at any stage of the proceedings, even on appeal (See Oloriode & Ors. v. Oyebi & Ors. (1984) 5 SC. 1 at 33; Salati v. Shehu (supra) at page 205 and even on the point being raised suo motu by the court. See Oloba v. Akereja (1988) 7 S.C. (Pt. 1) 1(1988) 3 NWLR (Part 84) 508 at 519 and 520. In addition, this new issue being on a point of law involving the correct interpretation of law to be placed on Exhibit F. in relation to Section 1 of the Abandoned Property Decree No. 90 of 1979, deserves looking into. See Sonekan v. Smith (supra) and North Staffordshire Railway Co. v. Edge (supra). The purpose of this of course, is to further show the invalidity of the sale of the said property in dispute and argue that neither Decree No. 90 of 1979 nor any Edict enabled the Rivers State Government to deal with abandoned property by selling and transferring title to the 2nd Respondent. Thirdly, if a trial court has not examined an exhibit thoroughly, the Court of Appeal is entitled and is indeed enjoined to do so and make a finding on it vide Iwo Local Government v. Adigun (1992) 6 NWLR (Part 133) 494. What in effect the submission means, and with which I agree, is that no new evidence would have been led, and arguing the ground will not introduce a new line of defence, nor would have the character of the case being changed in any way. Besides, the point raised being a substantial one that needs no further evidence coupled with the fact that the Exhibits tendered in court are enough to canvass the new point of law, the Appellant's application ought surely to have been acceded

to. This is the moreso, when it is remembered that it was the Respondents that first raised the issue of jurisdiction and competence of the Court. That being so, I entirely agree with the Appellant's submission that whether the Rivers State Government represented by the 1st Respondent or the APIC on the Exhibits tendered particularly Exhibit F. acted intra vires or ultra vires, Decree 90 of 1979, is a question of jurisdiction, a new point raised which the court below in its discretion and in the interest of justice and finality of litigation, should have allowed. See *Bockleman v. Nwaehi* (1965) 1 All NLR 112 and *Asiyanbi v. Adeniji* (1967) 1 All NLR 82 and *George Nwabia v. Adiri & Ors.* (1958) 3 FSC 112.

Furthermore, it is my firm view that the court below ought to have allowed the Appellant to file and argue the two grounds which in essence are additional grounds, provided they are arguable grounds.

It is for the above that I do not share the lower court's view that the grounds if allowed to be argued would change the original case the Appellant presented and that it would involve leading fresh evidence; nor do I accept as plausible reason for refusing the application in the circumstances that there would be delay in hearing the appeal if the application was granted. As its grant may and would inevitably turn out to be in the interest of justice, the court ought to accommodate such application subject to the award of costs. See Oyenuga & Ors. v. Provisional Council of the University of Ife (1965) NMLR 9 at page 12.

In the result, I will answer issues (ii) and (iv) in the negative.

TREATMENT OF ISSUES (I) AND (III)

In answering issue (i) and (iii) of the Appellant's issues for determination which overlap his grounds 3, 4 and 5 of the grounds of appeal, as arguments for same are repeated herein. I most respectfully adopt answers rendered to them in their entirety. ***It is noteworthy, however, that this Court in its appellate jurisdiction will very rarely interfere with the exercise of its discretion by the lower court vide Bank of Baroda v. Mercantile Bank Limited (1987) 3 NWLR (Part 60) 233 except where such exercise is based on extraneous issues or where***

the exercise of such discretion is not bona fide. See Haruna v. Ladeinde (1987) 4 NWLR (Part 67) 941 at 943. Significantly, the grant of leave to argue points of law as denoted in the two additional grounds of appeal is discretionary, but as earlier point out, the discretion has to be exercised both judicially and judiciously and the Supreme Court will not interfere with such decision of a lower court unless the exercise of such discretion is “manifestly wrong arbitrary, reckless or injudicious.” See per Nnamani, JSC in University of Lagos v. Olaniyan (1985) 1 NWLR 156 at 163. See also In Re: Adewunmi & Ors. (1988) 3 NWLR (Part 83) 483; University of Lagos v. Aigoro (1985) 1 NWLR 143 at 148; Lauwers Import - Export v. Jozebson Industries Ltd. (1988) 3 NWLR (Part 83) 429.

Indeed, the points of law raised in the said grounds need not be canvassed in the lower Court, provided there is evidence on the Record to support the new point. This is the essence of all the cases from Sonekan v. Smith (supra) culminating in Atoyebi v. Governor of Oyo State (1994) 5 NWLR (Part 344) 290 at 305 C-F. It may be that it was not taken in the lower court owing to some inadvertence on the part of counsel. For, as Agbaje, JSC in the Fairlakes Hotel Ltd’s case (supra) at page 23 C - E, the rationale is always to prevent an obvious miscarriage of justice.

It is pertinent to stress in conclusion that if the learned Justices of the court below had examined Exhibits C, D, F, M, N, K and L earlier admitted in evidence and forming part of the record before them, they would have discovered that:

(i) the issue of jurisdiction, which was indeed part of the case, still formed part of it and that a wrong interpretation of Decree No. 90 of 1979 in relation to Exhibit F, would deprive the trial court jurisdiction, which it had.

(ii) that the 2nd Respondent having admitted that he paid the purchase price in December, 1983, Exhibit K, when the action was filed in March, 1983, this would raise the question of the validity or otherwise of the sale of the property to the 2nd Respondent.

(iii) that no new evidence would have been led in relation to the

two grounds of appeal

(iv) that the parties were agreed that the land on which the property was erected is State land and that the invalidity of the sale of the property during the currency of the lease as denoted on Exhibits C and D would raise a serious question vis a vis the interpretation of Decree of 1990 in relation to Exhibit F.

(v) as I am in full agreement with the Appellant's submission that on the Exhibits tendered in the trial court, no new evidence would indeed have been led in relation to the two additional grounds of appeal, and the grant of leave would not have changed the character of the case fought by the parties in the trial court, the court below would have, in view of the issue of jurisdiction and taking into consideration the said Exhibits tendered, granted the Appellant's application.

It is for these reasons that I will also answer issues (i) and (iii) in the negative.

Accordingly, I allow this appeal, set aside the Ruling of the Court of Appeal (Port Harcourt Division) dated the 24th of May, 1995 and grant leave to the Appellant to file and argue in the said Court but of a panel differently constituted from that which gave the ruling appealed from for the two grounds of appeal to be heard expeditiously.

