

SUPREME COURT OF NIGERIA
FRIDAY 10TH MAY, 2002. SC. 190/1999
CORAM:- S. M. A. BELGORE, E. O. OGWUEGBU,
U. MOHAMMED, S. O. UWAIFO, A. O. EJIWUNMI, JJSC

REMILEKUN OLAIYA APPELLANT
(Otherwise known as Oluremi Olaiya,
an infant by miss Ronke Funsho –
her next friend)
AND
MRS. CORNELIA T. OLAIYA & 2 Ors RESPONDENTS

APPEALS - Courts - Issue - Raised but not considered - Propriety - Appellant's question on adoption is not fresh issue that requires leave - Hence Court of Appeal erred - By not allowing appellant to argue same (H1)

EVIDENCE - Adoption - Proof - 1st respondent has the burden to prove that - The adopted children belong to her deceased husband (H2)

ORDERS OF COURT - Administration of estate - Beneficiaries - Competence of - Since there was no proof of adoption of the children by deceased - Trial court's order including them as beneficiaries must be set aside (H3)

FACTS

The deceased i.e. Solomon Olaiya was husband to 1st plaintiff/ 1st respondent Mrs. Cornelia Olaiya. The deceased had a biological child i.e. Remilekun Olaiya outside the marriage. Nevertheless, the couple according to respondent adopted two other children i.e. Emmanuel Olaiya and Sarah Olaiya. The deceased subsequently died intestate leaving behind a number of landed and moveable properties. As a result, conflict arose between 1st respondent and deceased family members (defendants) as to the valid beneficiaries of the deceased estate. It was in view of the conflict that 1st respondent commenced this action at the High Court of Lagos State claiming that the only beneficiaries to deceased estate are the aforesaid children and

1st respondent. She also sought for perpetual injunction restraining defendants from intermeddling with deceased estate.

At the trial, the parties testified in support of their claim over deceased estate. Eventually, the court held in favour of 1st respondent by including the adopted children as beneficiaries of the said estate. Being dissatisfied, appellant obtained leave of Court of Appeal Lagos to appeal as interested person. Appellant contended that the adopted children do not belong to the deceased. Hence, they should be excluded from the list of beneficiaries of the estate. The court dismissed the appeal. Appellant thus filed appeal to Supreme Court.

ISSUES FOR DETERMINATION

“(i) Was the Court of Appeal right or wrong in treating the issue of validity of the adoption of Emmanuel and Sarah as a fresh point thereby failing to decide on the status and right of Emmanuel and Sarah as the beneficiaries of the deceased’s Estate.?”

“(ii) In the light of the pleadings who, as between the plaintiff and the defendants before the trial Court had the burden of proving the adoption of Emmanuel and Sarah? And whether the person with the burden discharged the burden?”

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

Courts - Issue - Raised but not considered - Propriety

1. Therefore, it seems to me clear that the adoption of Emmanuel and Sarah was properly raised during the trial of this case before the trial Court. It is against the decision of the trial Court that the appellant proceeded to the Court of Appeal to seek redress. But as the Court below refused to hear the appeal upon the grounds of appeal of the appellant, redress could not be obtained in that Court. What must be recognized from all I have said above is that the Court below fell into error by refusing to allow the ground of appeal of the appellant to be argued before them. This is because the court proceeded on the erroneous view that the question raised in the appellant’s ground of appeal before them was a new ground

for which the leave of the court had not been sought and obtained. From what I have said above, there can be no doubt that the question with the regard to the adoption of Emmanuel and Sarah cannot be said to be a new issue that the appellant had raised in the Court below. (p. 1351 D)

EVIDENCE - Adoption - Proof

2. I have adverted earlier in this judgment, in *Lewis & Peat (N.R.I.) Ltd. (supra)* that the plaintiff/respondent had the burden of establishing her claim that Emmanuel and Sarah are the adopted children of the deceased husband. Plaintiff/Respondent ought to have given evidence of the kind that would put the adoption of Emmanuel and Sarah beyond question.

Unfortunately, that evidence was not made available in this case by the plaintiff/respondent in the course of her testimony in support of her claim. It was evident that the plaintiff was conscious of this hence, in giving evidence of her own marriage to the deceased, she tendered her own marriage certificate to prove beyond doubt that she was legally married to the deceased. With regard to the appellant, her certificate of birth was also duly tendered and admitted in evidence. In other words, what I am saying in my respectful view is that the plaintiff failed to give such evidence, which will show quite clearly when and how Emmanuel and Sarah were adopted. For the Court below to have held otherwise is in my view erroneous, and that decision ought not to stand. I have before now referred to *Lewis & Peat N.R.I.) Ltd. v. Akhimien (supra)* and it seems to me from the pleadings and evidences which I have referred to above, that the burden is that of establishing the claim that Emmanuel and Sarah are the adopted children of the respondent and the deceased husband. (p. 1352 B)

