

SUPREME COURT OF NIGERIA

30TH JUNE, 2006. SC. 395/2001

**CORAM:- S. M. A. BELGORE CJN, U. A. KALGO, N. TOBI,
G. A. OGUNTADE, M. MOHAMMED, JJSC**

1. LUKE OKORO

2. JULIUS IWUAGWU

..... APPELLANTS

3. NDUWUEZE ORIUWA

(For themselves and as representing
the citizens of Ojiowere village, Okwelle)

AND

1. HILARY EGBUOH

2. STEPHEN MUONEKE

..... RESPONDENTS

3. NICHOLAS OSUOHA

(For themselves and as representing
the citizens of Umuduruiheoma/Ofenkoro
village, Okwelle)

APPEALS - Further evidence - Power of Court of Appeal to admit - On appeal from judgment on the merits - Is limited to when there are special grounds - Like matters occurring after trial (H1)

RULES OF COURT - Inadvertent omission - Of a party's counsel - Does not amount to special ground - Under O. 1 r. 20(3) Court of Appeal Rules (H2)

APPEALS - Further evidence on appeal - Leave to adduce - Principles to be considered - Evidence must be creditable and important - And not available at time of trial (H3)

FACTS

The Plaintiffs/Respondents had sued the Defendants/Appellants at the Okigwe High Court of Imo State claiming a declaration of title to a piece of land known as "ALA OBI" situate at Umuduruiheoma village, Okwelle.

They also claimed damages for trespass and perpetual injunction restraining the Appellants from further trespass into the said land. The Appellants raised a plea of estoppel per rem judicata. It was their case that the land in dispute was part of larger area of land granted them in a previous suit No. FSC 16/1959. In order to establish the defence of estoppel, Appellants tendered as exhibit, a Law Report wherein the judgment relied upon was published, instead of a certified true copy as required under the evidence Act. Respondents' only reaction then was their assertion that the land adjudicated upon in the judgment pleaded by Appellants was not the same as the instant Land in dispute.

The trial judge in his judgment upheld the plea of res judicata and dismissed the Respondents' claim. Dissatisfied with that judgment, Respondents appealed to the Court of Appeal, Port Harcourt Division. However, before the appeal was heard by the Court of Appeal, Appellants brought an application before the Court of Appeal praying for leave to adduce further evidence in the appeal by tendering the certified true copy of the proceedings and judgment in Supreme Court suit No. FSC 16/1959 on which they relied for their plea of res judicata. Respondents opposed the application. Upon hearing the motion, the Court of Appeal in its ruling refused the application by the Appellants. Aggrieved, the Appellants have brought this appeal against that ruling of the Court of Appeal refusing their application.

ISSUE FOR DETERMINATION

“Did the learned Justices of the Court of Appeal, having regard to all the circumstances of this case, exercise their discretion properly when they refused to grant leave to the appellants to adduce as further evidence in the appeal, the certified true copy of the proceedings and judgment of the Supreme Court in Suit No. F.S.C. 16/1959?”

HELD (Unanimously dismissing the appeal per **OGUNTADE JSC**)

Further evidence - Power of Court of Appeal to admit

1. Order 1 Rule 20(3) of the Court of Appeal Rules, 1981 (as amended) provides:

“(3) The Court shall have power to receive further evidence on

question of fact, either by oral examination in court by affidavit or by deposition taken before an examiner or commissioner as the court may direct, but in the case of an appeal from a judgment after trial or hearing of any cause or matter on the merits, no further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds.”

In the appeal on hand, it is common ground and clearly undisputed that judgment had been given on the merits by the trial court. When the provision of Order 1 rule 20(3) above is related to the facts in this case, it becomes obvious that the only reason that could justify the reception in evidence of further evidence is, if the applicants before the court below (i.e. the appellants or defendants) showed that there were special grounds making it necessary to grant them the leave sought to call further evidence. (p. 2182 G)

RULES OF COURT - Inadvertent omission

2. It is seen from the affidavit in support of the application that the reason relied upon by the defendants was the inadvertent omission of counsel engaged by them to tender the record of proceedings. Does this amount to a special ground as stated under Order 1 Rule 20(3) of the Court of Appeal Rules? I think not. It is helpful once more to bear in mind the language employed under Order 1 rule 20(3) above. It says:

“..... no further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds.” (underlining mine)

Under the said Rule, the only further evidence which can be admitted is on matters that happened after the trial or hearing, and even then, the applicant who wishes to call such further evidence must show special grounds. (p. 2186 B)

Further evidence on appeal - Leave to adduce

3. In *Comfort Asaboro v. M.G.D. Aruwaji & Anor.* (1974) 4 S.C. (Reprint) 87 at 90-91, this court 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.*

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.”