There shall be costs in favour of the Appellant in the sum of N10,000.00.

F

KARIBI-WHYTE JSC

I have read the judgment of my learned brother Onu, JSC. in this appeal, I agree with the reasoning therein and the decision allowing the appeal.

This appeal is on a very narrow issue. It is against the refusal of the Court of Appeal to allow the Appellant in that Court to raise and argue new points of law not argued or canvassed at the trial in the High Court. The new points of law intended to be raised are in the two additional grounds of appeal alleging errors in law in the judgment of the learned trial Chief Judge.

I set out hereunder verbatim the additional grounds of Appeal:

“1. ERROR IN LAW

This Learned Chief Judge erred in law when he held thus:

“Section 1 of the Abandoned Properties Decree 1979 the APIC has the right to sell every abandoned property and vest a good title on a purchaser. I would hold therefore that the claim in paragraph 13 (a) - (d) of the Plaintiff Statement of Claim is untenable in Law a finding contrary to Law and which has occasioned a miscarriage of justice.

“PARTICULARS OF ERROR

(i) Exhibits C and D, deeds of assignment dated 30/3/1961 and 7/12/64 respectively in favour of the Appellant and in respect of property in dispute was lease for 40 years commencing from 1st January, 1959, and dated 30/3/1961 and registered as No. 69 in Vol. 260 in Lands Registry, Enugu.

(ii) Exhibit F dated 19/3/79 by either the Abandoned Property Implementation Committee or the Rivers State Government to the 2nd Respondent was granted during the currency of the Original lease for 40 years.

(iii) Neither the APIC nor the Rivers State Government had legal authority to sell or deal with the property to the 2nd Respondent except under the State Land Law.

(iv) Since the APIC the State Government had not validity acquired title/interest in the property in dispute, it cannot transfer any title to the 2nd Respondent.

(v) Reliefs 13 (a) - (d) of the Amended Statement of Claim have nothing to do with compensation.

(vi) Exhibit F was not for the unexpired term of Exhibits C and D.

(vii) Courts interpret strictly Laws that deprive citizens of their property rights.

(viii) Both in the Respondents' pleadings and evidence, Exhibit F was issued by the State Government on 19/3/79 not the APIC, so Decree No. 90 of 1979 does not apply.

(ix) Decree No. 90 of 1979 is effective from 26/9/79 not retrospective, to 19/3/79.”

“2. ERROR IN LAW

The learned Chief Judge erred in law in his judgment when he held that that reliefs in paragraph 13 (a) - (d) were not tenable in Law when on the pleadings and evidence, the property in dispute before, after and during the action was State land, subject to the State Land Law, and could not be sold by either the APIC or the State Government. This is more so even after Exhibits M and N were published.

“PARTICULARS OF ERROR

(i) Exhibit F - the Deed of assignment is dated 19/3/79, whilst the purchase price Exhibit K was paid in December, 1983. The publication for sale of the property Exhibit L and on State land was on 15/7/88 or 15/7/85.

(ii) The evidence of D.W. at p. 97 line 10 - 13; paragraph 5 of Amended Statement of Defence of 2nd Respondent, paragraph 15 of said Amended Statement of Defence paragraph 5 (a) Amended Statement of Defence of 1st Respondent, admit property in dispute is State land.

(iii) Since the parties agreed that the property in dispute is on State land, and neither the APIC nor the State Government acquired the same under the relevant State Law or any Law, any dispossession of title in the Appellant must be in accordance with the State Lands Law

(iv) Exhibit F was not issued by APIC but by the State Government.

(v) Exhibit M and N of the Nigerian Tide publication is notice to all including APIC and the State Government that the property in dispute is subject of a Suit PHC/139/83 and any sale will not pass title under the doctrine of lis pendens.”

The two additional grounds of appeal challenge the interpretations of Section 1 of the Abandoned Properties Decree 1979 by the learned trial Chief Judge, and raise the issue of jurisdiction in particulars (iii) (viii) (ix) of additional ground, 1 and particulars (ii) (iii) (iv) of additional ground 2.

It is helpful in the determination of this appeal to refer to the claim before the High Court, and the arguments on the points of law in respect of which issue was joined. Plaintiff in his writ of summons claimed against the Defendants as follows:-

“PARTICULARS OF CLAIM

The plaintiff’s claim against the defendant jointly and severally is as follows:-

“1. A Declaration that the purported sale of the plaintiffs buildings situate at Plot 2 Block 260 Wobo Layout, Diobu known as No. 61 Ikwerre Road and registered as No. 36 at page 36 in Vol. 380 at the Land Registry Enugu, now kept at Port Harcourt, by the Rivers State Government (1st defendant) to the second defendant is unconstitutional and null and void.

2. A Declaration that the plaintiff is entitled to the grant of Statutory Right of Occupancy of the said premises.

3. A perpetual injunction restraining the second defendant by himself, his servants and or agents from dealing in the said property.

4. An account of any monies received by the second defendant as rents from the tenants of the said premises and payment over to the plaintiff any monies so found.

OR IN THE ALTERNATIVE

“5. Against the Defendants jointly and severally for compulsory Acquisition, a sum of Three Hundred Thousand Naira (N300,000.00) as the market value of the property situate at Plot 2 in Block 260 Wobo Layout. Port Harcourt popularly called No. 61 Ikwerre Road, Port Harcourt.”

The action was decided on the Statement of Claim and statement of defence filed by the parties. The gravamen of Plaintiff’s claim against the Defendants inter alia, is for a consideration that the purported sale of his buildings situate at 61, Ikwerre Road, Port Harcourt to the 2nd Defendant is unconstitutional, null and void. He also claimed for an account and payment over to him of any money received by the 2nd Defendant as rents from the tenants of the premises. In the alternative he claimed for N300,000.00 as the market value of the property.

This litigation arose because Appellant said that on return to Port Harcourt after the civil war, he was unable to regain possession of the buildings subject matter of this litigation and was informed they had been acquired by the 1st Defendant. On inquiry at the Office of the Ministry of Lands, and also at the Abandoned Properties’ Office in Port Harcourt,

he discovered that the property had been sold to the 2nd Defendant. He brought the action because he had not been paid any compensation.

