

SUPREME COURT OF NIGERIA
THURSDAY 11TH JULY, 2002 SC. 26/1996
CORAM:- A. B. WALI, I. L. KUTIGI, E. O. OGWUEGBU,
U. MOHAMMED, U. A. KALGO, JJSC

CHIEF KALU IGWE & Ors APPELLANTS
(For themselves and as representing
the people of Etitama Nkporo)

AND

CHIEF OKUWA KALU & Ors. RESPONDENTS
(For themselves and as representing
the people of Amaeke Abiriba)

APPEALS - Ground of appeal - Competence - Once leave was sought and granted - It covered not only the grounds of appeal then filed - But also the additional ground in the Amended Notice of Appeal (H1)

SUPREME COURT - Judgment - Power to set aside - Supreme Court can set aside its judgment - When such was obtained by fraud - Or when judgment is a nullity - And when the court was misled into giving same (H2)

APPEALS - Cross appeal - Distinctive nature - Cross appeal arises where two parties file appeals against a judgment - And each appeal is independent - Even though both are heard together (H3)

JUDGMENTS - Efficacy of - Supreme Court's concurring opinion - Since issue no. 5 was resolved in a concurring opinion - Failure to consider same in lead judgment - Did not rob the judgment of its efficacy (H4)

SUPREME COURT - Jurisdiction - Judgment - Setting aside - Supreme Court's jurisdiction to set aside its judgment - Cannot be converted to an appellate jurisdiction (H5)

FACTS

The Supreme Court delivered had in its majority lead judg-

ment dismissed appeal filed by appellants. Thereafter, appellants brought an application seeking for an order to set aside the said judgment and also for an order directing the appeal to be heard de novo before a new panel of the court. The grounds on which the application is based are that there was a denial of hearing when the court struck out grounds 5 and 6 that were argued as issue no. 5 in appellants' brief and that the learned justice of the court who read the lead judgment did not read appellants' Reply Brief.

Respondents thereafter filed a motion in opposition praying the court for an order striking out appellants' motion to set aside the judgment and for the trial of the suit de novo. The grounds on which the application is based are that appellants' said motion violates Order 8 and Rule 16 of the Supreme Court Rules and is therefore incompetent and that the motion is an appeal by the back door against the decision of the court which are correctly embodied in its judgment. The motion was therefore argued before the Supreme Court.

HELD

(Dismissing the main application per

OGWUEGBU JSC, KUTIGI JSC dissenting)

Ground of appeal - Competence

1. In the first application brought by the appellants/applicants granted by this Court on 9-7-96, leave to appeal on grounds other than law was sought. When, therefore, the appellants brought another application to further amend their notice of appeal which was granted on 11-3-2000 and which application contained the sixth ground of appeal on mixed law and facts, they did not need any leave. They needed only leave to amend their notice of appeal since the leave to appeal on grounds other than law granted on 9-7-96 covered not only the grounds of appeal then filed but also, the additional 6th ground. The leave granted on 9-7-96 relates to the entire appeal.

In the instance, the 6th ground of appeal which was argued as issue (5) in the appellants' brief in the appeal was competent.
(p. 2302 B)

Power of Supreme Court to set aside its judgment

2. I shall state that this court possesses inherent power to set aside its judgment in appropriate cases. Such cases are as follows:

(i) When the judgment is obtained by fraud or deceit either in the court or of one or more of the parties. Such a judgment can be impeached or set aside by means of an action which may be brought without leave.

(ii) When the judgment is a nullity. A person affected by an order of court which can properly be described as a nullity is entitled *ex debito justitiae* to have it set aside.

(iii) When it is obvious that the Court was misled into giving judgment under a mistaken belief that the parties consented to it.

In *Olorunfemi v. Asho* (*supra*) (Suit No. SC. 13/1999), this Court in its unreported Ruling dated 18-3-99 set aside its judgment delivered on 8-1-99 on the ground that it failed to consider the respondents' cross-appeal before allowing the appellants' appeal. It ordered that the appeal be heard *de novo* by another panel of Justices of this Court. (p. 2304 A)

Cross-appeal - Distinctive nature

3. I think one should draw a distinction between failure of the court to determine a cross-appeal and failure to determine one out of several issues in an appeal determined by the Supreme Court. A cross-appeal arises where two parties to a judgment are dissatisfied with it and each accordingly appeals. The appeal of each is called a cross-appeal in relation to that of the other. Each appeal is an independent and separate complaint by the parties even though both appeals are heard together. If the appellant withdraws or discontinues his appeal, a respondent/cross-appellant may proceed with his cross-appeal just as a counter-claimant in a civil suit may prove his counterclaim where the plaintiff discontinues his own action. (p. 2304 H)

JUDGMENTS - Efficacy of - Supreme Court's concurring opinion

4. The failure to consider Issue (5) in the leading judgment in

the circumstance stated did not rob the judgment of its efficacy where the said issue was exhaustively considered and resolved against the applicants in one of the concurring opinions. It will be uncharitable on the part of the applicants to contend that Issue (5) was not considered by the Court and
 B *that the failure amounted to a denial of fair hearing.* (p. 2305 F)