In *Akanbi v. Alao* (1989) 5 S.C. 1; (1989) 3 NWLR (Pt. 188) 118 at 159, this court stressing that the jurisdiction to receive further evidence on appeal should only be exercised in furtherance of justice said per Oputa JSC, that:

“Furtherance of justice in proceedings before our courts will also presuppose obedience to decisions of our various courts. It is an invariable rule of all courts and one founded on reason, common sense, fair play, and equal treatment of the contestants, and thus on justice, that if evidence which either was in possession of parties at the time of trial or which by proper diligence might have been obtained is either not produced or has not been procured and the case is decided adversely to the side to which the evidence was or could have been available; that side will not so easily be given the extra indulgence of being allowed, on appeal, to adduce or produce such evidence, as new or fresh evidence. Such fresh evidence, on appeal, ought normally to be confined to matters arising *ex improviso* which no human ingenuity could have foreseen. Order 1 Rule 20(3), Court of Appeal Rules, 1981, reflected this when it excepted from the general rules against fresh evidence on appeal ‘evidence on matters which occurred after the date of the trial or hearing.’ (p. 2186 E)

NOTABLE POINTS OF INTEREST**OGUNTADEJSC***1. Parties can not enhance quality of evidence under guise of further evidence*

It would seem that what the defendants had tried to do by their application B to call fresh evidence before the court below was to take the sting or efficacy out of the plaintiffs' 5th ground of appeal. Clearly, the application was not brought in the furtherance of the ends of justice but merely to overreach and thus defeat the ends of justice. The defendants were in fact not seeking to call further evidence on appeal but rather to improve the C quality of the evidence they had called at the court of trial. They had wanted to put in, the proceedings in the suit, which they pleaded to supplement the Law report on the same case, which they had tendered before the trial court. The defendant's duty as the respondents in the appeal by the D plaintiffs was to defend the correctness of the judgment in their favour not to enhance the quality to the evidence they had earlier called. If they thought that the plaintiffs' appeal to the court below was meritorious, they should have admitted that fact so that the court below could do what was E right in the circumstances. (p. 2189 D)

TOBIJSC*2. It is intended that parties lead all evidence at trial court*

Application to lead further evidence in an appellate court is not one of the F regular applications in the judicial process. The application is generally out of the normal stream in the judicial process because it is outside the ordinary scheme of things. This is because it is the intention of our G adjectival law that parties should lead all the evidence they need or require in the case at the trial court which jurisdiction is to hear oral evidence of the parties to ventilate their different pleadings. One of the reasons behind this principle is that it is the trial court that has the eyes of the eagle to look H closely at the demeanour of the witnesses, their habits, mannerisms and idiosyncrasies in the witness box. As opposed to this, an appellate court has not such eyes, by the fact of the appellate arrangement, to see the witnesses' facial and body movement in the box. On the contrary, an

appellate court is regimented to the cold record before it and the rules of procedure normally do not allow that court to move out of the record.
(p. 2190 H)

B 3. *Parties are bound to make same case on appeal as at trial*

One of the exceptions to the above rule is that appellate courts can, in appropriate cases, receive further evidence from the parties; and the further evidence is the evidence not led by parties at the trial. And because of the general basic rule of trial court hearing trial evidence, appellate courts are reluctant or loathe to grant applications to hear further evidence on appeal except in very compelling circumstances. I can recognize here two such circumstances. The first one is that the evidence sought to be led on appeal was not available at the time of the trial or during the trial.
D The second one is more generic and it is that an appellate court will grant an application to lead further evidence on appeal in the interest of justice. And here, it is in the interest of justice in the case and not to one of the parties only.

E The procedure for admitting further evidence on appeal is not at the disposal of an indolent or not diligent litigant. The procedure cannot be used for the repair of a case at the trial. It is not designed to overreach the other party or spring surprise at the other party when the appeal is heard.