Administration of estate - Beneficiaries - Competence of

3. Having come to the conclusion that it was not proved that Emmanuel and Sarah were the adopted children of the late Solomon Kayode Olaiya, it becomes necessary to consider whether the order the trial Court made which included them as joint beneficiaries of the estate of the deceased should be

allowed to stand. I think not. It therefore follows that it must be declared that Emmanuel and Sarah cannot be beneficiaries of the estate of the deceased for all the reasons already given. Therefore, that order of the trial Court which included them as co-beneficiaries of the estate of the deceased with the ap-
 B ***pellant and the respondent must be set aside and it is hereby set aside. In its place it is hereby ordered that the only benefi-***
 C ***ciaries of the deceased, Solomon Kayode Olaiya, are, the re-***
 spondent, Mrs. Cornelia T. Olaiya and Remilekun Olaiya.
 (p. 1352 H)

NOTABLE POINT INTEREST

OGWUEGBU JSC

1. Proof of adoption is essential for the purpose of devolution
 D ***of property on the intestacy***

You cannot pick children any how. Since Sarah and Emmanuel are not biological children of the plaintiff and her late husband evidence of adoption was material. Proof of adoption is essential both
 E for the adopter and the adopted person or any other person for the purpose of devolution of property on the intestacy. (p. 1355 A)

REPRESENTATION

Taiwo Osipitan with him A. M. Kayode for the appellant
 F A. Ajayi with him A. Oladigbolu for the respondents

CASES REFERRED TO

Ebba v. Ogodo (1984) 1 SCNLR 372
 Enang v Adu (1981) 11-12 SC 25
 G Igwego v. Ezengo (1992) 6 NWLR (Pt. 249) 561
 Lamai v. Orbih (1980) 5-7 SC 28
 Woluchem v. Gudi (1981) 5 SC 291
 Messrs Lewis & Peat N.R.I. Ltd. v. Akhimien (1976) 10 NSCC 360
 H Joseph Constantine Steamship Line v. Imperial Smelting Corpora-
 tion (1943) AC 154
 Folorunsho v. The State (1993) 8 NWLR (Pt. 313) 618
 Abiodun v. Adehin (1962) 1 All NLR 550
 Odukwue v. Ogunbiyi (1998) 8 NWLR (Pt. 561) 339

STATUTES REFERRED TO

Adoption Law of Lagos State (Cap. 5), s. 16

Evidence Act, s. 135

LEAD JUDGMENT BY EJIWUNMI JSC

This appeals stems from the judgment of the Court below. The case itself commenced at the trial Court with the plaintiff/respondent who by paragraph 20 of her Statement of Claim sought for the following reliefs from the trial Court.

They read as follows:-

“A. A declaration that the plaintiff along with the children of Solomon Kayode Olaiya (deceased) viz

(i) Emmanuel O. Olaiya

(ii) Sarah O. Olaiya

(iii) Remilekun Olaiya

are the exclusive beneficiaries of the estate of the said Solomon Kayode Olaiya (deceased) who died intestate on 24th February, 1981.

B. A declaration that the defendants do not have any beneficial interest in the Estate of the aforesaid deceased and their management and control of same amounts to intermeddling with the said Estate.

C. An order of perpetual injunction restraining the defendants, their agents and/or privies from further intermeddling or interfering in the Estate of Solomon Kayode Olaiya (deceased) both real and personal.

D. An order directing the defendants to render a full and comprehensive account of their intermeddling with the aforesaid estate and to pay over to the beneficiaries all monies constituting accrued income arising therefrom”.

With pleadings filed and exchanged and pursuant to the Summons for Directions filed by the solicitors for the plaintiff, the matter was set down for trial. The plaintiff thereafter gave evidence in support of her claims. The defendants also gave evidence and for both parties various documents were tendered and admitted as Exhibits. At the end of the trial, learned counsel for the parties addressed the Court. The trial Court thereafter delivered a considered judgment. In the course of the judgment, the learned trial judge held with re-

gard to the first relief claimed by the plaintiff thus -

“The first is the claim for a declaration that the plaintiff along with the children of Solomon Kayode Olaiya (deceased) viz

(i) Emmanuel O. Olaiya

(ii) Sarah O. Olaiya

B *(iii) Remilekun Olaiya*

are the exclusive beneficiaries of the estate of the said Solomon Kayode Olaiya (deceased) who died intestate on 24th February, 1981.”

With regard to the second relief, the learned trial judge said

C thus:-

“The second relief is a claim for declaration that the defendants do not have any beneficial interest in the Estate of the aforesaid deceased and their management and control of same amount to intermeddling with the said estate. There are two limbs to this

D *claim. The first limb is for a declaration that the defendants do not have any beneficial interest in the estate of the aforesaid deceased.*

This declaration sought herein must be granted for two reasons. The first is that under section 49(i)(a)(ii) where the intestate leaves surviving him a spouse and an issue, the spouse and the issue shall have

E *the residuary estate of the intestate distributed in the manner set down in the provision to the exclusion of all other blood relation including the brothers of the intestate. The second reason is that the learned defence counsel in his final address by himself conceded the*

F *grant of the said declaration. Submitted he... on the second prayer in the claim. I am not disputing the first arm of the prayer that the defendants do not have beneficial interest.”*

After a brief review of the facts and the law, the learned trial judge, held that the plaintiff is entitled to the declaration as the defendants took over, managed and controlled all the assets possessed by the deceased at his death. The third relief which is for an order of