SUPREME COURT - Jurisdiction - Judgment - Setting aside
 5. *The inherent jurisdiction of the court to set aside its judgment cannot be converted to an appellate jurisdiction as*
 C *though the matter before it is another appeal, intended to afford losing litigants yet another opportunity to re-state or re-argue their appeal.*

It must be emphasized that this court is a court of final
 D *resort and under the Constitution, it cannot under any disguise sit on appeal over its judgment or review it except under very exceptional circumstances.* (p. 2305 H)

NOTABLE POINT OF INTEREST

E **KUTIGI JSC** (Dissenting)
 1. *Exclusion of issue no. 5 deprived the majority lead judgment of its efficacy*

So in the instant case, the Appellants/Applicants' principal or main
 F issue (5) which relates to the title to the land in dispute is certainly germane to their appeal. Issue (5) is in my view wrongly excluded and which exclusion has clearly deprived the majority lead judgment of the character of a legitimate adjudication. To borrow the words of Prof. Kasunmu, "It is as if the appellants/Applicants were never heard
 G at all." I agree. This does not mean that issues (5) if taken at all will be resolved in favour of the Applicants as that will be preemptive of the result of the appeal. But the issue as it stands, if resolved in favour of the applicants will certainly have a positive effect on the lead majority judgment as it now stands. This is however not the
 H time to say whether the issue will succeed or fail in the appeal. It is enough now if the issue is substantial, germane and positive. I say it is. The Appellants/Applicants therefore deserve to be heard again. This is fundamental to any legitimate and lawful adjudication.

REPRESENTATION

Prof. A. B. Kasunmu SAN with U. Onwuka and Miss O. M. Lewis, for
the Appellants/Applicants

Chief K. K. Ogba for the Respondents

B

CASES REFERRED TO

Awote v. Owodunni (1986) 5 NWLR (Pt. 46) 941

Eleazor Obioha v. Innocent Ibero (1994) 1 NWLR (Pt. 322) 503

Alaka v Adekunle (1959) LLR 76

Cardoso v. Daniel (1986) 2 NWLR (Pt. 201) 1

Skenconsult (Nig.) Ltd. v. Ukey (1981) 1 SC 6

Craig v. Kanssen (1943) KB 256

Okafor & Ors. v. Anambra State (1991) 6 NWLR (Pt. 200) 659

Agunbiade v. Okunoga (1961) All NLR 119

Obimonure v. Erionosho (1966) 1 All NLR 250

Adigun v. A-G Oyo State (1987) 2 NWLR (Pt. 56) 197

C

D

STATUTE & RULES REFERRED TO

Constitution of Federal Republic of Nigeria 1999, s. 235

Supreme Court Rules 1999 (as amended), O. 8 r. 16

E

LEAD JUDGMENT BY OGWUEGBU JSC

On the 15th of February, 2002, this Court delivered judgment
in the above appeal. The plaintiffs/appellant's appeal was dismissed
by the majority judgment. On the 20th February, 2002, the appel-
lants brought a motion on notice for the following orders:

F

*"(1) An order setting aside the judgment of this Honorable G
Court contained in the lead judgment of Uthman Mohammed JSC
delivered on the 15th of February, 2002.*

*(2) An order directing the appeal to be argued de novo before
a new Panel of the Court."*

The grounds on which the application is based are as follows: H

*"1. There was a denial of fair hearing when the Court struck
out grounds 5 and 6 raised in the Notice of Appeal filed on 9th
September 1999 and argued as Issue 5 in the Appellant's Brief, which
issue touched on the title to the land in dispute on the ground that*

no leave of Court was obtained to argue those grounds when in fact leave was applied for and granted.

(2) *The learned Justice of the Supreme Court who read the lead judgment did not and could not have read the Appellant's Reply Brief dated 19th November 2001 when he stated in his Judgment.*

(a) *that there was no reaction by the Appellant to the Respondent's allegation that no leave of Court was obtained when in fact this issue was addressed on page 4 paragraph 1 of the Reply Brief and*

(b) *when the learned justice in dealing with Issue No.2 stated at page 8 paragraph 2 as follows:*

'Learned Counsel for the Appellants made heavy weather of these amendments but failed to point out how the amendments affected their case before the Court or how it would entail injustice or surprise or embarrassment to them. To say that the Appellant's were overreached by the amendment simpliciter without describing how the amendments affected their case before the Court is a hollow submission.'

When in fact at pages 1, 2 and 3 of the Reply Brief the Appellant catalogued the miscarriage of justice occasioned by the grant of the application to amend the pleadings and the documentary evidence to wit: the plans before the Court."

There is an affidavit of seventeen paragraphs in support of the application with exhibits annexed to it. The relevant paragraphs read as follows:

"7. That the appeal was argued on the 19th of November, 2001 on which day the Appellant filed its Reply to the Respondent's Brief with copies of same duly made available to the Court.

8. That in the lead judgment of Mohammed JSC, the learned Justice who read the lead Judgment struck out grounds 5 and 6 of the Appellant's grounds of appeal which grounds formed the subject matter of Issue 5 raised in the Appellant's Brief.

9. That the two grounds struck out raised the issue of title to the land in dispute and the non consideration and determination of these grounds of appeal was prejudicial to the case of the Applicant.

10. That the reason given in the lead judgment for striking out those grounds of appeal was that the Appellant did not in its

Reply Brief dispute the contention of the Respondent's Counsel that those grounds of appeal are incompetent as no leave of Court was obtained to argue those grounds.