F While an applicant is free to employ clever or trickish methods to re-open his case made at the trial court to obtain judgment on appeal, an appellate court will not help him open the gate when it is against the rules of court. An appellate court will be guided by the principle of law that a party is bound to make the same case in both the trial court and the Court of Appeal. An appellate court will not encourage, or better, allow a party make a case at the trial court and then take or make a somersault on appeal. That will be tantamount to blowing hot and cold with the same breath; a conduct which equity, with its hands of fairness and fairplay, will not allow.
H (p. 2191 C)

REPRESENTATION

E. O. Onyema Esq., (with him. D. O. Agbo), for the Appellants.

B. F. I. Nwofor, SAN., (with him, B. O. B. Udeibe), for the Respondents.

CASES REFERRED TO

Roe v. R. McGregor & Sons Ltd. (1968) 1 WLR 925

Ladd v. Marshall (1954) 3 All ER 745

B

Akanbi v. Alao (1989) 5 S.C. 1; (1989) 3 NWLR (Pt. 188) 118 at 159

Asaboro v. M.G.D. Aruwaji & Anor. (1974) 4 S.C. (Reprint) 87 at 90-91

Efuwape Okulate & Anor. v. Gbadamosi Awosanya & 5 Ors. (1990) 5 NWLR (Pt. 150) 340

C

Moshese General Merchants Ltd. v. Nigerian Steel Products Ltd. (1987) 2 NWLR (Pt. 55) 110

Adewunmi v. Plastex Nig. Ltd. (1986) 3 NWLR (Pt. 32) 767

Onyia Nwagwu Ngwu & 6 Ors. v. Ugwu Onuigbo & 3 Ors. (1999) 13 NWLR (Pt. 636) 512

D

Bello Akanbi & 3 Ors. v. Mamudu Alao & Anor. (1989) 5 S.C. 1; (1989) 3 NWLR (Pt. 108) 118

Nalsa & Team Associates v. N.N.P.C. (1991) 8 NWLR (Pt. 212) 652 at 676

E

Nneji v. Chukwu (1988) 3 NWLR (Pt. 81) 184

Long John v. Blakk (1998) 5 S.C. 83; (1998) 59 LRCN 3864

STATUTE & RULES REFERRED TO

F

Evidence Act, Cap 112, Laws of the Federation of Nigeria, 1990, ss. 97 (2)(c) and 109 (a)(iii)

Court of Appeal Rules, 1981, O.1 r. 20(3)

LEAD JUDGMENT BY OGUNTADE JSC

G

The respondents were the plaintiffs at the Okigwe High Court of Imo State where as the representatives of the citizens of Umuduruiheoma/ Ofenkoro village, Okwelle, they claimed against the appellants as the defendants (representing the citizens of Ojiowere village, Okwelle) the following:

“(1) A declaration that the plaintiffs are the owners in possession of the piece and parcel of land known as ‘ALA OBI’ situate at

Umuduruheoma village, Okwelle within jurisdiction.

(2) *N10,000.000.00 (Ten Million Naira) general damages for trespass committed by the defendants on or about 20th April, 1995.*

(3) *An order of this Honourable Court that the defendants return to the plaintiffs twenty pick-up loads of plaintiffs' cassava tubers the defendants forcefully harvested and carted away from the said land.*

(4) *Perpetual injunction restraining the defendants, their agents, servants and privies from further trespass in the said land.*

The parties filed and exchanged pleadings after which the suit was tried by Njemanze, J.

The plaintiffs called four witnesses whilst the defendants called one. The case made by the defendants was that the land in dispute formed a portion of land granted them in a previous suit No. FSC. 16/1959. In order to establish the defence of estoppel per res judicata which they raised, the defendants tendered as an exhibit, a Law Report wherein the judgment relied upon was published. The plaintiffs' reaction to the defence of estoppel per res judicata was that the land adjudicated upon in the judgment pleaded by the defendant was not the same as the land in dispute.

In a judgment delivered on 16/1/97, Njemanze J., dismissed plaintiffs' suit. He upheld the plea of estoppel per res judicata raised by the defendants. Dissatisfied with the judgment, the plaintiffs brought an appeal before the Court of Appeal. Port Harcourt Division (i.e. the court below). The defendants, on 20/3/2001, before the appeal brought by the plaintiffs before the court below was heard, brought an application, wherein they prayed for:

"An order granting leave to the respondents/applicants to adduce further evidence in this appeal by tendering the certified true copy of the proceedings and judgment of the Supreme Court in suit No. FSC 16/1959 Ihenacho Nwaneri & 2 Ors. v. Nnadikwe Oriuwa & 5 Ors."