G perpetual injunction restraining the defendants, their agents, and/or privies from further intermeddling or interfering in the estate of Solomon Kayode Olaiya (deceased) both real and personal was also

H granted.
Now, the background facts that led to the above declaratory reliefs granted to the plaintiff may be stated briefly as follows: The plaintiff, Mrs. Cornelia Titilola Olaiya, married the deceased, Solomon Kayode Olaiya on the 28th December 1963 under the Marriage Act

in the District of Islington, U.K. Following the marriage, it would appear that they established their matrimonial home in London before proceeding to Nigeria. It does appear that in Nigeria, they lived together in Kano at 100 Lamido Crescent, and in Lagos at 2 Ogabi Street. They lived together at the above address until the husband died on the 24/2/81 in that address. There was no biological child between them during the marriage. But the plaintiff claimed that they adopted two children, namely Emmanuel Olabunmi Olaiya, and Sarah Olufunmilayo Olaiya. The third child Remilekun Ajayi claimed by the defendant to be the only child of his brother, was first seen by the plaintiff at the grave side during the burial ceremony of her husband.

The plaintiff's husband was an electrical engineer, and in furtherance of his business, he founded and operated a company, Vallis Electrical Company, and was the substantial owner of the company. The deceased also left the following properties when he died: A twin duplex at No. 2 Bisi Ogabi Street, Ikeja; 3 landed property at Alagba Village, Agege; 2 Bungalows at Lamido Crescent, Kano; 3 uncompleted buildings in Kano - one at Duduyun Quarters and 2 uncompleted buildings at Naibawa Quarters, Kano; N100,000 fixed deposit in U.B.A. Ikeja; N50,000 fixed deposit in U.B.A. Kano. Following the death of plaintiff's husband, Solomon Kayode Olaiya, the defendants admitted that they took over the properties of the late Solomon Kayode Olaiya, including three Mercedes-Benz cars. The plaintiff's allegation that the defendants without commuting with her, then continued to manage all the properties including the electrical company. All they did with the regard of the properties in Lagos was first without obtaining Letters of Administration. In respect of the properties in Kano, it was claimed that Letters of Administration were obtained in Kano to administer the properties there. In any event, it is upon those facts that the trial Court found in favour of the plaintiff and made the several orders, I have earlier reproduced in this judgment. Being dissatisfied with the judgment of the trial Court, the appellant obtained the leave of the Court below, to appeal against the judgment as an interested party. The appellant was there described as Remilekun (otherwise known as Oluremi) an infant by Miss Ronke Funso her next friend. Pursuant to the order of the Court below, briefs of argument were subsequently filed and exchanged. After due

consideration of the argument proffered before that Court, the Court below dismissed the appeal. It would appear that the reason given for dismissing the appeal was because the Court considered that the issues formulated for the appellant were based on incompetent grounds of appeal. The Court below apparently took the view that the issues raised in the ground of appeal are new and they were not canvassed at the trial. And as the appellant failed to seek and obtain the leave of the Court, the grounds of the appeal so filed cannot be agitated in that Court. By so holding, the Court below upheld the preliminary objection of the respondents to the said grounds of appeal. As the appellant was not satisfied with the judgment of the Court below, a further appeal was filed to this Court.

Pursuant thereto, two grounds of appeal were filed, which, without their particulars, read thus:-

D “(1) *The Court of Appeal erred in law by failing to discharge its judicial duty of considering and pronouncing on the issue of adoption raised before it having regard to the pleadings and evidence led by the parties in the case at the trial Court and which failure has occasioned a miscarriage of justice.*

E (2) *The Learned Justices of the Court of Appeal misdirected themselves when they held that in the instant case it is the appellant who should have sought the leave of Court of Appeal in order to canvass the question of the validity of the adoption of Emmanuel and Sarah as that issue was not canvassed at the High Court, Lagos.*”

F In accordance with the Rules of this Court, Briefs of Argument were filed and exchanged. The learned counsel for the appellant at the hearing of the appeal, adopted the appellant’s brief and the reply brief to the respondent’s brief as part of his argument in the appeal, as he also made oral submissions to complement the arguments on the brief. Similarly, learned counsel for the respondents adopted and placed reliance on the respondent’s brief of argument. He also made submissions in furtherance of his contention in the brief. Though both parties framed two issues for determination of this appeal in their respective briefs, I will for the purposes of this judgment consider the merits of this appeal upon the issues raised in the appellant’s brief.

H “(i) *Was the Court of Appeal right or wrong in treating the issue of validity of the adoption of Emmanuel and Sarah as a fresh point thereby failing to decide on the status and right of Emmanuel*

and Sarah as the beneficiaries of the deceased's Estate.?

(ii) In the light of the pleadings who, as between the plaintiff and the defendants before the trial Court had the burden of proving the adoption of Emmanuel and Sarah? And whether the person with the burden discharged the burden?

