

SUPREME COURT OF NIGERIA

15TH APRIL, 2005. SC. 301/2003

**CORAM:- M. L. UWAIS CJN, S. M. A. BELGORE, I. L. KUTIGI,
A. I. KATSINA-ALU, G. A. OGUNTADE, JJSC**

UNITED BANK FOR AFRICA PLC APPELLANT/APPLICANT
AND
BTL INDUSTRIES LIMITED RESPONDENT/RESPONDENT

APPEALS - Evidence - Leave to call additional evidence on appeal - Three principles to be considered - Include unavailability of the evidence at the trial time - As laid down in *Asaboro v. Aruwaji* (H1)

APPEALS - Evidence - Liberty to call new evidence on appeal - Should not be granted indiscriminately - So there can be an end to litigation (H2)

EVIDENCE - Appeals - Further evidence on appeal - On ground of further corroboration of a party's case - Will not be allowed (H3)

EVIDENCE - Appeals - Fresh document on appeal - That could have been produced at the trial - And that seeks to enhance credibility of a witness - Will not be allowed (H4)

APPEALS - Exhibits - Additionally sought to be tendered on appeal - That are not incontrovertible - Will not be permitted by the Supreme Court (H5)

FACTS

Before the Supreme Court, the appellant/applicant filed a motion praying inter alia, for leave to raise fresh issues of law, leave to amend Notice of Appeal and an order granting the appellant leave to adduce additional evidence for the court to receive on appeal. Appellant filed in support of the application an affidavit to which were annexed several documentary exhibits. A further affidavit was filed and it later filed a brief in support of the application. The respondent filed a brief against the

application in which it opposed the prayers seeking leave to adduce additional evidence. The appellant abandoned 3 out of its 10 prayers.

The apex court in this ruling, therefore, had to consider only depositions and counsel's argument in respect of prayer 7 i.e. leave to adduce additional evidence on appeal.

HELD (Unanimously dismissing the application for leave to adduce additional evidence per lead ruling of **OGUNTADE JSC**)

Additional evidence on appeal - Three principles to be considered

1. Has the appellant/applicant shown by its affidavit evidence before this court enough ground to be granted its request to be allowed to call additional evidence in the appeal? I think not.

In *Comfort Asaboro v. M. G. D Aruwaji & Anor* (1974) 4 S.C. 87 at 90-91 (Reprint) this court had cause to consider the principles which are to be taken into consideration in an application to call additional evidence on appeal. The court per Coker, JSC., said:

“The decision also evidently applied the principles which time honoured practice has established and the matters which the courts have always taken into consideration in the judicious exercise of powers to grant leave to adduce new evidence, namely:

(i) The evidence sought to be adduced must be such as could not have been with reasonable diligence obtained for use at the trial;

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

(iii) The evidence must be such as apparently creditable in the sense that it is capable of being believed and it need not be incontrovertible. (p. 1069 D)

New evidence on appeal - Should not be granted indiscriminately

2. The discretion to grant a party the liberty to call new evidence on appeal is one sparingly exercised. This is because its indiscriminate use portends great danger for the administration of justice. In a case as this which was commenced at the High Court, parties exercise their right to file pleadings and later call evidence at the trial in support of their differ-

ent standpoints. Witnesses called are cross-examined by their adversaries. It is the normal expectation therefore that parties would diligently bring before the court all the evidence needed in support of their case including all documents.

Human experience shows that we often get wiser after an event. When judgment has been given in a case, parties with the advantage of what the court said in the judgment get a new awareness of what they might have done better or not done at all. If the door were left open for everyone who has fought and lost a case at the court of trial to bring new evidence on appeal, there would be no end to litigation and all the parties would be the worse for that situation. There is no doubt that there is a jurisdiction and power in the court to allow fresh evidence on appeal but it is a power which has been used only in exceptional circumstances. (p. 1070 F)

Appeals - Further evidence on appeal

3. In the instant case, the court of trial and the Court of Appeal have adjudicated and given expressions to their thoughts on the merits or demerits of the case of parties. The appellant/applicant now wishes to call further evidence because according to the applicant in paragraph 13 of its affidavit:

“These exhibits further corroborate the case of the appellant....”