In his defence, 1st Defendant stated that the property in dispute was State land and that the lease to Plaintiff of 30th March, 1961 was for a term of 40 years commencing from January 1, 1959. He stated that the Plaintiff was assigned the lease by Ezeikpe Bros. & Sons under an irrevocable power of attorney, without the prior consent of the Governor. It was also averred that by virtue of the provisions of the Abandoned Properties (Custody and Management) Edict 1969, the property became abandoned property lawfully leased to the 2nd Defendant. It was also averred that by virtue of the Public Officers Protection Law, and Abandoned Properties' Decree No. 90 of 1979, Laws of the Federal Republic of Nigeria, the action was statute-barred, and that the Court had no jurisdiction to entertain the suit.

The 2nd Defendant admitting that the property is 61, Ikwerre Road, averred that it was not assigned to him, but leased to him by the Rivers State Government under the State Land Law. Further the property being State land subject to State Land Law on 18th July 1979, the Abandoned Properties Implementation Committee, offered and he accepted to buy the property in dispute. On completion of the purchase the Rivers State Government granted him a lease of the property. He admitted he told the tenants to attorn tenant to him and that he had been collecting rents from them. He contended that any interest the Appellant now has in the Property is for compensation in accordance with section 1 (1) of the Abandoned Properties' Decree No. 90 of 1979.

After evidence led by both the Plaintiff and Defendants the learned trial Chief Judge dismissed the claims in paragraph 13 (a) - (d) of the Amended Statement of Claim, and held that by virtue of Section 1 of the Abandoned Properties' Decree 1979, there was a right to sell every abandoned property and vest a good title in the purchaser. He however granted the alternative relief, and awarded N380,000 as market value of the property in dispute.

Defendants have appealed against the award of N380,000.00 Plaintiffs has appealed against the dismissal of the reliefs in paragraph 13 (a) - (d)

claimed.

It is in respect of this appeal, Plaintiff has brought a motion in the Court of Appeal seeking to raise issues of law which were neither raised nor argued in the court of trial. It is obvious on the record that the case of the Plaintiff was fought and decided on the interpretation of section 1 of the Abandoned Properties' Decree No. 90 of 1979 and the Abandoned Properties' (Custody and Management) Edict 1969. This is because the basis on which the learned trial Chief Judge dismissed Plaintiff's claim was that the property in issue having been validly sold and good title having been vested on the 2nd Defendant by virtue of section 1 of the Abandoned Properties' Decree 1979, the Plaintiff has not established any of the reliefs claimed. B C

Plaintiff has now appealed claiming error in law in the interpretation of section 1 of the Abandoned Properties' Decree No. 90 of 1979, when the learned Chief Judge held that the Abandoned Properties' Implementation Committee had the right to sell every abandoned property and vest a good title on the purchaser. The question whether the APIC or the Rivers State Government had legal authority to sell or deal with the property to the 2nd respondent, otherwise than under the State Land Law was neither raised nor argued. It was also not an issue whether the APIC or the State Government validly acquired any title/interest in the property in dispute which it can transfer to the 2nd Defendant. The question whether the lease on the property was for the unexpired term was not raised. The applicability of the Abandoned Properties' Decree No. 90 of 1979 which came into force on 28/9/79, in view of the fact that the lease Exhibit F was issued by the State Government on the 19/3/79, was not raised. The question whether the Decree was to have a retrospective operation was not raised during the trial. D E F G

Similarly, additional ground 2 challenges the error that the reliefs in paragraph 13 (a) - (d) were not tenable. The fact that the subject matter was at all material times State land, and subject to the State Land Law which could not be sold by either the APIC or the State Government was not raised in the Court of trial. H

It is important however to observe that before the trial Court, the

building lease subject matter of the litigation, was tendered as Exhibit F by Plaintiff and is in evidence. 1st Defendant relied entirely on the provisions of the Public Officers Protection Law, the Abandoned Properties' (Custody and Management) Edict 1969 and the Abandoned Properties' Decree and the State Land Law Public Lands Acquisition (Miscellaneous) Provisions Decree 1976, for his Defence.

Similarly, 2nd Defendant relied on State Land Law Cap. 122 Laws of Eastern Nigeria 1963, Building lease granted by the Abandoned Properties' Implementation Committee dated 19th March 1979 under cover of the letter of the Chief Land Officer dated 17th April, 1979, Abandoned Properties' Decree No. 90 of 1979.

Plaintiff/Appellant therefore brought a motion to argue the new points of law indicated in the additional grounds of appeal; as having not been canvassed or argued during the trial and to incorporate them in his brief of argument. The Court of Appeal after hearing arguments from the parties refused the application holding that the effect of granting the application is to change completely the nature and character of the case fought in the lower court. It was also held that Exhibit F was not made an issue in the Court below so as to meet the new point of law. That to allow the new points sought to be introduced would make it necessary for Respondents to lead evidence by production of other documents antecedent to Exhibit F. It was therefore held that further evidence would be required in the hearing of the appeal.

Appellant appealed to this Court against the ruling alleging five errors in law, exercise of discretion and misdirection in law.

*"Part Of The Decision Of The Lower Court Complained Of:
The Whole Ruling*

"3. GROUNDS OF APPEAL

(1) ERROR IN LAW

The learned Justices of the Court of Appeal erred in law when they held (per Onalaja JAC) that if the prayer is granted evidence would have to be led whether APIC acted intra vires, the powers granted to it under Decree 90 of 1979.

"PARTICULARS OF ERROR

(i) *A proper interpretation of Exhibit F, C and D vis-a-vis Secs. 3(2) and S. 1 of Abandoned Properties Decree 90 of 1979, Cap. 1 Laws of the Federation 1990, would not require any evidence in rebuttal;*

(ii) *The points raised in Ground 1 touches on lack of jurisdiction or jurisdiction to entertain claim in paragraph 13 (a) - (d) of Appellant's claim;*

(iii) *Arguing the said ground, did not introduce new line of defence, nor change the character of the case;*

(iv) *Whether APIC on the Exhibits tendered and relied upon by Appellants and Respondents acted intra vires or ultra vires Decree 90 of 1979 is a question of jurisdiction.*

"(2) ERROR IN LAW

The learned Justices of the Court of Appeal erred in law when they held:

"In the final submission learned Senior Advocate opined that looking at Exhibit F was the learned trial Judge right to decline jurisdiction. With respect no positive issue of jurisdiction has been raised in the fresh point.