The plaintiffs opposed the application. The court below in its ruling on 17/9/2001 refused the application. The defendants were dissatisfied with the order refusing their application to adduce further evidence on appeal. They have brought this appeal against the order. In their appellants' brief, the issue for determination in the appeal was identified as this:

“Did the learned Justices of the Court of Appeal, having regard to all the circumstances of this case, exercise their discretion properly when they refused to grant leave to the appellants to adduce as further evidence in the appeal, the certified true copy of the proceedings and judgment of the Supreme Court in Suit No. F.S.C. 16/1959?”

B

The plaintiffs in their respondents’ brief formulated an issue for determination, which in substance is the same with the defendants’ issue.

In the appellants’ brief, it was argued that it was erroneous for the court below to have taken the general view that because the further evidence sought to be adduced had been available during the trial, the application could not be granted. Counsel relied on Bello Akanbi & Ors. v. Momudu Alao & Anor. (1989) 5 S.C. 1; (1989) 5 S.C. 1 at 19 & 44. It was further argued that the paramount consideration in the grant of the leave to call further evidence on appeal was to ensure that the real question in controversy was determined on the merits. Adeleke v. Aserifa (1990) 5 S.C. (Pt. 1) 104; (1990) 3 NWLR (Pt. 136) 94 at 110. Other cases relied upon on the same point are Owata v. Anyigor (1993) 2 NWLR (Pt. 276) 380 and Gboasonyi v. Onwubuariri (1997) 3 NWLR (Pt. 195) 599. E Appellants’ counsel argued further that where the evidence to be called on appeal would have an effect on the jurisdiction of the court, the court should grant leave to call further evidence on appeal. Nwanezu v. Idris (1993) 11 LRCN 315, at 332; Gazu v. Nyam (1998) 2 NWLR (Pt. 538) F 477. Developing this argument further, counsel stated that since the further evidence to be called related to the applicability of res judicata, it was an additional reason to grant it - Salawu Yoye v. Olubode. In any case, it was submitted, technicalities should not be allowed to hinder justice - Nalsa & Team Associates v. N.N.P.C. (1991) 8 NWLR (Pt. 212) 652 at G 676; Nneji v. Chukwu (1988) 3 NWLR (Pt. 81) 184 and Long John v. Blakk (1998) 5 S.C. 83; (1998) 59 LRCN 3864.

The plaintiffs in their respondents’ brief argued that although the application of the defendants before the court below was for leave to call H further evidence on appeal, what they had tried to do was to bring anew the same evidence they had previously tendered. It was argued that the defendants had not offered any special reason why they had not previously

called the same evidence during the trial. Counsel relied on Bello Akanbi & 3 Ors. v. Mamudu Alao & Anor. (1989) 5 S.C. 1; (1989) 3 NWLR (Pt. 108) 118. It was argued that if the counsel retained by the defendants at the trial had made a mistake, the defendants would still be bound by his conduct of the case - Moshese General Merchants Ltd. v. Nigerian Steel Products Ltd. (1987) 2 NWLR (Pt. 55) 110; Adewunmi v. Plastex Nig. Ltd. (1986) 3 NWLR (Pt. 32) 767 and Onyia Nwagwu Ngwu & 6 Ors. v. Ugwu Onuigbo & 3 Ors. (1999) 13 NWLR (Pt. 636) 512.

Counsel stated the conditions for admitting further evidence on appeal as stated in Asaboro v. Aruwaji (1974) 4 S.C. (Reprint) 87; (1974) 4 S.C. 119 at 123-124 and submitted that the facts in this case did not fit into any of the conditions. Counsel also relied on Adeleke v. Aserifa (supra); Efuwape Okulate & Anor. v. Gbadamosi Awosanya & 5 Ors. (1990) 5 NWLR (Pt. 150) 340. It was submitted that the facts surrounding the present application differed from those in Igboasanyi v. Onwubuariri (supra).

The respondents' counsel argued further that the application by the defendants was in reality an attempt to overreach the plaintiffs in their appeal before the court below. It was stated that the plaintiffs had in one of the grounds of appeal before the court below argued the inappropriateness of tendering a law report in the place of record of proceedings.

Finally, it was submitted that since the defendants had not filed a cross-appeal, they could not bring an application for leave to call further evidence in the appeal before the court below.

I start a consideration of the only issue in this appeal by examining the relevant Court of Appeal Rule governing the exercise of the power to admit further evidence on appeal. **Order 1 Rule 20(3) of the Court of Appeal Rules, 1981 (as amended) provides:**

“(3) The Court shall have power to receive further evidence on question of fact, either by oral examination in court by affidavit or by deposition taken before an examiner or commissioner as the court may direct, but in the case of an appeal from a judgment after trial or hearing of any cause or matter on the merits, no further evidence (other than evidence as to matters which have occurred after the date of the trial or

hearing) shall be admitted except on special grounds.”