12. *That in resolving Issue No.2 against the Appellant, the Honorable Justice Mohammed JSC at page 8 of the lead Judgment also stated as follows:-* B

'Learned Counsel for the Appellant made heavy weather of these amendments but failed to point out how the amendments affected their case before the court or how it would entail injustice or surprise or embarrassment to them. To say that the appellants were overreached by the amendment simpliciter without describing how the amendments affected their case before the Court is a hollow submission.' C

13. *That it is of course incorrect that the prejudice created by the granting of the amendment was not stated by the Appellant as all these were set out on pages 1, 2 and 3 of the Reply to the Respondent's Brief.*

14. *That I am informed by Miss. O. M. Lewis and I verily believe that the statements attributed to the Honorable Justice of the Supreme Court who read the lead judgment could not have occurred if cognizance had been taken of the Reply to the Respondent's Brief filed by the Appellant before the Court.* E

15. *That the error on the part of the Honorable Justice who read the lead Judgment has resulted in a miscarriage of justice. As Judgment would have been given in favour of the appellant or at worst the case would have been sent back for retrial."* F

The defendants/respondents thereafter filed a motion in opposition praying the Court for the following orders:

"An order striking out the appellants' motion dated 15/2/2002 G (sic) to set aside the judgment of this Honorable Court dated 15/2/2000 (sic) and for the trial of this suit DE NOVO at the Umuahia High Court, Abia State;

AND TAKE NOTICE that the grounds on which this application is based are as follows: H

(i) The Appellants' said motion violates Order 8, Rule 16 of the Supreme Court Rules and is by reason thereof incompetent.

(ii) The motion is an appeal by the back door against decisions of this Honorable Court which are correctly embodied in its judg-

ment.”

The application is supported by an affidavit of eight paragraphs with exhibits annexed to the said affidavit. In addition, the defendant/respondent filed a counter-affidavit of nineteen paragraphs in opposition to the plaintiffs’ motion to set aside the judgment. The

B relevant paragraphs are reproduced hereunder:

“4. That paragraph 11 of the affidavit is incorrect as Ex ‘A’ on which the appellants, rely for this application, was in respect of the five grounds of appeal filed by the appellants on March, 13, 1996, which 5 grounds of appeal formed part of the appellants’ Motion on

C Notice also filed on March, 13, 1996 and granted on July 9, 1996.
7. That the Motion on Notice referred to in paragraph 4 above which is annexed hereto as Exhibit ‘1’ was supplanted by a subsequent Motion on Notice filed on September 9, 1999, granted on
D March 11, 2000, and containing a second Amended Notice of Appeal.

8. That in paragraph 12 of the affidavit in support of the application for a 2nd Amended Notice of Appeal in the Motion on Notice granted on March 11, 2000. The appellants had deposed as
E follows:-

‘That the Notice of Appeal, particularly grounds 2, 4, 5 and 6 has to be amended after relating the amendments made on the plans on the day judgment was to be delivered with the pleadings and evidence.’

F 9. That in view of paragraph 7 above the original Amended Notice of Appeal filed by the appellants on March 6, 1996, granted on July 9, 1996, and referred to in Exhibit ‘A’ in the appellants’ affidavit was abandoned together with the five grounds of appeal contained in it and the leave to file grounds of appeal not based on law
G only.

10. That the appellants failed to disclose in their affidavit the fact that their 1st Amended Notice of Appeal which was allowed in Exhibit ‘A’ of their affidavit contained only five grounds of Appeal
H unlike the 2nd Amended Notice of Appeal which contained 6 grounds of appeal on which this appeal was argued.

11. That the motion seeking leave to file the 2nd Amended Notice of Appeal and granted on March 11, 2000 did not contain any prayer for leave to file any ground of appeal which was not

based on law or which was an attack on the concurrent findings of the lower courts. The said motion and the order allowing it are hereto attached as Exhibit '2'.

13. *That paragraphs 9 and 10 of the affidavit are not correct in that Grounds 5 and 6 were based on facts or on concurrent findings of fact of the two lower courts and no leave to file these two grounds were sought or obtained in the Appellants' motion to file an amended notice of Appeal containing a prayer for leave to argue grounds other than those of law allowed on 9/3 200 and on which this appeal was fought.*

14. *That the appellants did not exhibit in their affidavit the prayers contained in their 2nd motion allowed on 9/3/2000 on which the appeal was argued and which did not seek leave to argue grounds not based on law only.*

16. *That the submissions in the amended Brief filed on 15/2/ 2000 and alleging miscarriage of justice, ignored the fact that the two lower courts had already found that there was no miscarriage of justice, while on p.8 of the lead judgment the allegation of a miscarriage of justice had been exhaustively dealt with and dismissed."*

In moving the motion, Professor Kasunmu, SAN stated that the application is brought under the inherent jurisdiction of the court and that the grounds upon which the application is based are as set out in the schedule to the application. These grounds have been set out earlier in this ruling. He also relied on the affidavit in support of the application together with the documents annexed to the affidavit.

There is a preliminary issue raised by the learned counsel for the respondents to the effect that the leave granted to the applicants by this Court to further amend their notice of appeal and to deem it as properly filed and served contained a sixth ground of appeal which was of mixed law and fact. That the appellants did not obtain leave of this Court to appeal on that 6th ground.