If I am able to allow the applicant leave to call further evidence to corroborate the case of the appellant, it seems to me that there is no reason why the same latitude ought not be extended in the interest of justice to the respondent so that it could also assist the respondent to strengthen or ‘corroborate’ its case. In that event, there will be no end to the litigation. (p. 1071 C)

EVIDENCE - Appeals - Fresh document on appeal

4. It seems to me that when an appellate court is called upon to allow fresh evidence on appeal, it must recognize the necessity to adhere strictly to the three conditions stated above in *Asaboro v. Aruwaji* (supra). It is undisputed that the same person who signed the documents which ap-

pellant/applicant wishes to put in as additional evidence had himself been a witness at the trial of the suit. He had testified as D.W.5. He was at the hearing extensively cross-examined and the trial Judge had had the opportunity of expressing an opinion as to his credibility as a witness. Viewed from this angle, the attempt to put in evidence document prepared by this same person is an indirect way to enhance the credibility of this person as a witness. The applicant's request, if granted, draws this court, an appellate court, into an area traditionally reserved for trial courts in civil matters. It is the province of the court of trial to ascribe probative value to the evidence of witnesses. It seems to me also that evidence given by a witness who had once testified in a case does not become any more credible just because the evidence was subsequently reduced into writing. It does not qualify as such evidence which could not have been produced at the trial with reasonable diligence under the first condition stated in *Asaboro v. Aruwaji* (supra). (p. 1071 F)

Exhibits - Additionally sought to be tendered on appeal

E 5. As I observed earlier, the maker of Exhibits U06 to U09 had testified earlier in the trial; and the trial Judge had had an opportunity of expressing an opinion as to his credibility. I do not therefore think that the exhibits subsequently made by same person would, if admitted, have an important effect on the whole case. This is the more so, given the fact that the intention of the applicant is to use the evidence to 'corroborate' aspects of the case made at the hearing.

I do not wish to concern myself with a consideration of the issues whether the so-called evidence can be described as apparently credible but it is obvious that it cannot be described as incontrovertible in view of the fact that the maker of the document had testified earlier as a witness. It suffices for me to say that the evidence which the appellant/applicant wishes to call as additional certainly does not fall in line with what is permissible as stated in *Asaboro v. Aruwaj* (supra). Prayer 7 must therefore be refused. (p. 1072 D)

NOTABLE POINT OF INTEREST

OGUNTADE.JSC

1. Courts lean against hearing fresh evidence on appeal

Before concluding on the said prayer 7, it is helpful to call to mind the observations of Oputa, JSC., in *Obasi v. Onwuka* (1987) 3 NWLR (Pt. 61) 364, 372 in an application to call additional evidence on appeal: B

“To talk therefore of assessing the rightness or wrongness of the trial court’s verdict today by evidence that will be given tomorrow is to talk in blank prose. This is the reason why appellate courts are very reluctant to admit “fresh evidence” “new evidence” or “additional evidence” on appeal except in circumstances where the matter arose ex improviso which no human ingenuity could foresee and it is in the interest of justice that evidence of that fact be led:- R. v. Dora Harris (1927) 28 Cox 432. But by and large, at least in criminal cases (and the principles should also be the same in civil cases). The courts lean against hearing fresh evidence on appeal.” (p. 1072 H) C
D

REPRESENTATION

Dr. Konyin Ajayi, SAN., (with him, Seye Opasanya, Segun Akerele, Mohammed Salau and Oyinkan Badejo-Okusanya (Mrs.)), for the Appellant. E

Chief Afe Babalola, SAN., (with him, Chief A. S. Awomolo, SAN., Mr. Seni Okunloye, SAN., G. Oyewole Esq., A. Adenipekun Esq., A. Adewunmi Esq., M. B. Badmus (Miss), Olodokun Sowemimo Esq., and Akin Aremu Esq., with him) for the respondent. F