In the appeal on hand, it is common ground and clearly undisputed that judgment had been given on the merits by the trial court. When the provision of Order 1 rule 20(3) above is related to the facts in this case, it becomes obvious that the only reason that could justify the reception in evidence of further evidence is, if the applicants before the court below (i.e. the appellants or defendants) showed that there were special grounds making it necessary to grant them the leave sought to call further evidence. What then are the special grounds shown by the defendants. In paragraphs 6-15 of the affidavit in support of the application to call further evidence, the defendants deposed thus:

“6. That both in their pleadings and evidence during the trial as fully contained in the Records of Appeal already before this Honourable Court, the respondents/applicants made a case that the land now in dispute is part of the land adjudicated upon by the Supreme Court in Suit No. FSC 16/1959 Ihenacho Nwaneri & 2 Ors. v. Nnadikwe Oriuwa & 5 Ors.

7. That both in their own pleadings and evidence during the trial as fully contained in the records of appeal already before this Honourable Court, the appellants made a case that the land now in dispute is not part of the land adjudicated upon by the Supreme Court in the said 1959 suit.

8. That during the trial, we, the defendants/respondents/applicants retained the services of P. A. Chikezie Offoaro Esq. to conduct our case.

9. That when the said P. A. Chikezie Offoaro Esq., demanded from us the judgment of the Supreme Court in Suit No. FSC 16/1959, we handed over to him what we had, which was the Law Report called ‘Selected Judgments of the Federal Supreme Court of Nigeria Vol IV 1959’.

10. That the said P. A. Chikezie Offoaro Esq., informed us and we verily believed him that the said Law Report being an official Law Report was sufficient and admissible to prove the said judgment.

11. That in order to fortify our case, we also made several trips to the Supreme Court, Lagos and at great expense and inconvenience, we succeeded in obtaining a certified true copy of the proceedings/Records

that formed the appeal in F.S.C. 16/1959.

12. That when D.W.I testified on behalf of the respondents/applicants, the said Law Report containing the judgment of the Supreme Court was tendered without objection from the appellant's counsel and B admitted in evidence as Exhibit 'C'.

13. That when we confronted him over the non-tendering of the certified true copy of the records of proceedings given to him, the said P. A. Chikezie Offoaro Esq., informed us and we verily believed him that he C inadvertently omitted tendering the same but assured us that there was no problem since the Law Report containing the judgment had been tendered.

14. That the said P. A. Chikezie Offoaro, Esq. continued to represent us at the early stages of this appeal until we debriefed him D sometime in October 2000 and retained the services of our present solicitors D. O. Agbo & Co.

15. That upon perusing the records of appeal and the briefs of Argument filed by the parties, our leading Solicitor D. O. Agbo, Esq., informed us and we verily believe him as follows:- E

(a) That since both parties pleaded the suit that culminated in the said Suit No. FSC 16/1959, it is in the interest of justice that the duly certified true copy of the proceedings and judgment in the said FSC 16/1959 be tendered during the hearing of this appeal as further evidence. F

(b) That we require the leave of this Honourable Court to adduce the said further evidence on appeal.

(c) That the adduction of the further evidence is to properly place a document which both parties pleaded before the court for a just G determination of this case on the merits devoid of technicalities."

In their counter-affidavit, the plaintiffs in Paragraphs 6-16 deposed thus:

"6. That the records of the proceedings and the judgment delivered H by the Federal Supreme Court of Nigeria in Appeal No. FSC 16/1959 had always been available since Wednesday, June 3, 1959 which was the date the Federal Supreme Court delivered judgment in the appeal.

7. That the further evidence now sought to be adduced by the

applicants was not in respect of matters, which have occurred after the date of the trial or hearing of this case at the trial court.