Before the application to further amend the notice of appeal granted on 11-3-2000, the appellants had on 9-7-96 obtained leave of this Court to appeal on grounds other than of law and also on concurrent findings of the two lower courts.

The sixth ground of appeal was argued with ground five as Issue (5) in the appellants' brief of argument. Professor Kasumu,

SAN replied to the objection in the appellants' Reply brief. This was the Reply brief which he contends in this application that the court did not advert to in its judgment which led to the striking out and non-consideration of the said Issue (5). Learned counsel for the respondents has raised the same objection to the said ground (6) in their opposition to this application.

In the first application brought by the appellants/applicants granted by this Court on 9-7-96, leave to appeal on grounds other than law was sought. When, therefore, the appellants brought another application to further amend their notice of appeal which was granted on 11-3-2000 and which application contained the sixth ground of appeal on mixed law and facts, they did not need any leave. They needed only leave to amend their notice of appeal since the leave to appeal on grounds other than law granted on 9-7-96 covered not only the grounds of appeal then filed but also, the additional 6th ground. The leave granted on 9-7-96 relates to the entire appeal. See *Awote Ors. v. Owodunni & Or.* (1986) 5 NWLR (Pt.46) 941. ***In the instance, the 6th ground of appeal which was argued as issue (5) in the appellants' brief in the appeal was competent.***

Having cleared the way, I will continue with the consideration of the application for an order to set aside the judgment of this Court delivered on 15-2-2002.

Professor Kasunmu, SAN contended that the appellants were denied fair hearing when the Court struck out grounds 5 and 6 raised in their notice of Appeal and argued as Issue (5) in the Appellants' brief which issue touched on title to the land in dispute. He referred the Court to the portion of the judgment of my learned brother Mohammed, JSC on the issue which reads:

"Learned counsel for the appellants made heavy weather of these amendments but failed to point out how the amendments affected their case before the Court or how it would entail injustice or surprise or embarrassment to them. To say that the Appellants were overreached by the amendment simpliciter without describing how the amendments affected their case before the Court is a hollow submission."

Professor Kasunmu, SAN further submitted that the reason

given by the court for striking out the two grounds was that leave was not obtained before they were filed and if the court had read the Reply brief, it would have discovered that leave was indeed sought and obtained and the remarks made by the Court as to the incompetence of the two grounds of appeal would not have been made.

He concluded that the germane issue in the appeal which is title to the land in dispute was not considered and in his view, it was a fundamental error. We were urged to set aside the judgment and order that the appeal be heard *de novo* by another panel. B

Learned Senior Advocate of Nigeria referred the Court to the cases of *Alao v. A.C.B Ltd.* (2000) 9 NWLR (Pt.672) 264, 271-273; 280-281 and 296, *Ex parte, Pinochet Ugarte No.2* (1999) 1 WLRL 272 and *Olorunfemi & Ors. v. Asho* (1999) 1 NWLR (Pt.585) 1. In *Asho's* case (*supra*), this Court failed to consider the respondent's cross-appeal. A motion to set aside the said judgment was brought. The Court granted the application and ordered that the appeal be re-heard by a panel different from that which heard it. I will say more on this later in the Ruling. *Pinochet's* case had to do with bias which is not the case in the application before the Court. C

Chief K. K. Ogba, learned counsel for the respondents submitted that the application to set aside the judgment is contrary to section 235 of the Constitution of the Federal Republic of Nigeria, 1999 and the provisions of Order 8, rule 16 of the Supreme Court Rules, 1999 as amended. It was his further contention that the applicants did not seek the leave of court to appeal on the sixth ground of appeal when they applied for leave to further amend the Notice of Appeal. E

I have expressed my view on this point in this Ruling and I will not make further comments on it. The said ground of appeal was competent. Chief Ogba referred the Court to the case of *Alao v. A.C.B. Ltd.* (*Supra*) and submitted that *Alao's* case provided the only conditions upon which this Court can set aside its judgment. F

The learned respondents' counsel referred the Court to section 235 of the Constitution which makes provision for the finality of any determination of the Supreme Court and Order 8, rule 16 of the Rules of this Court which provides that the Court will not review any judgment once given and delivered by it except to correct any clerical mistakes or some error arising from any accidental slip or omis- G

sion, or to vary the judgment or order so as to give effect to its meaning or intention. These two provisions do not arise in the application before us. ***I shall state that this court possesses inherent power to set aside its judgment in appropriate cases. Such cases are as follows:***

B (i) ***When the judgment is obtained by fraud or deceit either in the court or of one or more of the parties. Such a judgment can be impeached or set aside by means of an action which may be brought without leave.*** See Alaka v Adekunle (1959) LLR 76; Flower v. Lloyd (1877) 6 Ch.D. 297; Olufumise v. C Falana (1990) 3 NWLR (Pt.136) 1.

(ii) ***When the judgment is a nullity. A person affected by an order of court which can properly be described as a nullity is entitled ex debito justitiae to have it set aside.*** See Skensconsult D (Nig.) Ltd. v. Ukey (1981) 1 SC 6, Craig v. Kanssen (1943) KB 256, 262 and 263; Ojiako & Ors. v. Ogueze & Ors. (1962) 1 All NLR 58, Okafor & Ors. v. Anambra State & Ors. (1991) 6 NWLR (Pt.200) 659, 680.