CASES REFERRED TO

Obasi v. Onwuka (1987) 3 NWLR (Pt. 61) 364, 372 G
Okpanum v. S.G.E. Nig. Ltd. (1995) 7 NWLR (Pt. 559) 537 at 548
Gozu v. Nyan (1998) 2 NWLR (Pt. 538) 477 at 493
Comfort Asaboro v. M. G. D Aruwaji & Anor (1974) 4 S.C. 87 at 90-91
Akinloye v. Eyiola & Ors (1968) NMLR 92 at 95 H
Fabumiyi & Anor v. Obaye & Anor (1968) NMLR 242 at 247
Balogun v. Agboola (1974) 10 S.C. (Reprint) 83
Obasi v. Onwuka (1987) 3 NWLR (Pt. 61) 364, 372

R. v. Dora Harris (1927) 28 Cox 432

LEAD JUDGMENT BY OGUNTADE JSC

The appellant, United Bank for Africa Plc, its motion filed on 23/2/

B 05 prayed for the following:

“(1) *An order granting leave to the appellant to raise fresh issues of law as to: (a) Frustration; (b) public policy consideration; (c) misjoinder of causes; (d) illegality and supervening legislation; (e) jurisdiction; (f) unjust enrichment; and (g) burden of proof.*

C (2) *An order granting the appellant leave to amend the Notice of Appeal dated 20/10/03 by substituting thereof the Notice of Appeal attached as Exhibit 1101 to the affidavit in support of this motion.*

D (3) *An order enlarging the time within which to apply for leave to file grounds other than the grounds of law in this appeal.*

(4) *An order granting leave to appellant to file grounds other than grounds of law in this appeal.*

E (5) *An order granting leave to the appellant to file grounds of appeal challenging concurrent findings of fact.*

(6) *An order, (sought ex abundante cautela), granting the appellant extension of time within which to appeal.*

F (7) *An order granting the appellant leave to adduce additional evidence for the court to receive on appeal.*

(8) *An order granting the appellant leave to file an amended brief of argument, with liberty for the respondent to file a fresh brief, or alternatively;*

G (9) *An order granting leave to the appellant to file its Reply brief out of time; or further alternatively*

(10) *An order deeming the Reply brief filed on the date hereof as duly and properly filed.”*

H The appellant/applicant filed in support of the application an affidavit to which were annexed several documentary exhibits. A further affidavit was filed on 21/2/05. It later filed a brief in support of the application on 23/2/05 and a Reply brief on 23/2/05. Respondent filed its brief against the application on 10/3/05.

This court on 14/03/05 heard arguments for and against the grant of the prayers sought on the application. The respondent's counsel in his brief indicated that he was only opposing prayers 5 and 7 out of the ten prayers sought by the applicant.

Dr. Konyin Ajayi SAN., of counsel for the appellant/applicant indicated that he was no longer pursuing prayers 5, 9 and 10. He urged us to grant prayers 1, 2, 3, 4, 6 and 8, which were not being opposed. He then moved prayer 7 in the terms filed.

Chief Afe Babalola SAN., of counsel for the respondent in opening his argument stated that he was not opposing applicant's prayers 1, 2, 3, 4, 6 and 8. He adopted his written brief which was filed on 10/3/05. Chief Babalola observed that the additional evidence which the appellant/applicant wished to call was as shown on Exhibits U06 to U09. He said that those exhibits were made by a person who had testified during the trial as D.W.5. Counsel said that the trial Judge had ruled that D.W. 5 was an interested person. Counsel referred us to pages 217 and 218 of the record. It was the further submission of counsel that the contents of Exhibits U06 to U09 contradicted the evidence which D.W. 5 gave at the hearing. Chief Babalola submitted that the exhibits related to sum of £8m whereas the case before the trial court concerned about £3m. Counsel argued that the appellant/applicant was only trying to improve on the case which it had made before the trial court. He further said that, considering the contents of Exhibit U06, there was an imperative need to cross-examine D.W.5 on the additional evidence. He urged the court to refuse the application as the documents sought to be put in as additional evidence had not been pleaded before the trial court.