"PARTICULARS OF ERROR

(i) *Ground 1 and particulars (viii) and (ix) raised the issue of jurisdiction;*

(ii) *Page 114 line 12 - 14 of the Record the learned trial Judge agreed both Counsel relied on S. 3 (2) of Abandoned Properties' Decree No. 90 of 1979;*

(iii) *Court declined jurisdiction to entertain Appellant's claim in paragraph 13 (a) - (d) of the Plaintiff's claim the new point is that on the Exhibits the Court had jurisdiction.*

(iv) *It is the correct interpretation of Decree 90 of 1979 operative from 26/9/79 in relation to Exhibit F dated 19/3/79, that is the new point, that is whether the trial Court had jurisdiction to entertain the claim or not.*

(v) *The correct interpretation of (iv) above coupled with Exhibits C and D can be resolved without calling additional evidence. No evidence could be called in rebuttal if the point was raised and canvassed in time.*

(vi) *Jurisdiction can be raised at any stage of proceedings at the trial, in*

the Court of Appeal or in the Supreme Court; Chief Daniel Oloba v. Isaac Akereja (1988) 3 N.W.L.R. Part 84 p. 508 at p. 519, p. 520

“(3) ERROR IN LAW

The learned Justices of the Court of Appeal erred in law when they held:

- B “As this is a ruling not argument of the appeal and cautious that one is not to pre-empt the decision of the final appeal, the stated averments to reflect that the applicant was aware and cognisant of the Abandoned Properties Decree and the Committee set up under it with its powers and duties, leading me to the conclusions that the fresh point now being raised could have been canvassed in the lower court.”

“PARTICULARS OF ERROR

- D (i) *The fresh points of law substantive or procedural need not be raised in the trial Court: this is the essence of the principle of raising fresh points of law not raised, nor canvassed in the Court below;*

- E (ii) *Provided the fresh points are substantive or procedural and no further evidence is required, the Court will readily grant the application*

(iii) *The principles and practice laid down in the Fairlakes Hotel Limited cases (supra), Lawani Atoyebi’s case (supra) does not put the strictures explicit in the dicta of the Justices.*

- F (iv) *The question of jurisdiction or lack of it by a trial Court to entertain a claim and the interpretation whether the Rivers State Government can sell State Land without due process explicit in the fresh points in Grounds 1 and 2 of the proposed grounds of Appeal need not be raised in the trial Court provided the principles of law are complied with in the Appellate Court.*

“(4) ERROR IN LAW

The Learned Justices of the Court of Appeal erred in law in refusing to grant the application in that they did not exercise their discretion judiciously and judicially.

- H **“PARTICULARS OF ERROR**

(i) *The Court enunciated correctly the principles of law explicit in A.G. of Oyo State & Anor. v. Fairlakes Hotel Limited (1988) 5 N.W.L.R. (Part 91) 1 and Alhaji Atoyebi & Ors. v. The Governor of Oyo State &*

Ors. (1994) 5 N.W.L.R. (Part 344) 290 at 305, but failed in the instant application to apply it.

(ii) Issues like natural justice, pleading referred to in the Ruling are factors not necessary for decision.

(iii) The Records, Exhibits tendered and parties agreed that the property in dispute is State Land.

(iv) The issue whether the Rivers State Government could sell Stated Land during the currency of a lease and on which there is property was in evidence at the trial: No new evidence could have been led.

(v) The Justices failed to examine critically the Exhibits relied upon particularly Exhibit C,D,F,M,N,K and L. These were in the Record."

"(5) MISDIRECTION

The learned Justices of the Court of Appeal misdirected themselves when they held:-

"The complaint against APIC by applicant was that it had custody of his TITLE documents and not the validity or invalidity of its action"

PARTICULARS OF MISDIRECTION

(i) The complaint of Appellant is misconstrued by the Court.

(ii) Ground 1 dealt with the issue of jurisdiction or lack of it by the trial Court and a proper interpretation of Decree 90 of 1979 in relation to Exhibits C, D and F.

(iii) The validity or invalidity of the action of APIC or the Rivers State Government in relation to Exhibits C, D and F, was in issue.

(iv) The Record and Exhibits tendered and accepted by the Court are only documents required to contain the fresh points of law.

(v) The issue as disclosed in the 2 proposed grounds is not whether or not the property in dispute is abandoned property or not, or the custody or lack of it by APIC."

Four issues for determination have been formulated by Appellant from the above grounds of appeal. The issues are as follows:-

"12. ISSUES FOR DETERMINATION

The issues for determination in this appeal are:-

(i) *Did the learned Justices of the Court of Appeal exercised their discretion judicially and judiciously when they refused to allow the Appellant to argue fresh points of law, even when it touched on jurisdiction or lack of it to entertain or not to entertain the claims in paragraph 13 (a) - (d) of the Appellant's Amended Statement of Claim?*

(ii) *Did the learned Justices of the Court critically examine the Exhibits tendered and accepted in the trial Court and applied the principles of law enunciated in A.G. of Oyo State & Anor. v. Fair Lakes Hotel Limited (1988) 12 S.C. (PRT 1) 1; (1988) 5 N.W.L.R. C (Part 92) 1?*

(iii) *Were the Justices of the Court of Appeal right to have held that arguing the two grounds of appeal could have been canvassed in the lower court, or that evidence would have been led whether APIC acted intra vires, the powers granted to it under Decree No. 90 D of 1979?*

(iv) *Were the learned Justices of the Court of Appeal right to hold that in the grounds of appeal no issue of jurisdiction has been raised?"*

2nd Defendant/Respondent has formulated only two issues as follows:

"(i) Whether the learned Justices of the Court were right in holding that (further) evidence would be required for determination of the new points of law sought to be raised by the Appellant.

(ii) Whether or not the learned Justices of the Court of Appeal F rightly exercised their discretion in refusing the Appellant's application."

A careful examination of the two formulations will show that the first issue of Appellant raises the same issue as issue (ii) of the 2nd Respondent, and raise the question of the exercise of discretion of the Court below.

Issue (iii) of Appellant and issue (i) of the 2nd Appellant raise the same issue whether further evidence would be necessary in the hearing of the appeal. Issue (ii) of the Appellant which raises the question of the application of the principles of law enunciated in A.G. of Oyo State & anor v. Fair Lakes Hotel Limited (1988) 12 S.C. (Part I) 1; (1988) 5 N.W.L.R. G (Pt. 92) and issue

(iv) of the Appellant on grounds of jurisdiction stand alone. I shall therefore consider this appeal in accordance with my analysis of the issues for determination formulated. So considered the issues formulated will

be:-

(a) Whether further evidence was necessary in hearing of the appeal.