E (iii) ***When it is obvious that the Court was misled into giving judgment under a mistaken belief that the parties consented to it.*** See Agunbiade v. Okunoga (1961) All NLR 119 and Obimonure v. Erionosho (1966) 1 All NLR 250.

F ***In Olorunfemi v. Asho (supra) (Suit No. SC. 13/1999), this Court in its unreported Ruling dated 18-3-99 set aside its judgment delivered on 8-1-99 on the ground that it failed to consider the respondents' cross-appeal before allowing the appellants' appeal. It ordered that the appeal be heard de novo by another panel of Justices of this Court.*** See generally G Alao v. A.C.B. Ltd. (supra).

H The applicants' application does not fall within any of the above cases. The nearest to it is Asho's case (supra) where the respondents' cross-appeal was not considered by the court before allowing the appellants' appeal. The applicants are contending in this application that Issue (5) in their brief which was distilled from grounds 5 and 6 of their grounds of appeal was struck out as incompetent by Mohammed, JSC who wrote the leading judgment and that the said issue involved a consideration of title to the disputed land.

I think one should draw a distinction between failure of

the court to determine a cross-appeal and failure to determine one out of several issues in an appeal determined by the Supreme Court. A cross-appeal arises where two parties to a judgment are dissatisfied with it and each accordingly appeals. The appeal of each is called a cross-appeal in relation to that of the other. Each appeal is an independent and separate complaint by the parties even though both appeals are heard together. If the appellant withdraws or discontinues his appeal, a respondent/cross-appellant may proceed with his cross-appeal just as a counter-claimant in a civil suit may prove his counter-claim where the plaintiff discontinues his own action. In other words, an issue in an appeal cannot be equated with a cross-appeal, moreso, where the non-determination of an issue in the appeal is by the Supreme Court and not by an intermediate appellate court. Even in the latter case, the substantiality of the ground of appeal or issue which was not considered must have had a decisive effect on the judgment and a miscarriage of justice must have resulted. Therefore, applications to set aside the judgment of this court should not be taken very lightly by litigants and should not be turned into an avenue of re-arguing an appeal which was dismissed. B C D E

In the instant application, it was contended that the failure of my learned brother Mohammed, JSC to consider Issue (5) in the appellants' brief which was germane to title to the land in dispute, was a fundamental error. In my opinion, the error was not such that warrants the order sought. The applicants failed to bring their case within any of the conditions under which this Court can grant the order sought. F

The failure to consider Issue (5) in the leading judgment in the circumstance stated did not rob the judgment of its efficacy where the said issue was exhaustively considered and resolved against the applicants in one of the concurring opinions. It will be uncharitable on the part of the applicants to contend that Issue (5) was not considered by the Court and that the failure amounted to a denial of fair hearing. The inherent jurisdiction of the court to set aside its judgment cannot be converted to an appellate jurisdiction as though the matter before it is another appeal, intended to afford losing litigants yet another opportunity to re-state or re-argue their G H

appeal. It must be emphasized that this court is a court of final resort and under the Constitution, it cannot under any disguise sit on appeal over its judgment or review it except under very exceptional circumstances. For the above reasons, I see no merit in the application and I hereby dismiss it with N1,000.00 costs to the respondents.

WALI JSC

I have had a preview of the lead Ruling of my learned brother Ogwuegbu, JSC and I agree with the reasons ably set out by my learned brother for dismissing the appellants/applicant's application to set the judgment of this court which was delivered on 15/2/200. I adopt the reasons as mine.

The application brought on 20/2/2002 is hereby dismissed for want of merit with N1,000.00 costs to the Respondents.

KUTIGI JSC (DISSENTING)

This is a Motion On Notice brought pursuant to the inherent jurisdiction of the Court by the Appellants/Applicants praying for the following orders:-

“1. An order setting aside the judgment of this Honourable Court contained in the lead judgment of Uthman Mohammed JSC delivered on the 15th of February, 2002.

2. An order directing that the appeal be argued de-novo before a new Panel of the court.

3. And for such order or further orders as this Honourable Court may deem fit to make in the circumstances.”

The grounds for the application are as contained in the schedule attached to the motion. It reads:-

“THE SCHEDULE

GROUND FOR THE APPLICATION

1. There was a denial of fair hearing when the Court struck out grounds 5 and 6 raised in the Notice of Appeal filed on the 9th September, 1999 and argued as Issue 5 in the Appellant's Brief, which issue touched on the title to the land in dispute on the ground that no leave of Court was obtained to argue those grounds when in fact

leave was applied for and granted.

2. The learned Justice of the Supreme Court who read the lead (majority) Judgment did not and could not have read the Appellant's Reply Brief dated 19th November, 2001 when he stated in his Judgment:

(a) That there was no reaction by the Appellant to the Respondent's allegation that no leave of Court was obtained when in fact this issue was addressed on page 4 paragraph 1 of the Reply Brief and

(b) When the learned Justice in dealing with Issue No.2 stated at page 8 paragraph 2 as follows:

'Learned Counsel for the Appellants made heavy weather of these amendments but failed to point out how the amendments affected their case before their Court or how it would entail injustice or surprise or embarrassment to them. To say that the Appellant's were over-reached by the amendment simpliciter without describing how the amendments affected their case before the Court is a hollow submission.'