Dr. Ajayi, SAN., in his reply said that the documents were not in existence during the trial and the hearing of the appeal at the court below as they were made on 15/5/03. Counsel relied on *Okpanum v. S.G.E. Nig. Ltd.* (1995) 7 NWLR (Pt. 559) 537 at 548. He said that there was no necessity to amend the pleading. He argued that the pleadings as they had stood could sustain the additional evidence sought to be called. Counsel said that the additional evidence sought to be called was made by an agency of the Federal Government. He submitted that the evidence sought

to be called would buttress the evidence already before the trial court. It would also assist the court in dealing with the issues in controversy in the appeal.

Let me say in this ruling that it is only necessary to consider the facts deposed to by parties in their affidavit evidence and counsel's argument with respect to only prayer 7 as respondent's counsel is not opposing prayers 1, 2, 3, 4, 6 and 8. Appellant/applicant's counsel had also indicated that he was not pursuing prayers 5, 9 and 10. In the affidavit filed in support of the application, the appellant/applicant by a legal practitioner, Mr. Ugochukwu Okwesili of 57 Marina, Lagos, deposed thus in paragraphs 12 to 14:

"(12) After the hearing of the appeal at the lower court on 05/05/03, the Central Bank of Nigeria and the Debt Management Office wrote the appellant on 15/05/03, 15/07/03 and 11/09/03 respectively with respect to the subject-matter of this appeal, as shown to me marked Exhibits U06, U07, U08 and U09.

(13) These exhibits further corroborate the case of the appellant that:

13.1 All the claims of the respondent were submitted to the CBN and all were refinanced (except 10 unmatched bills).

13.2 The appellant was made to pay an additional sum of N53.5m on account of the respondent.

13.3 The appellant has not been repaid this amount by the respondent; and

13.4 It will be unjust to make the appellant pay further sums on account of the respondent.

(14) Further, the exhibits are all documentary and require no witness and examination, and will have a material impact on and will be necessary for, the determination of the appeal."

The respondent, by its Managing Director, Mr. Kayode Fasanya, in paragraphs 6 to 20 of the counter-affidavit deposed thus:

(6) That in regard to paragraph 12 of the Appellant's Affidavit on the issue of fresh evidence, my investigation shows that Exhibits U06, U07, U08 and U09 were procured by the Appellant/Applicant through

Mr. Coker who wrote the letters without any authority and over one decade after refinancing exercise had closed.

(7) That the maker of the document, Coker J. A. was the D.W.5 in the trial court who testified on oath on the 8th February, 7th March, 30th May, 10th and 31st July, 2001. B

(8) That Exhibit U06 was on the face of it a reply to a letter dated 14th July, 2001.

(9) That when the D.W.5, Coker J. A. was giving evidence on 15th July, 2001 and 11th September, 2001, he suppressed the fact that the appellant wrote the letter of 14th July, 2001. C

(10) That judgment was delivered on 22nd July, 2002 by the trial court.

(11) That judgment was delivered by the Court of Appeal on 22/7/2003. D

(12) That both Exhibit U06 dated 15/5/2003 and Exhibit U07 dated 15/7/2003 were not brought to the notice of the Court of Appeal by the appellant even though they were available.

(13) That Exhibits U06, U07 and U08 had and still have nothing whatsoever to do with the respondent's 333 bills in respect of which the appellant failed to remit the money due to the overseas suppliers. E

(14) That the amount in issue in Exhibits U06-U07 is GBP 8,528,885.22. F

(15) That the issue before the lower court, Court of Appeal and this court is the failure of the appellant to remit the following sums of money to the overseas suppliers, to wit:

(a) GBP 3,632,872.93

(b) US \$3,384,263.37 G

(c) French Francs: 3,478,031.85

(d) Dutch Marks: 3,431,790.47

(e) Belgian Francs: 3,758,533.10

(f) Dutch Krone: 79,515.00 H

(16) That the new evidence which the appellant intends to introduce violently contradicts the case before the lower court.