It is I think, given the contention in this appeal to first consider B
issue (2) By this issue, the question raised is whether adoption was
pleaded to make it an issue in the trial. In regard, learned counsel for
the appellant contends that on the basis of the pleadings and the
evidence, adoption was an issue between the parties and should not C
have been dismissed summarily by the Court below. In his view the
Court fell into error by so doing. He therefore urged that the appeal
be allowed. A number of authorities were brought to the attention of
the Court by learned counsel for the parties. They will be duly con-
sidered in the course of the judgment. D

Before doing so, the submission made on behalf of the re-
spondents must be set down. The thrust of the contention of the
learned counsel both in their brief and in his oral argument in court is
that the adoption of the children was not an issue between the par- E
ties at trial. It is his contention therefore that when the appellant raised
the question of the adoption or otherwise of Emmanuel and Sarah
in the grounds of appeal to the Court below, an entirely new matter
was raised before the court. He therefore submitted that the Court
below was right to have dismissed the appeal as the grounds of ap- F
peal were incompetent, leave having not been sought and obtained
from the Court to argue them.

In order to consider whether the pleadings disclosed "adop-
tion" of Emmanuel and Sarah as an issue in the matter, I refer to
paragraphs 7 and 9 of the Statement of Claim. They read thus: G

*"Para 7: The deceased was survived by three (3) children whose
particulars are as stated below:*

<i>Name</i>	<i>Date of Birth</i>
(1) Emmanuel Olabunmi Olaiya	20th July, 1976
(2) Sarah Oluwafunmilayo Olaiya	8th August, 1979
(3) Remilekun Olaiya	8th September, 1977

*Para 9: All the other children of the deceased are infants of
school age."*

For the respondents, paragraphs 3, 4, 6, of their Amended

Statement of Defence are deemed relevant. They are:

“Para 3 - The defendants admit paragraph 7 only to the extent that deceased was survived by one child, a girl called Remilekun Olaiya, born on 8th September, 1977.

Para 4 - The defendants deny paragraphs 9,10,13,14,15, and
 B *20 of the Statement of Claim.*

Para 6 - The defendants deny paragraph 9 of the Statement of Claim and state that the deceased had only one child, Remilekun Olaiya, an infant still studying overseas and who was taken care of by
 C *the 1st defendant from birth until her mother took her abroad.”*

I think it is manifest from the paragraphs of the pleadings of the parties quoted above that at the trial, part of the plaintiff’s case against the defendant was that when her deceased husband died, he left her as his lawfully married wife with three children whose names
 D and dates of birth were pleaded in paragraph 7 of her statement of claim. It is also manifest from the pleadings of the defendants in paragraphs 4 and 6 of their Amended Statement of Defence, that while the defendants did not deny the status of the plaintiff as the lawfully wedded wife of their late brother, Solomon Kayode Olaiya, they made
 E it clear in paragraphs 3, 4 and 6 of the said pleadings that their late brother left only one daughter, named Remilekun Olaiya, who the 1st defendant pleaded that he looked after until the mother of the child took her abroad.

It seems clear from the state of the pleadings that when the trial
 F commenced, issues were joined as to whether the deceased, Solomon Kayode Olaiya, died leaving three children or one. Upon that state of the pleadings, the question then is who had the burden of establishing whether the deceased left three children. The principles, which
 G apply to situations of this kind, have been considered in several authorities known to our jurisdiction. But upon the peculiar facts of this case, I consider apposite the simple rules enunciated in the case of Lewis & Peat (N.R.I.) Ltd v. Akhimien [1976] 10 N.S.C.C. 360 at 365. They are:

H (1) *“Where there is no issue the question of burden of proof does not*

(2) On the burden of proof on the pleadings: the rule is that the burden of proof rests on the party whether plaintiff or defendant who substantially asserts the affirmative of the issue. Joseph

Constantine Steamship Line v Imperial Smelting Corporation (1942) A.C. 154 at 174...

(3) *On the burden of adducing evidence: used in this sense the burden of proof may shift depending on how the scale of evidence preponderates. Subjects to the scale of evidence preponderating, the burden of proof rests squarely on the party who would fail if no evidence at all or no more evidence, as the case may be, were given, on either side. In other words, it again rests before evidence is taken by the court of trial on the party who asserts the affirmative of the issue...*

It would be recalled that learned counsel for the appellant has argued that the learned counsel for the respondent must have recognized that having regard to the state of the pleadings, the respondent had the burden of proving her claim. As part of that exercise, the plaintiff in the course of her evidence about her marriage to her husband in London, in support of which the certified true copy of the marriage between them dated 28/12/63 which was admitted as Exhibit A.

In the context of this case, it is desirable to quote her evidence as stated in the printed record. It reads:-

"My husband died on the 24/2/81 at Bisi Ogabi Street, in Lagos. My marriage to my husband was still subsisting at the time he died. My husband was survived by three children. Their names are:

(1) Emmanuel Olubunmi Olaiya

(2) Sarah Olufemi Olaiya

(3) Remilekun Olaiya

Bunmi was born on 20/7/76. Sarah was born on 8/8/79. Remilekun, I am not sure of the date of birth. I did not (sic) the child. Emmanuel and Sarah were our adopted children. Remilekun I saw at the burial of my husband. I have not seen her after then. I do not know where she is.

The first two children were adopted by myself and my late husband. My husband and the family recognized them as our children. Before my husband died the family knew the two children with us."