(b) Whether the principles of law enunciated in *A-G. of Oyo State & anor. v. Fair Lakes Hotel Limited* (1988) 12 S.C. (Part 1)1; (1988) 5 N.W.L.R. was correctly applied. B

(c) Whether the Court of Appeal rightly exercised their discretion in refusing the Appellant's application

(d) Whether the learned Justices of the Court of Appeal were C right to hold that no issue of jurisdiction has been raised?

I shall now proceed to consider the well settled and accepted principles enabling an appellate Court to grant an application to raise new points of law not canvassed or argued in the Court of trial. Generally the Court of Appeal will not allow points which were not taken D in the trial Court to be taken for the first time before it. This is because the appellate Court would not have had the benefit of the opinion of the trial court on the issue - See *Kabaka's Government v. A.G. of Uganda* (1965) 3 W.L.R. 512. This is especially so where the new point raised involves consideration of matters of fact with which E the Court below were in a more advantageous position to deal with and which they had in fact dealt with See - *Ejiofodomi v. Okonkwo* (1982) 11 SC. 74, *John Dweye & Ors. v. Joseph Iyamahan & Ors.* (1983) 8 SC. 76. In very exceptional circumstances, the point may F be allowed - See *United Marketing Co. v. Kara* (1963) 1 WLR 523.

The Supreme Court has granted an application to raise and argue a point raised for the first time in the appellate Court where it was a mere omission to state and argue a legal proposition which did not require any underlying facts or hypothesis than those already G admitted or proved in the Court below - See *Akpene v. Barclays Bank of Nigeria & Anor* (1977) 1 SC. 47; *Djukpan v. Orovuyovbe & Anor.* (1967) 1 All NLR 134; *Etowang Enang & Ors. v. Fidelis Ikor Adu* (1981) 11 - 12 SC. 19; *Mabiaku Onotavie & Ors. v. Binite H Onokpase & Anor* (1984) 12 SC. 19. Where however there is a variation in the proved and admitted facts, the Court may hold that it was too late to raise the point.

Invariably the Court will allow a fresh point to be argued on appeal where the issue is relevant and no further evidence was necessary - See Sonekan v. Smith (1964) NMLR 59; Fadiora & Anor. v. Gbadebo (1978) 3 SC. 219; Orogan & Ors. v. Soremekun (1986) 5 NWLR 688. Where a fresh point is allowed to be raised in the Court of Appeal, the Court ought not decide the point in favour of the Appellant unless it is satisfied:

- (i) that it has before it all the facts bearing on the new point as if it has been raised in the trial Court, and
- (ii) no satisfactory explanation could have been given in the court below if it had been so raised - See Fadiora & anor v. Gbadebo & anor (1978) 3 SC. 219; Ewharieme v. The State (1985) 3 NWLR 272; Abaye v. Ofili & anor (1986) 1 NWLR (Part 15) 134; Sonekan v. Smith (1964) All NLR 168; Oredoyin & ors. v. Arowolo & Ors. (1988) 12 S.C. (Part 1); 1(1989) 4 NWLR 190; A.G., of Oyo State v. Fair Lakes Hotel Ltd. (1988) 12 SC. (Part 1) 1; (1988) 5 NWLR 1.

An issue which though not a ground of appeal before the Court but was properly raised before that Court, either by the parties or by the Court *Suo motu*, and on which argument of parties were heard and decision given, can support a ground of appeal to the appellate Court - See Awote & ors. v. Onatunni & Ors. (1986) 5 NWLR 941.

The application to raise and argue the issue of the jurisdiction of a trial Court and of the Competence of the other Party has been accepted at any stage of the proceedings and even on appeal - See Adesola v. Abidoye (1999) 14 NWLR 28; Shittu-Bay v A.G. of the Federation (1998) 10 NWLR 392; Adefulu v. Okulaja (1998) 5 NWLR 435; Salati v. Shehu (1986) 1 NWLR 198. This is because this issue is fundamental to adjudication -

See Madukolu v. Nkemdilim (1962) 1 All NLR 587. It is however desirable for such technical grounds to be raised in the trial court to enable the other side know the case he has to meet on appeal - See Shobogun v. Sanni & Ors. (1974) 1 All NLR (Pt. 2) 311.

I have already set out the issues for determination in this appeal. I have also stated the issues contested by the parties in the Court of trial and the decision of the trial Court. I have also stated the additional grounds raised for the first time in the Court of Appeal and sought to be argued therein, which was rejected by the Court of Appeal, and the grounds on which the Court of Appeal rejected the application.

Mr. Clement Akpamgbo SAN, learned Senior Counsel arguing the appeal for the Appellant has urged us to allow the appeal inter alia on the fresh point of the question of jurisdiction of the trial Court. This was formulated in his issues (ii) and (iv), which is issue (a) in my formulation. Learned Senior Counsel submitted that the basis of the judgment of the learned trial Chief Judge was that the Court had no jurisdiction to entertain the reliefs sought in paragraphs (a) - (d) of the Amended Statement of Claim by virtue of section 1 of the Abandoned Properties' Decree No. 90 of 1979. He however argued that the relief sought to invalidate the sale of the subject matter of dispute to the 2nd Respondent must be construed to be retrospective. The point raised is for the Interpretation of the Abandoned Properties' Decree and to show that it cannot have retrospective effect, and that the transaction resulting in Exhibit F is not affected by the Decree.

The Decree came into force on the 28th September, 1979. Exhibit F the instrument of title of the 2nd Respondent was effective from 19th March, 1979. In effect the Exhibit F ante dates the Defence and was not covered by it. Accordingly the trial Court did not lack the jurisdiction to entertain the reliefs claimed in paragraphs 13 (a) - (d) of the amended Statement of Claim.

The contention of learned Senior Counsel is that the transaction resulting in the sale of the subject matter of this litigation is unconstitutional, null and void.

Mr. Okiri, learned Counsel to the Respondent opposed the contention. It was submitted that the Appellant's point indicates a case different and made in the Court below. In the Court below the contention was that the Rivers State Government had acquired the property in dispute and sold it to 2nd Respondent without paying compensation to Appellant. The competence of the Rivers State Government to enter into the transaction in Exhibit F was not challenged. Similarly the authority of the Abandoned Properties' Implementation Committee to sell the property in dispute was not challenged. The validity of the purported acquisition of the lease Exhibit F was not contested.

Learned Counsel submitted that interpretation whether or not De

cree No. 90 of 1979 has retrospective effect can no longer be regarded as a substantial point of law in view of the Court of Appeal decision in *Levi Okechukwu v. C. Alagba* (1991) 8 NWLR (Pt. 207) 54. It was submitted that the materials for the determination of the new points were not in the record.