(17) That at no time did the respondent transact any business with

the appellant in the sum of GBP 8,528,855.22.

(18) That the judgment of the High Court and the Court of Appeal which are before this Honourable Court show clearly that the claims are as in paragraph 15 above.

B (19) That contrary to paragraph 14 of the appellant's affidavit, Exhibits U06, U07, U08 ad U09 are credible having regard to the interest of the 5th defendant, the ruling of the High Court on him, the fact that the subject matter of the letter was available as far back as 1988, the amount contradicts the appellant's case in the lower court, the amount was never C earlier and the letters had been opportunity to tender the letter earlier and the letters were written without authority.

(20) Chief Afe Babalola, SAN., informs me and I verily believe him that he wishes to cross-examine the maker of the documents exten- D sively on the following issues among others:

(a) That the writer, Mr. Coker, who was the 5th appellant's witness was prompted to write the letters by a letter dated 14th of June, 2001, when he was still giving evidence.

E (b) That Mr. Coker knew that the case was pending at that time and he did not bring it to the attention of the court that he received the letter.

(c) That it took him about two years after receiving the letter before he wrote Exhibits U06 and U07. F

(d) That he knew that the case was pending in the Court of Appeal when he wrote Exhibits U06 and U07.

(e) That the court below had ruled that Mr. Coker was an interested person in the matter and even though he knew about the ruling of G the court, he nevertheless wrote the letters, Exhibits U06-U08 at the prompting of the appellant.

(f) That the respondent's bills are in different denominations and that the claim of the respondent has nothing to do with huge sum of GBP H 8,528,888.22 contained in the letters which Mr. Coker wrote.

(g) That he knew as a fact and even testified on oath on 8/2/2001 "*that refinancing exercise had ended in 1992 and that it would be wrong for anyone to say that re-financing continued after 31/3/1992*".

(h) That it is misleading as the appellant wants to do to give the impression contained in Exhibits U06 and U08 that re-financing continued eleven years after the Central Bank of Nigeria has closed all files relating to refinancing exercise.

(i) That Mr. Coker, 5th Defence Witness has no authority to write the letter on behalf of the appellant. B

(j) That the appellant bank dealt with over hundred of thousands of Bills during re-financing exercise in 1985 and 1988.

(k) That in the absence of Debit Advice from the CBN to UBA accompanied with the list of the Bills in issue, it is not possible to know whether the CBN had re-financed the Plaintiff's Bills. C

(l) That the appellant did not tender any Debit Advice or any supporting schedule of bills containing the respondent's bills.

(m) That the 1st D.W. in fact testified that the CBN did not send D any DSSR to the appellant thereby confirming the respondent's case that the respondent's bills were never treated as successful by CBN.

Has the appellant/applicant shown by its affidavit evidence before this court enough ground to be granted its request to be allowed to call additional evidence in the appeal? I think not. E

In Comfort Asaboro v. M. G. D Aruwaji & Anor (1974) 4 S.C. 87 at 90-91 (Reprint) this court had cause to consider the principles which are to be taken into consideration in an application to call additional evidence on appeal. The court per Coker, JSC., said: F

"The decision also evidently applied the principles which time honoured practice has established and the matters which the courts have always taken into consideration in the judicious exercise of powers to grant leave to adduce new evidence, namely: G

(i) The evidence sought to be adduced must be such as could not have been with reasonable diligence obtained for use at the trial;

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

(iii) The evidence must be such as apparently creditable in the sense that it is capable of being believed and it need not be incontrovertible.