When in fact at pages 1, 2 and 3 of the Reply Brief the Appellant catalogued the miscarriage of justice occasioned by the grant of the application to amend the pleadings and the documentary evidence to wit: the plans before the Court."

The Application was supported by a 17 - paragraph affidavit sworn by one Olusola Odeyinka, a litigation officer in the Chambers of Prof. A. B. Kasunmu SAN, Counsel for the Appellants/ Applicants. I consider the following paragraphs of the affidavit quite relevant -

"4. That Judgment was delivered by the Supreme Court in this matter on the 15th of February, 2002 wherein the appeal of the Appellant was dismissed by three to the five Judges who presided over the appeal.

5. That the lead (majority) Judgment was read by Uthman Mohammed JSC with A. B. Wali, JSC and E. O. Ogwuegbu JSC concurring while I. L. Kutigi, JSC and U. A. Kalgo dissented.

6. That the appellant's Brief was filed on the 7th of June, 1999 whilst the Respondent's Brief was filed and served on the Appellant's Counsel on the evening of Thursday, the 15th of November, 2001.

7. That the appeal was argued on the 19th of November,

2001 on which day the Appellant filed its Reply to the Respondent's Brief with copies of same duly made available to the Court.

8. That in the lead (majority) Judgment of Mohammed JSC, the learned Justice who read the Judgment struck out grounds 5 and 6 of the Appellant's grounds of appeal which grounds formed the subject matter of Issue 5 raised in the Appellant's brief.

9. That the two grounds struck out raised the issue of title to the land in dispute and the non consideration and determination of these grounds of appeal was prejudicial to the case of the Applicant.

10. That the reason given in the lead (majority) Judgment for striking out those grounds of appeal was that the Appellant did not in its Reply Brief dispute the contention of the Respondent's Counsel that those grounds of appeal are incompetent as no leave of Court was obtained to argue those grounds.

11. That I am informed by Miss O. M. Lewis and I verily believe same to be true that contrary to the fact as stated in the lead Judgment, leave of this Honourable Court in respect of grounds 5 and 6 was obtained on the 9th of July, 1996 and this was so stated on page 4 of the Reply to the Respondent's Brief. Attached herewith and marked as Exhibit A is the application to appeal on grounds other than grounds of law and the order of Court granting the said application.

12. That in resolving Issue No.2 against the Appellant, the Honourable Justice Mohammed JSC at page 8 of the lead Judgment also stated as follows:

"Learned Counsel for the Appellants made heavy weather of these amendments but failed to point out how the amendments affected their case for the Court or how it would entail injustice or surprise or embarrassment to them. To say that the Appellants were over-reached by the amendment simpliciter without describing how the amendments affected their case before the Court is a hollow submission."

13. That it is of course incorrect that the prejudice created by the granting of the amendment was not stated by the Appellant as all these were set out on pages 1, 2 and 3 of the Reply to the Respondent's Brief.

14. That I am informed by Miss O. M. Lewis and I verily believe that the statements attributed to the Honourable Justice of the

Supreme Court who read the lead (majority) Judgment could not have occurred if cognizance had been taken of the Reply to the Respondent's Brief filed by the Appellant before the Court.

15. That the error on the part of the Honourable Justice who read the lead (majority) Judgment has resulted in a miscarriage of Justice, as Judgment would have been given in favour of the Appellant or at worst the case would have been sent back for retrial."

The Appellants/Applicants also relied on the following documents which were already before the Court:-

- a. The Record of Appeal
- b. The Exhibits
- c. The Appellants' Brief filed on the 7th of June, 1999
- d. The Respondents' Brief filed on the 15th of November, 2001
- e. The Reply to the Respondents' Brief filed on the 19th November, 2001
- f. The judgments of the five Justices delivered on the 15th of February, 2002.

The application was moved by learned Counsel for the appellants/applicants Professor A. B. Kasunmu SAN. He relied on the grounds for the application as contained in the Schedule attached to the application above. He also relied on the affidavit and the documents already in Court referred to above. It was stressed that the singular act of erroneously striking out grounds 5 & 6 of the Grounds of Appeal as well as issue (5) which directly touched on the title to the land in dispute, the effect was as if the appeal was never heard at all. That issue (5) was the meat of appellants' case. He said the Appellants' Reply brief clearly showed the appellants properly reacted to the question of leave raised or alluded to by the Respondents in their brief and that the Appellants never conceded the point as stated in the majority lead judgment of the Court. That issue (5) being the appellants' main issue in the appeal was never considered. Failure to consider issue (5) was a fundamental error which has occasioned a miscarriage of justice. The following cases were cited in argument - GBADAMOSI SANUSI OLORUNFEMI & ORS. VS. CHIEF RAFIU EYINLE ASHO (2000) 2 NWLR (PT.634) 143, ALHAJI ALAO VS. A.C.B, LTD (2000) 9 NWLR (PT.672) 264, AWOTE VS. OWODUNNI (1986) 5 NWLR (PT.46) 941.

The Court was urged to grant the application as prayed.