It is apparent from the contentions of learned Counsel that the point raised before the Court of Appeal is a question of Law. The argument of Respondent is that it is not a substantial point of law. It is clear from the judgment that it was decided that Appellant lost the reliefs sought in paragraphs 13 (a) - (d) of the amended Statement of Claim on the ground that the reliefs were incompetent and untenable and that the Court had no jurisdiction to entertain them by virtue of sections 1 and 3 (2) of the Abandoned Properties' Decree No. 90 of 1979. The applicability of this Decree was raised by and relied upon by the Respondent.

It stands undisputed that the Decree in issue came into effect on the 28th September, 1979. The transaction relied upon by 2nd Respondent resulting in Exhibit F was dated 19th March, 1979 and registered on July 18, 1979.

On the above facts, the question whether the said Decree No. 90 of 1979 would have retrospective effect on the transaction and therefore to deprive the Court of Appeal jurisdiction is obviously an issue. It is a well settled principle that the question of the jurisdiction or lack of it can be raised at any stage of the proceedings even on appeal - See *Oloriode & ors. v. Oyebi & Ors.* (1984) 5 SC. 1. This issue is new having not been raised by Appellant at the trial, or in the Court below. It is a point of law bearing on the correct interpretation of the provisions of section 1 of the Abandoned Properties' Decree No. 90 of 1979, and relied upon by the learned trial Chief Judge in his judgment. It is pertinent to observe, that the question of jurisdiction and competence was first raised by the Respondent.

It is indisputable that the purpose of raising the issue is to demonstrate and for a determination whether the learned trial Chief Judge and the Court below were right in their interpretation of section 1 of Decree No. 90 of 1979. In such a situation it is in the interest of justice, not only

desirable, but also necessary to afford the party raising the issue, the opportunity to do so - See *Sonekan v. Smith* (1964) All NLR 168.

Learned Counsel to the Respondent has contended that the point raised in the ground of appeal was bound to lead to the introduction of new evidence, and a new defence which was not necessary when the case was fought. It was submitted that admitting the ground of appeal will lead to changing the character of the case. I am afraid, this is a complete misconception of the nature of the issue, which merely raises the interpretation of the provisions of Decree No. 90 of 1979 simpliciter. This is an issue considered in the Court of trial. Whether the Government of Rivers State, represented by the 1st Respondent or the Abandoned Properties' Implementation Committee on the Exhibits before the Court, and specifically Exhibit F, acted within its powers, within Decree No. 90 of 1979 is undoubtedly an issue of jurisdiction. The point raised has not altered the character of the case in any manner whatsoever.

It is however important to state that the essence of the issue raised in the additional ground of appeal is for the determination vel non the Decree No. 90 of 1979 should be given retrospective effect and accordingly deprive the Court of its jurisdiction. This issue which was raised before the learned trial Chief Judge arose from the judgment of the learned trial Chief Judge. *Stricto sensu*, this is not a new issue having arisen from the judgment of the learned trial Chief Judge. This is a point which can be taken on appeal simpliciter. This is an issue of jurisdiction which as I have already said, can be raised at any stage of the proceedings even on appeal.

The issue of jurisdiction is egregious upon the record, and the Court below ought to have taken that fact into account in considering the application. I am certain if the Court below had taken these factors into account in their consideration of the additional grounds of appeal it would not have declined but would have granted the application.

The Court was clearly in error when it held that the grant of the application and allowing the additional ground of appeal would change the character of the original case presented by the Appellant and would involve the leading of fresh evidence. It is clearly wrong to hold as the Court

below did that granting the application and allowing the additional ground of appeal will result in delays in the hearing of the appeal. I do not think the additional ground of appeal will result in any unnecessary delay in the hearing of the appeal. A ground of appeal raising the issue of the jurisdiction of the Court cannot be ignored for any reason whatsoever.

For the above reasons and those stated in the leading judgment of my learned brother, Onu JSC, I allow the appeal and abide by the orders made in the leading judgment.

OGUNDARE JSC

I agree entirely with my learned brother Onu, JSC, that this appeal be allowed and that the Appellant be granted leave to argue the issues raised in the additional grounds of appeal before the Court of Appeal.

The Appellant had sued the Defendants (now Respondents) claiming, as per paragraph 13 of his amended statement of claim -

“(a) A Declaration that the purported sale of the plaintiffs building situate at Plot 2 Block 260 Wobo Layout, Diobu known as No. 61 Owerri Road now Ikwerre Road and registered as No. 36 at page 36 in Vol. 380 at the Land Registry Enugu, now kept at Port Harcourt, by the Rivers State Government (1st Defendant) to the second Defendant is unconstitutional and null and void.

(b) A declaration that the plaintiff is entitled to the grant of Statutory Right of Occupancy of the said premises.

(c) A perpetual injunction restraining the second Defendant by himself, his servants and or agents from dealing in the said property.

(d) An account of any monies received by the Defendant as rents from the tenants of the said premises and payment over to the plaintiff any monies so found.

OR IN THE ALTERNATIVE

(e) The Plaintiff claims against the Defendants jointly and severally a sum of Three Hundred and Eighty Thousand Naira (N380,000.00) as the Market Value of the property situate at Plot 2 in Block 200 Wobo Layout, Port Harcourt popularly called No. 61 Owerri Road now Ikwerre Road, Port Harcourt.”

He lost on the main reliefs but won on the alternative relief. He appealed to the Court of Appeal out of time after obtaining extension of time so to do - his notice of appeal is however not copied in the record of appeal before us. The 2 Defendants also appealed against the judgment of the trial court granting the alternative relief of the Appellant. The Appellant subsequently applied to the Court of Appeal for Leave.

(i) To argue points of law not argued nor canvassed in the court below captioned as "Additional Grounds of Appeal" and marked as Exhibit A.

(ii) Incorporate Exhibit A in Appellant's Brief of Argument exhibited as Exhibit B.

(iii) Deem Exhibit B filed in Court on 29/7/94 as duly filed upon payment of the prescribed fees."

The Court of Appeal refused the application for the reason, per Onalaja JCA who read the lead judgment of the Court, that -

"As this is a ruling part not argument of the appeal and cautious that one is not to pre-empt the decision of the final appeal, the stated averments to reflect that the applicant was aware and cognisant of the Abandoned Properties Decree and the Committee set up under it with its powers and duties, leading me to the conclusion that the fresh point now being raised could have been canvassed in the lower court. The complaint against APIC by applicant was that it has the custody of his Title documents and not the validity or invalidity or its action. If the prayer is granted evidence would have to be led whether the APIC acted intra or ultra vires the powers granted to it under Decree 90 of 1979.