Pausing for a moment to comment on the above evidence of the respondent, it is manifest that she sought first, to prove her own status as the legal wife of the late Solomon Kayode Lawal. Secondly,

she sought to give evidence concerning how the three children named as the children left by her husband at death became of their family. The merits of her evidence in this regard will be considered later when I shall have made reference to the other pieces of evidence germane as to the number of children left by the deceased.

B I will therefore now refer the relevant portion of the evidence given at the trial by the first defendant, Chief Benjamin Olaleye Olaiya, a brother of the deceased and I quote:-

“There was no biological issue by the plaintiff for my brother. He had one daughter Remilekun Olaiya who is now in London studying. She is the only child of my brother. There is a birth certificate to this effect. I see this document. It is the birth certificate.”

C The birth certificate was thereafter admitted by the Court and marked Exhibit E. Under cross-examination, the 2nd defendant, who D gave his name as Godfrey Olayinka Olaiya, and brother of the deceased, stated inter alia thus:-

“I know the children who survived my late brother. I only know of Remilekun Olaiya. I do not remember the names of the other children of my brother. I do not know who prepared the obituary at the death of my brother. I saw the obituary. The names of those listed in the obituary as surviving my brother were Remilekun, Bunmi, Funmilayo.”

Now, having to the averments made in the pleadings and the evidence to which I have referred above, the question then is, whether F a Court properly directed would not have recognized at least that the number of children left by the deceased when he died, and how they became children of the marriage were raised as issues between the parties. It is manifest that the plaintiff/respondent in order to prove G that she was legally married to the deceased tendered her marriage certificate, which was admitted in evidence as Exhibit A. Similarly, the birth certificate of the appellant, Remilekun Olaiya was admitted in evidence as Exhibit E. Her certificate of birth issued by the Births and Death Registry put her paternity beyond question. However, the situation as to the other children - Emmanuel Olubunmi Olaiya and H Sarah Oluwafunmilayo Olaiya, I must hold do not allow for such an answer. In their own case, the only evidence led by the plaintiff/respondent was that they were both adopted by the deceased and herself.

The learned trial judge considered the question in his judgment when he observed that

“Though the word “adoption” came up in the evidence adduced by the parties, having regard to the said two children, reading the evidence on the said two children, reading the evidence on the issue as a whole, I do not find that the dispute between the parties is whether or not there was a valid adoption the relevant law.” ^B

It follows that in respect of the question as to whether Emmanuel and Sarah were indeed children of the deceased was certainly an issue, upon the pleadings and the evidence on record. It is also manifest that from the record, the only evidence proffered in their behalf to justify the claim was that they were the adopted children of the deceased. However, that being the only evidence with regard to the adoption of Emmanuel and Sarah, the trial Court was led to proceed by sophistry to presume that the deceased did put the two children up as his children and that it was so presented to his brothers. However, a careful perusal of the evidence would show that the brothers refused to acknowledge them as claimed by the respondent. ***Therefore, it seems to me clear that the adoption of Emmanuel and Sarah was properly raised during the trial of this case before the trial Court. It is against the decision of the trial Court that the appellant proceeded to the Court of Appeal to seek redress. But as the Court below refused to hear the appeal upon the grounds of appeal of the appellant, redress could not be obtained in that Court. What must be recognized from all I have said above is that the Court below fell into error by refusing to allow the ground of appeal of the appellant to be argued before them. This is because the court proceeded on the erroneous view that the question raised in the appellant’s ground of appeal before them was a new ground for which the leave of the court had not been sought and obtained. From what I have said above, there can be no doubt that the question with the regard to the adoption of Emmanuel and Sarah cannot be said to be a new issue that the appellant had raised in the Court below.*** ^C
^D
^E
^F
^G
^H

Generally, in law, an appellate Court ought not to reverse the decision of a court unless it is clear that the court below is perverse and shown to have arrived at upon an erroneous view of the facts of

the law applicable thereto. See Ebba v. Ogodo (1984) 1 S.C.N.L.R. 372; (1984) 4 S.C. 84; Enang v. Adu (1981) 11-12 S.C. 25; Igwego v. Ezengo (1992) 6 N.W.L.R. (Pt. 249) 561; Lamai v. Orbih (1980) 5-7 S.C. 28; Woluchem v. Gudi (1981) 5 S.C. 291. If the Court below had adverted to this question properly, they might have arrived at a different decision. I have also in the course of this judgment adverted to the evidence led by the plaintiff in connection with the adoption of Emmanuel and Sarah. ***I have adverted earlier in this judgment, in Lewis & Peat (N.R.I.) Ltd. (supra) that the plaintiff/respondent had the burden of establishing her claim that Emmanuel and Sarah are the adopted children of the deceased husband. Plaintiff/Respondent ought to have given evidence of the kind that would put the adoption of Emmanuel and Sarah beyond question.***

Unfortunately, that evidence was not made available in this case by the plaintiff/respondent in the course of her testimony in support of her claim. It was evident that the plaintiff was conscious of this hence, in giving evidence of her own marriage to the deceased, she tendered her own marriage certificate to prove beyond doubt that she was legally married to the deceased. With regard to the appellant, her certificate of birth was also duly tendered and admitted in evidence. In other words, what I am saying in my respectful view is that the plaintiff failed to give such evidence, which will show quite clearly when and how Emmanuel and Sarah were adopted. For the Court below to have held otherwise is in my view erroneous, and that decision ought not to stand. I have before now referred to Lewis & Peat N.R.I.) Ltd. v. Akhimien (supra) and it seems to me from the pleadings and evidences which I have referred to above, that the burden is that of establishing the claim that Emmanuel and Sarah are the adopted children of the respondent and the deceased husband.