Chief Ogba learned Counsel for the Respondents opposed the application. He filed a Counter-Application which I find quite irrelevant to this application. He said the application was contrary to Section 235 of the 1999 Constitution and Order 8 Rule 16 Rules of the Supreme court. He said Appellants/Applicants' issue (5) which was struck out by the lead majority judgment of this Court was not germane to the appeal. That the leave of this Court which was obtained by the Appellants was in respect of the 1st Amended Notice of Appeal only and did not affect the 2nd Amended Notice of Appeal by the Appellants. That the application is an attempt to appeal through the back door. The case of ALHAJI ALAO VS. A.C.B. LTD (supra) was cited in support. We were urged to dismiss the application.

Because of the nature of the order which I intend to make finally in this Ruling, I ought to be brief. First of all I think reliance placed by Chief Ogba learned Counsel for the Respondents on Section 235 of the Constitution and Order 8 Rule 16 of the Supreme Court Rules is clearly misplaced. The provisions of the Constitution and the Rules respectively deal with the finality of any determination of the Supreme Court and a review of the judgment of the Supreme Court. These are not the issues involved in this application. This application is only asking us to set aside our own judgment and to rehear the appeal afresh because of the circumstances and or reasons set out in the supporting papers for the application.

On the question of whether or not leave to file grounds 5 & 6 was obtained before they were filed by the appellants, the lead judgment after setting down the two grounds resolved as follows -

"It is axiomatic that the Respondents' Counsel is right that ground 5 has been erroneously coined "ground of law." It is at best ground of mixed law and fact. Ground 6 is definitely a ground of facts only. These two grounds could only be argued after obtaining the necessary leave of this Court or the Court below. The appellants have not reacted to this objection in their reply brief. Since they have not done so I will regard their silence as accepting that the objection is meritorious. Therefore strike out grounds 5 & 6 and the issues formulated on them."

And the issue formulated on grounds 5 & 6 which was struck out reads:-

“5. Whether the respondents had established a claim to the land in dispute and whether in the circumstance of the case, the test for resolving conflicting traditional evidence was applicable and properly applied.”

The Appellants/Applicants have convincingly demonstrated in this Court that they did not only react to the leave question but had also filed a Reply brief contrary to the holding above. In the Reply brief they gave 9th July 1996 as the date leave of this Court was obtained. The point therefore at which to resolve the question of whether or not the Appellants obtained leave is not now. It could only have been properly resolved at the hearing of the appeal where the issues were joined and which stage had long been passed as shown in the decision above. It was never decided then.

Now back to the question before the Court. The Supreme Court and indeed any Court of law, has in my view, inherent power and jurisdiction to set aside its own judgment or decision in appropriate cases. These will include -

- (1) When the judgment was obtained by fraud; or
- (2) When the judgment is a nullity such as when the Court itself was not competent; or
- (3) When the Court was misled into giving judgment under a mistaken belief that the parties had consented to it; or
- (4) Where judgment was given in the absence of jurisdiction; or
- (5) Where the procedure adopted was such as to deprive the decision or judgment of the character of a legitimate adjudication (see generally ALAO VS. A.C.B LTD (supra), MADUKOLU & ORS. VS. NKEMDILIM (1962) ALL NLR (PT. 2) 581.

In the case of GBADAMOSI SANUSI OLURUNFEMI & ORS. VS. CHIEF RAFIU EYINLE ASHO (supra) referred to by Prof. Kasunmu, this Court set aside its own judgment earlier reported in (1999) 1 NWLR (PT. 585) 1 and ordered a fresh hearing of the appeal because the Court failed or inadvertently forgot to consider the cross-appeal of the Respondent in the same appeal. That was proper I believe. The procedure of considering a main appeal and leaving out a cross-appeal, would certainly in my view be one which would have deprived the decision or judgment of the character of a legitimate adjudication.

So in the instant case, the Appellants/Applicants' principal or main issue (5) which relates to the title to the land in dispute is certainly germane to their appeal. Issue (5) is in my view wrongly excluded and which exclusion has clearly deprived the majority lead judgment of the character of a legitimate adjudication. To borrow the words of Prof. Kasunmu, "It is as if the appellants/Applicants were never heard at all." I agree. This does not mean that issues (5) if taken at all will be resolved in favour of the Applicants as that will be preemptive of the result of the appeal. But the issue as it stands, if resolved in favour of the applicants will certainly have a positive effect on the lead majority judgment as it now stands. This is however not the time to say whether the issue will succeed or fail in the appeal. It is enough now if the issue is substantial, germane and positive. I say it is. The Appellants/Applicants therefore deserve to be heard again. This is fundamental to any legitimate and lawful adjudication.

Consequently the application succeeds. It is hereby allowed by me. I accordingly order as follows -

1. The judgment of this Honourable Court contained in the lead majority judgment of Uthman Mohammed JSC delivered on the 15th of February, 2000 is ex debito justitiae set aside.
2. The appeal No. SC/26/96 is hereby directed to be argued de novo before a new Panel of the Court.
3. There shall be no order as to costs.

F _____

MOHAMMED JSC

I have had the advantage of reading the ruling of my learned brother, Ogwuegbu, JSC, in draft, and I agree with him that this court has no power to set aside its judgment on the grounds which the applicants have based their application.