In his final submission learned Senior Advocate opined that by looking at Exhibit F was the learned trial Judge right to decline jurisdiction with respect no positive issue of jurisdiction has been raised in the fresh point."

Edozie JCA who concurred in the above view, added:

"With the leave of the Court of Appeal if the necessary evidence is in the record of the lower court, a new issue may be raised thereon in the Court of Appeal if such issues raise substantial point of law or procedure which would affect the decision of the court below. The new issue for

which leave is sought to argue on appeal is whether or not the property in dispute was an abandoned property, an issue which was not canvassed in the court below. Since on the respondents' showing, all the documents bearing on that fresh issue are not on record, the leave sought cannot be granted. The application is therefore, refused."

The issues raised by the proposed additional grounds of appeal, rather than being new issues not canvassed at the trial, in fact arose out of the judgment of the trial court. They formed the basis on which the trial Court dismissed the main claims of the Plaintiff/Appellant. The Appellant was entitled, as of right, to challenge on appeal, this basis. He does not need any special leave to argue the proposed additional grounds of appeal since the interpretation of section 1 of the Abandoned Properties Decree 1979 was the basis upon which the trial court came to its conclusion to dismiss the Appellant's main claims.

With profound respect to their Lordships of the Court below, they were in serious error when they held that the two additional grounds of appeal sought to be canvassed by the appellant before them would change the character of the case fought in the trial court. They appeared to have lost sight of paragraph 8 (b) of the Amended Statement of Defence of the 1st Defendant which reads:

"The 1st defendant further contends and shall contend at the trial of this suit that :-

(b) And also by virtue of the provisions of the Abandoned Properties Decree No. 90 of 1979 laws of the Federal Republic of Nigeria, the Court has no jurisdiction to entertain this suit in as much as it affects the validity of the sale by APIC."

and paragraph 18 of the Amended Statement of Defence of the 2nd Defendant which reads:

"18. The 2nd Defendant avers that the Plaintiff is not entitled to any of the claims contained in paragraph 13 of his Amended Statement of Claim and will contend at the trial that in so far as any transaction leading to the issue of the Building Lease to the 2nd Defendant amounted to a disposition or sale of an abandoned property conducted by the APIC set up by the Federal Military Government, it is lawfully and properly

made by virtue of section 1 (1) of the Abandoned Properties Decree (No. 90) of 1979."

The learned trial Chief Judge in his judgment held:

"By Section 1 of the Abandoned Properties Decree 1979, the APIC has the right to sell every abandoned property and vest a good title on a purchaser. I would hold therefore that the claim in paragraph 13 (a) - (d) of the Plaintiff's statement of claim is untenable in law."

The proposed additional grounds of appeal, without their particulars, read:

"1. ERROR IN LAW

This (sic) learned Chief Judge erred in law when he held thus:

'(By) Section 1 of the Abandoned Properties Decree 1979, the APIC has the right to sell every abandoned property and vest a good title on a purchaser. I would hold therefore that the claim in paragraph 13 (a) - (d) of the Plaintiff's statement of claim is untenable in law."

a finding contrary to law and which has occasioned a miscarriage of justice.

2. ERROR IN LAW

The learned Chief Judge erred in law in his judgment when he held that that (sic) reliefs in paragraph 13 (a) - (d) were not tenable in Law when on the pleadings and evidence, the property in dispute before, after and during the action was State land, subject to the State Land Law, and could not be sold by either the APIC or the State Government. This is more so even after Exhibits M and N were published."

Will it be right to say that these grounds do not arise from the judgment appealed against or that they raise new issues not canvassed at the trial or worse still, that they change the character of the case as fought in the trial court? I rather think not.

On whole, I hold that this appeal succeeds. The ruling of the Court below is set aside. The application of the appellant dated 29th day of July 1994 and filed on the same day, is hereby granted. The appeal is remitted to the court below to be heard with utmost dispatch and by a panel of that court differently constituted.

I abide by the orders made by my learned brother Onu, JSC, in

cluding the order for costs.

UWAIFO JSC

B I read in advance the judgment of my learned brother Onu, JSC, and agree that the appeal be allowed, the leave sought granted and the appeal in the lower court be heard by a different panel.

It is clear that the appellant lost the reliefs sought in para. 13 (a) - (d) of his amended statement of claim on the basis held by the trial court that the reliefs are incompetent and untenable and that it had no jurisdiction to entertain them by virtue of sections 1 and 3 (2) of the Abandoned Properties Decree No. 90 of 1979. The applicability of that Decree was raised by the 1st and 2nd respondents. The said Decree commenced with effect from 28 September, 1979 whereas the relevant transaction relied on by the 2nd respondent took place by Deed of Lease dated 19 March, 1979 and registered on 18 July, 1979 after the Abandoned Properties Implementation Committee had offered him the property.

E If that be the position, the question whether the said Decree No. 90 of 1979 would have a retrospective effect upon that transaction to deprive the court of jurisdiction has become an issue. That issue was raised at the trial court and consequently arose from the decision it arrived at based on the said Decree. I think it was out of abundance of caution that the appellant sought the leave of the lower court to appeal from the consequences thereof as a new issue. But the correct position, in my view, is that it is not a new issue but simply an issue arising from the judgment of the trial court which can be taken on appeal simpliciter. Furthermore, it concerns the issue of jurisdiction which can be raised at any stage of the proceedings whether at the trial or an appeal.

If the lower court had seen the matter in the light of the explanation above, I believe it would not have hesitated in granting the application to allow the appellant to file and argue what in essence are additional grounds of appeal, provided they are arguable grounds. With due respect, I do not share the lower court's view that the grounds of appeal if allowed to be argued would change the original case the appellant presented and that it would involve the leading of fresh evidence. Nor do I

accept as good reason for refusing the application in the circumstances that there would be delay in hearing the appeal if the application was granted. I think if some delay is inevitable in the overall interest of justice, the court ought to accommodate it subject to costs.

For the above reasons and those stated in greater detail by my learned brother Onu, JSC, I allow this appeal and abide by the orders, including the order for costs, made in the leading judgment.

EJIWUNMI JSC

I have had the privilege of reading before now the judgment just delivered by my learned brother Onu, JSC. It is manifest that the main question for determination in this appeal is whether the lower court erred in not acceding to the request of the Appellant to argue additional grounds of Appeal before that Court.