See for these observations Roe v. R McGregor & Sons Ltd. (1968) 1 WLR 925 where the earlier decision of the Court of Appeal in Ladd v. Marshall (1954) 3 All ER 745 was considered and applied. Strictly speaking, under our own Rule, the discretion to grant leave to adduce new evidence is properly exercised for the "furtherance of justice". The exercise must however be judicious and it is in this respect that the guidelines set out above have been followed and applied. We are not unmindful of the fact that it would be a dangerous precedent to allow a person who did not call evidence in the lower court, or who, for one reason or another, had called insufficient evidence at the trial, with comparative ease, to bring forward for the first time before this court the evidence which could and should have been adduced before the trial Judge. Such an attitude would be disastrous to the principles of seeing an end to litigation. The stand taken by the Privy Council in the case of Edie Maud Leeder v. Nnance Ellis (1953) at 52 as also illustrates this point. However one looks at the problem, it seems to be generally accepted that the guiding principles have always been applied to the special facts or circumstances of each application before the Court of Appeal and in every case the question whether or not sufficient diligence has been put into the quest for such evidence has been decided as a matter of fact."

This court also in Okpanum v. SGN. (Nig.) Ltd. (1998) 5 S.C. 147; (1998) 7 NWLR (Pt. 559) 537 at 546-547 said substantially the same thing.

The discretion to grant a party the liberty to call new evidence on appeal is one sparingly exercised. This is because its indiscriminate use portends great danger for the administration of justice. In a case as this which was commenced at the High Court, parties exercise their right to file pleadings and later call evidence at the trial in support of their different standpoints. Witnesses called are cross-examined by their adversaries. It is the normal expectation therefore that parties would diligently bring before the court all the evidence needed in support of their case including all documents.

Human experience shows that we often get wiser after an

event. When judgment has been given in a case, parties with the advantage of what the court said in the judgment get a new awareness of what they might have done better or not done at all. If the door were left open for everyone who has fought and lost a case at the court of trial to bring new evidence on appeal, there would be no end to litigation and all the parties would be the worse for that situation. There is no doubt that there is a jurisdiction and power in the court to allow fresh evidence on appeal but it is a power which has been used only in exceptional circumstances.

In the instant case, the court of trial and the Court of Appeal have adjudicated and given expressions to their thoughts on the merits or demerits of the case of parties. The appellant/applicant now wishes to call further evidence because according to the applicant in paragraph 13 of its affidavit:

“These exhibits further corroborate the case of the appellant.....”

If I am able to allow the applicant leave to call further evidence to corroborate the case of the appellant, it seems to me that there is no reason why the same latitude ought not be extended in the interest of justice to the respondent so that it could also assist the respondent to strengthen or ‘corroborate’ its case. In that event, there will be no end to the litigation.

Now in *Gozu v. Nyan* (1998) 2 NWLR (Pt. 538) 477 at 493, I expressed the opinion that the three conditions stated in *Asaboro v. Aruwaji* (supra) must co-exist before a court would consider exercising its power to call fresh evidence on appeal.

It seems to me that when an appellate court is called upon to allow fresh evidence on appeal, it must recognize the necessity to adhere strictly to the three conditions stated above in *Asaboro v. Aruwaji* (supra). It is undisputed that the same person who signed the documents which appellant/applicant wishes to put in as additional evidence had himself been a witness at the trial of the suit. He had testified as D.W.5. He was at the hearing extensively cross-examined and the trial Judge had had the opportunity of expressing an opinion as to his credibility as a witness. Viewed from this

angle, the attempt to put in evidence document prepared by this same person is an indirect way to enhance the credibility of this person as a witness. The applicant's request, if granted, draws this court, an appellate court, into an area traditionally reserved for trial courts in civil matters. It is the province of the court of trial to ascribe probative value to the evidence of witnesses: See *Akinloye v. Eyiola & Ors* (1968) NMLR 92 at 95; *Fabumiyi & Anor v. Obaye & Anor* (1968) NMLR 242 at 247 and *Balogun v. Agboola* (1974) 10 S.C. (Reprint) 83; (1974) 1 AUNLR (Pt. 11) 66 at 73. It seems to me also that evidence given by a witness who had once testified in a case does not become any more credible just because the evidence was subsequently reduced into writing. It does not qualify as such evidence which could not have been produced at the trial with reasonable diligence under the first condition stated in *Asaboro v. Aruwaji* (supra).