I have before now shown how the Court below was wrong to have referred even though obliquely, to Emmanuel and Sarah as the adopted children of the respondent and the deceased husband. ***Having come to the conclusion that it was not proved that Emmanuel and Sarah were the adopted children of the late Solomon Kayode Olaiya, it becomes necessary to consider***

whether the order the trial Court made which included them as joint beneficiaries of the estate of the deceased should be allowed to stand. I think not. It therefore follows that it must be declared that Emmanuel and Sarah cannot be beneficiaries of the estate of the deceased for all the reasons already given. Therefore, that order of the trial Court which included them as co-beneficiaries of the estate of the deceased with the appellant and the respondent must be set aside and it is hereby set aside. In its place it is hereby ordered that the only beneficiaries of the deceased, Solomon Kayode Olaiya, are the respondent, Mrs. Cornelia T. Olaiya and Remilekun Olaiya. For all the reasons I have set out in this judgment, this appeal is allowed by me and the judgment of the Court below is hereby set aside. N10,000.00 costs is awarded in favour of the appellant.

BELGORE JSC

I agree with the judgment of my brother, Ejiwunmi J.S.C. and for the full reasons he gave for the judgment to which I have nothing more to add I also allow the appeal, Emmanuel O. Olaiya and Sarah O. Olaiya are hereby excluded from among beneficiaries of the estate of Solomon Kayode Olaiya. I also award N10,000.00 as costs to the appellant against plaintiff/respondent personally.

OGWUEGBU JSC

I have had a preview in draft of the judgment just delivered by my learned brother Ejiwunmi, JSC, and I agree with him that this appeal should be allowed; that the judgment of the Court of Appeal be set aside and it is hereby set aside.

The plaintiff in paragraphs 7 and 9 of her statement of claim averred that her deceased husband, Solomon Kayode Olaiya who died interstate was survived by her and three children: (1) Emmanuel Olabunmi Olaiya, (2) Sarah Oluwafunmilayo Olaiya and (3) Remilekun Olaiya and that they are infants of school age. In paragraph 3, 4 and 6 of the Amended Statement of Defence, the defendants averred as follows:

“3. The defendants admit paragraph 7 only to the extent that

deceased was survived by one child, a girl called Remilekun Olaiya, born on 8th September, 1977.

4. The defendants deny paragraphs 9, 10, 13, 14, 15, and 20 of the Statement of Claim.

6. The defendants deny paragraph 9 of the Statement of Claim and state that the deceased had only one child Remilekun Olaiya, an infant still studying overseas and who was taken care of by the 1st defendant from birth until her mother took her abroad."

In her evidence the plaintiff / respondent stated in part:

"Bunmi was born on 20/7/76. Sarah on 8/8/79. Remilekun I am not sure of the date of birth... Emmanuel and Sarah were our adopted children. Remilekun I saw at the burial of my husband. I have not seen her after then. I do not know where she is. The first two children were adopted by myself and my late husband. My husband and family recognized them as our children. Before my husband died the family knew the two children with us."

In his evidence, the 1st defendant Benjamin O. Olaiya who is a brother of the deceased testified in part:

"There was no biological issue by the plaintiff for my brother. He had one daughter Remilekun Olaiya who is now in London studying. She is the only child of my brother. There is a birth certificate to this effect. I see this document. It is the birth certificate."

The birth certificate was received in evidence as Exhibit "E". Godfrey O. Olaiya (2nd defendant) who is also a brother of the deceased testified in part as follows:

"I know the children who survived my late brother. I only know of Remilekun Olaiya. I do not remember the names of the other children of my brother... The names of those listed in the obituary as surviving my brother were Remilekun, Bunmi, Funmilayo."

Having carefully gone through the pleadings and the evidence adduced by the parties, the Court of Appeal, Lagos Division coram Oguntade, Pats Acholonu and Aderemi JJ.C.A. were with utmost respect, in grave error in holding that the learned trial judge was not called upon by the plaintiff to pronounce on the validity of the adoption of Sarah and Emmanuel and that the question of adoption was not an issue before the trial court. Both parties joined issue on the question of adoption and it was a live issue and a crucial one for that matter which the courts below neglected to resolve.

You cannot pick children any how. Since Sarah and Emmanuel are not biological children of the plaintiff and her late husband evidence of adoption was material. Proof of adoption is essential both for the adopter and the adopted person or any other person for the purpose of devolution of property on the intestacy. From the pleadings, the burden of proof rested on the plaintiff/respondent who substantially asserted the affirmative of adoption of Sarah and Emmanuel. This forms an essential fact of the case of the plaintiff and if she could tender a certified true copy of the marriage certificate between her and the husband, it was strange that she was unable to tender any documentary evidence establishing the adoption or offering any acceptable evidence to that effect. The burden of proof lies on him who affirms a fact, not on him who denies it. See *Messrs Lewis & Peat (NRI) Ltd. v. A. E. Akhimien* (1976) ALL NLR 365 and *Joseph Constantine Steamship Line v. Imperial Smelting Corporation* (1943) AC 154.