However, in order to appreciate my views on this question, it is desirable to state that the Appellant had sued the Defendants (now Respondents) claiming, as per paragraph 13 of his amended Statement of Claim:

(a) A Declaration that the purported sale of the plaintiff's building situate at Plot 2 Block 260 Wobo Layout, Diobu known as No. 61 Owerri Road now Ikwerre Road and registered as No. 36 at page 36 in Vol. 380 at the Land Registry Enugu, now kept at Port Harcourt, by the Rivers State Government (1st Defendant) to the second Defendant is unconstitutional and null and void.

(b) A declaration that the Plaintiff is entitled to the grant of Statutory Right of Occupancy of the said premises.

(c) A perpetual injunction restraining the second Defendant by himself, his servants and or agents from dealing in the said property.

(d) An account of any monies received by the Defendant as rents from the tenants of the said premises and payment over to the plaintiff any monies so found.

OR IN THE ALTERNATIVE

(e) The Plaintiff claims against the Defendants jointly and severally a sum of Three Hundred and Eighty Thousand Naira (N380,000.00) as the

Market Value of the property situate at Plot 2 in Block 200 Wobo Layout, Port Harcourt popularly called No. 61 Owerri Road now Ikwerre Road, Port Harcourt.”

B The Appellant lost on the main reliefs, but succeeded on the alternative relief. He then appealed to the Court of Appeal, though out of time, after obtaining the leave of Court. The two Defendants also appealed against the judgment of the trial Court. Thereafter the Appellant applied to the Court of Appeal for leave to argue points of
C law not argued or canvassed in the court below.

This application was refused. The Court below, in refusing the application held per Onalaja, JCA, inter alia, as follows:

D *“The Respondents fought the case in the lower court on the case put up by the applicant who as Plaintiff sued the Respondents as Defendants. The present application is to change completely the case fought in the lower court, it is in the interest of justice not to allow a party especially a Plaintiff to change its case from court to court Exhibit F was not made an issue in the Court below to meet the new
E point of law. Respondents would have to lead evidence by production of other documents antecedent to Exhibit F. The Applicant was in error and it is misconceived that no further evidence would be led. He associated himself and relied on the authorities cited by the 1st Respondent that the application be dismissed. Finally, the applica-
F tion shall cause a delay of the hearing of this appeal, which had been ripe since. So, for the above reasons court should dismiss this application.....”*

G As the Appellant was dissatisfied with the Ruling of the Court below, he lodged an appeal to this Court, pursuant to the leave of this Court. And in accordance with the Rules of this Court, Briefs of Argument were filed and exchanged.

In the Appellant’s brief, the following four issues were identified for the determination of the Appeal.

H (i) Did the learned Justices of the Court of Appeal exercise discretion judicially and judiciously when they refused to allow the Appellant

to argue fresh points of law, even when it touched on jurisdiction or lack of it to entertain the claims in paragraph 13 (a) - (d) of the Appellant's Amended Statement of Claim?

(ii) Did the learned Justices of the Court of Appeal critically examine the Exhibits tendered and accepted in the trial court and applied the principles of law enunciated in A.G. of Oyo State & Anor. v. Fairlakes Hotel Limited (1988) 12 S.C. (Part 1) 1 (1988) 5 NWLR (Part 92) 1?

(iii) Were the Justices of the Court of Appeal right to have held that arguing the two grounds of appeal could have been canvassed in the lower court, or that evidence would have been led whether APIC ultra intra vires, the powers granted to it under Decree No. 90 of 1979?

(iv) Were the learned Justices of the Court of Appeal right to hold that in the grounds of appeal no issue of jurisdiction has been raised?

For my part, it is evident from the issues raised above, that, though the Court below refused the Appellant's application, it is manifest that the Court in refusing the application failed to advert to the salient facts accepted by the trial Court. In the result, the Court below failed to advert to those facts in applying the principles governing the grant of the kind of prayers sought for by the Appellants.

In Amusa Opoola Adio & Amos Afolabi v. The State (1986) 3 NWLR (Pt. 30) 536, this Court, stated the principle that ought to be followed when considering prayers of the kind sought before the Court below by the Appellant; as follows at page 587:

"Leave to argue additional grounds is not the same as leave to argue and urge issues not raised in the Court. But the rule that an Appellant will not be allowed to raise on appeal a question not canvassed in the court below is not an inflexible and rigid rule. It is subject to the demand of justice. Thus where the question involves substantial points of law, either substantive or procedural, the court may entertain the appeal all the same and prevent an obvious miscarriage of justice."

Before the trial Court, the Appellant tendered Exhibits A, B, C, & D. The 1st Respondent in order to prove that the lease to the 2nd Respondent is valid and lawfully issued to the latter, tendered Exhibit F, and contended that by virtue of the provisions of the Abandoned Properties Decree No.

90 of 1979 Laws of the Federation, the Court has no jurisdiction to entertain the suit in as much as it affects the validity of the sale by APIC. The contention of the 2nd Respondent is to the effect that the property is State Land, was brought by him (2nd Respondent) with Exhibit F is the evidence
B of the purchase. Reliance was also placed on the Abandoned Properties Decree No. 9 of 1979.

The trial Court in the course of its judgment, with regard to the Decree held thus, inter alia:

*“By Section 1 of the Abandoned Properties Decree 1979, the APIC
C has the right to sell abandoned property and vest a good title on a purchaser. I would hold therefore that the claim in paragraph 13 (a) - (d) of the Plaintiff’s statement of claim is untenable in law.”*

It is thus clear that the judgment of the trial Court was based on Exhibit F, and the provisions of the Abandoned Properties Decree No. 90 of
D 1979, Laws of the Federation.

When, therefore, the Appellant brought the application before the Court below, those facts should have fallen for consideration in the decision to grant or not to grant leave to the Appellants. It is my respectful view that if the Court below had adverted properly to the findings of the trial
E Court based upon the facts on the printed record, their decision would have been different. And substantial justice would have resulted from their decision.

Quite apart from the fact that leave to appeal ought to have been granted to the Appellants upon their application, it is my considered view
F that the application to that Court for leave to appeal, was totally unnecessary. I say this because upon the facts disclosed in this case, and the finding made thereon by the learned trial Judge, the Appellants could have quite properly appealed against the judgement of the lower court as of right.

I would therefore for the above reasons and the fuller reasons given
G in the judgment of my learned brother Onu, JSC allow this appeal. I also abide with the consequential Orders made in the said judgment.

H