As I observed earlier, the maker of Exhibits U06 to U09 had testified earlier in the trial; and the trial Judge had had an opportunity of expressing an opinion as to his credibility. I do not therefore think that the exhibits subsequently made by same person would, if admitted, have an important effect on the whole case. This is the more so, given the fact that the intention of the applicant is to use the evidence to 'corroborate' aspects of the case made at the hearing.

I do not wish to concern myself with a consideration of the issues whether the so-called evidence can be described as apparently credible but it is obvious that it cannot be described as incontrovertible in view of the fact that the maker of the document had testified earlier as a witness. It suffices for me to say that the evidence which the appellant/applicant wishes to call as additional certainly does not fall in line with what is permissible as stated in *Asaboro v. Aruwaj* (supra). Prayer 7 must therefore be refused.

Before concluding on the said prayer 7, it is helpful to call to mind the observations of Oputa, JSC., in *Obasi v. Onwuka* (1987) 3 NWLR (Pt. 61) 364, 372 in an application to call additional evidence on appeal:

“To talk therefore of assessing the rightness or wrongness of the trial court’s verdict today by evidence that will be given tomorrow is to talk in blank prose. This is the reason why appellate courts are very reluctant to admit “fresh evidence” “new evidence” or “additional evidence” on appeal except in circumstances where the matter arose ex improviso which no human ingenuity could foresee and it is in the interest of justice that evidence of that fact be led:- R. v. Dora Harris (1927) 28 Cox 432. But by and large, at least in criminal cases (and the principles should also be the same in civil cases). The courts lean against hearing fresh evidence on appeal.”

In the final conclusion, I make the following orders:

(1) Leave is granted to the appellant/applicant to raise fresh issues of law as to:

- (a) Frustration;
- (b) Public Policy consideration;
- (c) Misjoinder of causes;
- (d) Illegality and supervening legislation;
- (e) Jurisdiction;
- (f) Unjust enrichment; and
- (g) Burden of proof.

(2) Leave is granted to the appellant/applicant to amend his Notice of Appeal by substituting for the existing Notice of Appeal annexed to the affidavit in support of the application as Exhibit U01.

(3) Time for appellant/applicant to seek leave to appeal on ground other than law is extended till today.

(4) Leave is granted to the appellant/applicant to file ground of appeal other than law.

(5) Prayer 5 which appellant/applicant’s counsel indicated he was not pursuing is struck out.

(6) Time within which the appellant may bring its appeal is extended by 21 days from today 15/04/05.

(7) Prayer 7 which has no merit is dismissed.

(8) Leave is granted to the appellant/applicant to file an amended appellant’s brief within six weeks from today 15/04/05 with liberty to the

respondent to file its amended brief (if it be so advised) within 6 weeks of service upon it of the amended appellant's brief.

(9) Prayers 9 and 10 which are alternatives to prayer 8 granted above are struck out.

B (10) I award in favour of the respondent costs assessed and fixed at N1,000.00

UWAIS CJN

C I have had the opportunity of reading in draft the ruling read by my learned brother, Oguntade, JSC. I entirely agree with him and adopt his ruling in its entirety as mine.

BELGORE JSC

D I agree with the ruling of my learned brother, Oguntade, JSC. I also make the consequential orders as set out in the ruling.

KUTIGI JSC

E I read in advance the ruling just delivered by my learned brother, Oguntade JSC. I agree with his reasoning and conclusions. The application succeeds in part only. It is accordingly ordered as follows-

(1) Prayers 5, 9 and 10 which were withdrawn are struck out.

F (2) Prayers 1, 2, 3, 4, 6 and 8 which were not opposed are granted as prayed.

(3) Prayer (7) for leave to adduce additional evidence in this court is refused and or dismissed.

G (4) Costs of N1,000.00 are awarded to the respondent in the motion.

KATSINA-ALU JSC

H I have had the advantage of reading in draft the ruling of my learned brother, Oguntade, JSC. I entirely agree with it. I have nothing to add.