Substantial justice was not done in this case by the court below. The appeal of the defendants was dismissed on the grounds that the question of adoption was not an issue before the trial court and that the defendants who were appellants in that Court did not obtain the leave of that court before raising it. This view of the court below was erroneous. The issue was canvassed in the pleadings, the evidence and the addresses of learned counsel at the trial court and the issue ought to have been determined.

For the above reasons and the fuller reasons contained in the judgment of my learned brother Ejiwunmi, JSC, I too allow the appeal and abide by all the consequential orders made by him together with the order for costs.

MOHAMMED JSC

I have had the advantage of reading the judgment which has just been delivered by my learned brother, Ejiwunmi, JSC, and I agree both with his reasons and conclusion. I agree that the issue of the validity of the adoption of Emmanuel and Sarah is not a fresh point. From the pleadings and evidence adduced before the learned trial judge the issue of the status of the children was canvassed. I therefore agree that both Emmanuel and Sarah are not entitled to

be counted among the beneficiaries of the estate of Solomon Kayode Olaiya (deceased) for the reasons given in the lead judgment. I will therefore allow this appeal. I also award N10,000.00 costs in favour of the appellant.

B

UWAIFO JSC

I have had the opportunity of reading in advance the judgment of my learned brother Ejiwunmi, JSC. I agree with it that there is merit in this appeal.

C The appellant challenged the decision of the trial court which seemed to have regarded Emmanuel and Sarah (who were popularly known to bear the surname Olaiya) as the legally (or lawfully) adopted children of Mr. Solomon Kayode Olaiya. The challenge was D a narrow but important point on which two issues were raised by the appellant as follows:

“(1) Is the question of adoption an issue for determination before the trial court having regard to the pleadings and the evidence led by the parties in the case.

E *(2) If so has that issue been determined by the trial judge according to law based on the evidence led by the plaintiff/respondent in the proceedings.”*

The 1st respondent framed two issues as follows:

F *“1. Was the validity or propriety of the adoption of Emmanuel Olubunmi Olaiya and Sarah Olufunmilayo Olaiya by Solomon Kayode Olaiya (deceased) an issue canvassed before and entertained or considered by the learned trial judge in determining this action at the lower court having regard to the evidence led by the parties?*

G *2. If the answer to issue number (1) above is negative, what is the proper order to make in this appeal in view of the failure of the appellant to seek and obtain leave of this Honourable Court to raise and argue a fresh issue not raised, tried or considered and pronounced upon by the lower court?”*

H The issue of adoption of the said Emmanuel and Sarah was canvassed before the learned trial judge. He considered the evidence led thereon and observed:

“To resolve the position of these other two infants, I have gone into the evidence led by the parties thereon. Making the case for the

two infants, the plaintiff testified ‘The first two children were adopted by myself and my late husband. My husband and the family recognized them as our children. Before my husband died, the family knew the two children with us. After my husband’s death, the 2nd defendant wrote to confirm the acceptance of the children within the family’. It was at this stage, the plaintiff put the 2nd defendant’s letter (Ex.B) in evidence. She referred to the last portion of Ex. B where the 2nd defendant wrote ‘6 Finally, it was agreed that the word “adopted” remain as it is since it does not affect the rights of the children.’ The plaintiff explained that what led to the statement from the 2nd defendant arose from her request that the word “adopted” be left out in the application for Letters of Administration in respect of all the children. In response, the 2nd defendant then wrote to say that the word ‘adopted’ should remain as it did not affect the rights of the children to the estate.”

After further discussing the evidence, the learned trial judge came to the following conclusion:

“Unless there is any other fact to the contrary, one must presume that the deceased intended and did put the two children up as his children and it was so presented to his brothers. I do not believe the 1st defendant when he stated that he was unaware that the deceased had accepted the said two children as his own children. I hold that the two defendants knew and treated the two children as if they were natural children of the deceased.”

The court below precipitately held that the question of adoption was a new issue for which leave was required. That court observed per Pats Acholonu JCA., in its judgment given on 11 March, 1999 as follows:

“The overall important point to note is that the issue of adoption came to the case tangentially and does not form the kernel or the gravamen of the questions determined by the court below. This court cannot raise an issue not based on what was agitated in the court below. See *Folorunsho v. The State* (1993) 8 NWLR (pt.313) 618. The appellants are making a heavy weather of an issue not raised or thoroughly canvassed before the court below. There was no claim for declaration that the 2 children Sarah and Emmanuel are the truly and legally adopted children of Mr. Solomon Kayode Olaiya. In my view there has been an over reaction to the judgment of the

court below. The learned trial court was not called upon by the 1st respondent to pronounce on the validity of the adoption of Sarah and Emmanuel. It is not an issue.

What then should the appellant have done. She should have sought the leave of the court to canvass an issue not brought forth in the High Court for it is long settled that an appellant who seeks to argue in the appeal a point not taken up and marshaled in the court below must first obtain the leave of the court for so doing."