There is no power in the Supreme Court to review or set aside its own judgment. It may however depart from a principle of law which it has previously laid down. Such a departure will not affect the efficacy of the previous judgment. In a recent full court's decision of this court, viz, Eleazor Obioha v. Innocent Ibero and Anor. (1994) 1 NWLR (Part 322) 503 this court reached the following conclusions:

"By virtue of section 215 of the 1979 Constitution, the Supreme Court cannot sit on appeal over its own judgment. The pro-

vision gives a stamp of finality to any decision of the Supreme Court. There is no constitutional provision for the review of the judgment of the supreme Court by itself. Indeed there can be no appeal questioning the decision of the Supreme Court to itself or to anybody or person as there must be finality to litigation. Hence, the appellate jurisdiction of the Supreme Court is limited by section 213(2) of the 1979 Constitution to hearing appeals from the Court of Appeal only and no more. In the instant case, the Supreme Court has no jurisdiction to grant the application since the purpose of the application is to challenge the correctness of the judgment of the Supreme Court delivered on the 26th of February, 1993 in SC.91/88 and to seek rehearing of the appeal. (Cardoso v. Daniel (1986) 2 NWLR (Part 201) 1; Adigun v. A-G Oyo State (1987) 2 NWLR (Part 56) 197; Asiyambi v. Adeniji (1967) 1 All NLR 861."

The facts which led to the decision above seems to be on all fours with the case in hand. The application seeking for the review of the judgment which this court delivered on 26th February, 1993 was in fact asking for the judgment of this court to be set aside because, according to the applicants, this court made accidental slip or omission whilst considering the point whether the appellants were entitled to judgment. In the application it was pointed out by the applicants that this court took the erroneous view that the respondent filed only two grounds of appeal in the respondents' Notice of Appeal and inadvertently failed to take notice of the two additional grounds of appeal to the Court of Appeal from the High Court. In view of this error the applicant came back to the Supreme Court and applied for the following orders:

"(i) directing a review of the judgment given in appeal SC., 91/1988 aforementioned as delivered on 26th day of February, 1993, and

(ii) correcting some errors arising from accidental slip or omission in the judgment, to wit:- that the respondent in his appeal from the decision of the High Court to Court of Appeal filed only two grounds;

(iii) discharging the order restoring the judgment of the High Court arising from the error arising (sic) from the accidental slip or omission;

(iv) discharging the decisions of the Court in the judgment of

23rd February, 1993.

(a) that the District Officer in Exhibit K assessed the capacities in which the parties sued and were sued from personal capacities to representative capacities; and

B (b) that the District Officer in Exh. K had no authority to alter the capacities in which the parties sued and were sued from personal capacities to representative capacities;

C (v) discharging the decision of the court in the judgment of 23/2/93 that there was no basis for the decision of District Officer in which Exh. K, the native court judgment upon the respondents plea of estoppel rested, to the effect that the native court action was fought or prosecuted in representative capacities;

D (vi) ordering the rehearing of the appeal in this court or the rehearing of the appeal in the court of Appeal or the retrial of the case itself.”

This court unanimously dismissed the application of Eleazor Obioha and held, per Belgore JSC, “what this court is being asked to do is to review its judgment, not to correct clerical errors or errors from accidental slip or omission but to overturn the judgment already given. This court has consistently refused to be dragged into this pitfall. The purpose of this application is clear, it is an appeal cloaked in the guise of a motion.” The Chief justice in his contribution referred to s.215 of 1979 Constitution which provided that the decision of this court was final. Kutigi JSC, also agreed with Belgore JSC’s ruling and said that it was settled law that this court had no power to change its own judgment or sit as an appeal court over its own judgment. In the same judgment the decision of Obaseki, JSC, in the case of Adigun and Ors. V. Attorney-General of Oyo State & Ors. (1987) 2 NWLR (Part 56) 197, was referred to. In that case Obaseki JSC reproduced the provisions of section 215 of the Constitution which reads:

H “Without prejudice to the powers of the President or of the Governor of a state with respect to the prerogative of mercy, no appeal shall lie to any other body or person from any determination of the Supreme Court.”

Obaseki JSC went further and said;

“This provision gives a stamp of finality to the determination by the Supreme Court. There is no constitutional provision for the

review of the judgments of the Supreme Court by itself. Indeed, if there were, it would constitute an appeal into which the present application falls. But as the Constitution and the law now stand, there cannot be an appeal questioning the decision of the Supreme Court to itself or to anybody. This is good for the integrity of the court as there must be finality to litigation when a matter has undergone two, B
three or four appeals;?”

The decision of this court in the case of *Obioha v. Ibero* (supra) has established beyond any doubt that there is no constitutional provision for the review of the judgment of the Supreme Court by itself. C
It will not be possible for this court to set aside its judgment without reviewing its decision. The moment this court delivered its judgment, subject to slip rule principle, it becomes *functus officio*. For these reasons and fuller reasons in the ruling of my learned brother Ogwuegbu JSC, this application is dismissed. I grant N1,000.00 costs D
to the respondents.

KALGO JSC

I have read in advance the ruling of my learned brother E
Ogwuegbu JSC in this application which has just been delivered. I entirely agree with the reasoning and the conclusions reached therein which I adopt as mine. I have nothing useful to add. I therefore find no merit in the application. I dismiss it and abide by the order of F
costs made in the leading ruling.

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