I think, with the greatest respect, that the court below did not fully appreciate that from the pleadings and evidence, the issue of adoption was canvassed before the lower court. Both in the pleadings and evidence, the question whether Emmanuel and Sarah were the children of Mr. Solomon Kayode Olaiya (deceased) was a major one. It was not in dispute that the appellant was the only natural child of the man. Therefore, if Emmanuel and Sarah were to be regarded also as his children, then how this became so was made an issue and in a sense was decided by the learned trial judge when he accepted that they are his children.

It was pleaded in paras. 7 and 9 of the statement of claim that the deceased was survived by three children, naming the appellant as well as Emmanuel and Sarah for that purpose. This was denied and corrected in paras. 3 and 6 of the amended statement of defence as follows:

"3. The defendants admit paragraph 7 only to the extent that the deceased was survived by one child, a girl called Remilekun Olaiya, born on 8th September, 1977.

6. The defendants deny paragraph 9 of the statement of claim and state that the deceased had only one child, Remilekun Olaiya, an infant still studying overseas and who was taken care of by the 1st defendant from birth until her mother took her abroad."

In reaction to the above, the plaintiff filed a reply in which she averred in para. 1 as follows:

"1. In response to paragraph 3 and 6 of the defence the plaintiff avers that (a) Emmanuel Olubunmi Olaiya (b) Sarah Oluwafunmilayo Olaiya were both children of the deceased by legal and valid adoption under the applicable Law and were brought up and recognized as such prior to the deceased's death in 1981."

A half-hearted effort was made by the plaintiff (now respon-

dent) to give evidence of the so-called legal and valid adoption under the applicable Law when she testified thus:

“The first two children [i.e. Emmanuel and Sarah] were adopted by myself and my late husband. My husband and the family recognized them as our children. Before my husband died the family knew that the children were with us. After my husband’s death the 2nd defendant wrote to inform the acceptance of the children within the family.” ^B

This cannot be evidence of legal and valid adoption under the applicable Law.

The Adoption Law of Lagos State (Cap.5) which came into force on 21st September, 1968 was the only applicable Law on adoption in Lagos at the material time. It has not been shown that the said adoption of Emmanuel and Sarah was done under that Law. If that had been so, the best evidence would have come from the Adopted Children Register established under section 16 of the Law. The burden is on the respondent to produce that evidence. The law is that he who asserts the affirmative has the onus of proving it by virtue of section 135 of the Evidence Act: see *Abiodun v. Adehin* (1962) 1 All NLR 550; *Lewis & Peat (N.R.I.) Ltd. v. Akhimien* (1976) NSCC (Vol.10) 360; *Odukwe v. Ogunbiyi* (1998) 8 NWLR (pt. 561) 339. Having regard to the foregoing, I answer issue I raised in this appeal by saying that the Court of Appeal was wrong in regarding the issue of the validity of the alleged adoption of Emmanuel and Sarah as a fresh point. It was a point the appellant is entitled to raise in the normal course of the appeal as arising from the proceedings at the trial court. ^C ^D ^E ^F

As to issue 2, the respondent had the burden of proving the said adoption. She failed to discharge that burden. But the court below, by its pronouncement per Pats Acholonu JCA, has reached a decision that the said children were indeed adopted by the deceased and were his children. First, the learned Justice said: ^G

“In the long testimony of d.w.2 the only reference to the children in his evidence runs thus: ^H

I know the children who survived my late brother. I know of Remilekun Olaiye. I do not remember the names of the other children of my brother I saw the obituary. The names of those listed in the obituary as surviving my brother were Remilekun, Bunmi and

Funmilayo.

That was all. The fact that the 2nd defendant was not aware of their adoption is his own business. He does not have to know.” [Emphasis mine]

Later, the learned Justice said further:

B “What motivates this rather strange appeal? A critical observa-
 tion of the effort put in the whole gamut of the appeal sends a mes-
 sage that the whole matter seems to be borne out of greed and cu-
 pidity, and avarice. The appellant wanted to be the sole beneficiary
 C but she goofed in the attempt to actualize in the nefarious intention
 that will make her renounce her brothers to whom she shared com-
 mon father.”

I can find no justification for the decision reached and the scath-
 ing comments made by the learned justice. The issue of adoption of
 D a child and the consequences of it cannot be so casually disposed of
 by a court of law as the court below seemed to have done. No one
 will lightly permit a stranger to claim his or his family lineage and
 inheritance unless through entitlement by blood or genuine adop-
 tion. Since the respondent failed to discharge the burden of proving
 E adoption, there can be no basis for including the said Emmanuel and
 Sarah as beneficiaries of the estate of Solomon Kayode Olaiya (de-
 ceased) as was done in the judgment of the trial court.

The judgment of the court below is wrong and cannot be al-
 lowed to stand. In the circumstances, I too, see merit in this appeal
 F and allow it. I set aside the judgment of the court below. It is ordered
 that the judgment of the trial court be and is hereby amended to
 exclude the persons named as Emmanuel O. Olaiya and Sarah O.
 Olaiya from being among the beneficiaries of the estate of Solomon
 G Kayode Olaiya (deceased). I award costs of N10,000.00 to the ap-
 pellant against the plaintiff/respondent.

H