8. *That the appellants' counsel, B. E. I. Nwofor informed me and I verily believed him that:*

(a) *The further evidence now sought to be adduced is not a matter B that arose ex improvis which no human ingenuity could foresee.*

(b) *The applicants at all material times pleaded the documents now sought to be introduced in evidence in Paragraph 11 of their Statement of Defence and counterclaim and had always been in possession thereof but C preferred at the trial not to tender certified copies thereof but rather tendered the Law Report containing the Federal Supreme Court judgment in FSC. 16/1959 as Exhibit C.*

9. *That as a matter of fact, the trial court utilized Exhibit C in D writing its judgment in favour of the respondents now applicants.*

10. *That the instant appeal now turns inter alia, on whether or not the trial court was right in admitting and using Exhibit C to determine the case against the appellants.*

11. *That before raising the issue of admissibility of Exhibit C in this E court, the appellants were granted leave by this Honourable Court on 17/11/99 to raise that issue which was the complaint in ground 2 of the additional grounds of appeal copied on pages 6 and 7 of the appellants brief.* F

12. *That the issues of the propriety of the trial court admitting and acting on Exhibit C had been exhaustively canvassed by the parties in their respective Briefs now before this court and what the respondents (now applicants) are seeking to achieve by their instant application is to preempt G the decision of this court by seeking to correct their omission or error at the trial court without even conceding the error and thereby overreach the appellant's case in an unjust manner.*

13. *That the instant application is brought merely to enable the H applicants 'fortify their case' as stated in paragraph 11 of the supporting affidavit and not to further the ends of justice.*

14. *That Paragraphs 13, 15(a) (c), 16, 18, 20, 21, 23, 25, 26, 27, 28 and 29 of the supporting affidavit are denied.*

15. *That it is not in the interest of justice to permit the applicants, on appeal, to seek to adduce further evidence to fortify and improve upon their case by bringing further evidence which they could with reasonable diligence have produced and tendered at the trial court.*

B 16. *That the appellants will be prejudiced if this application is granted.”*

It is seen from the affidavit in support of the application that the reason relied upon by the defendants was the inadvertent omission of counsel engaged by them to tender the record of proceedings. Does this amount to a special ground as stated under Order 1 Rule 20(3) of the Court of Appeal Rules? I think not. It is helpful once more to bear in mind the language employed under Order 1 rule 20(3) above. It says:

D “..... *no further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds.*” (underlining mine)

E Under the said Rule, the only further evidence which can be admitted is on matters that happened after the trial or hearing, and even then, the applicant who wishes to call such further evidence must show special grounds. **In Comfort Asaboro v. M.G.D. Aruwaji & Anor. (1974) 4 S.C. (Reprint) 87 at 90-91, this court 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." B

In Akanbi v. Alao (1989) 5 S.C. 1; (1989) 3 NWLR (Pt. 188) 118 at 159, this court stressing that the jurisdiction to receive further evidence on appeal should only be exercised in furtherance of justice said per Oputa JSC, that: C

"Furtherance of justice in proceedings before our courts will also presuppose obedience to decisions of our various courts. It is an invariable rule of all courts and one founded on reason, common sense, fair play, and equal treatment of the contestants, and thus on justice, that if evidence which either was in possession of parties at the time of trial or which by proper diligence might have been obtained is either not produced or has not been procured and the case is decided adversely to the side to which the evidence was or could have been available; that side will not so easily be given the extra indulgence of being allowed, on appeal, to adduce or produce such evidence, as new or fresh evidence. Such fresh evidence, on appeal, ought normally to be confined to matters arising ex improviso which no human ingenuity could have foreseen. Order 1 Rule 20(3), Court of Appeal Rules, 1981, reflected this when it excepted from the general rules against fresh evidence on appeal 'evidence on matters which occurred after the date of the trial or hearing.'" D E F

In the said case *Akanbi v. Alao* (supra), this court pointedly made the observation that the error of counsel in the conduct of the case will not be accepted as an excuse to allow the client concerned to lead further evidence on appeal. G

The court below in refusing the application to call fresh evidence on appeal said at pages 87-88: H

"The Record of the proceedings and Judgment by the Supreme Court in Suit No. F.S.C. 16/1959 were all the time before the trial of the case in the trial court available to the applicants and their counsel P. A.

Chikezie Offoaru Esq., who conducted the case of the applicant to the best of his professional competence.

In our view of the law, see Order 1 Rule 20(3) of the Court of Appeal Rules and the principles decided in the cases of (1) Comfort B Asaboro v. M.G.D. Aruwaji (1974) 4 S.C. (Reprint) 87; (1974) 4 S.C. 119 at page 125 and also Amatagu v. Iweka II (1995) 8 NWLR (Pt. 415) 547 at p. 591, we fail to see, having read through the affidavit evidence in support of the application, any special circumstance or circumstances to C compel us to grant the application.

A party in the trial court ought to go thereto armed with all materials he has to prove his case or any issue involved at the trial (sic). He therefore, calls his witness and tenders what would prove his case. The D Appeal Court does not try issues. It does not generally receive evidence except in special circumstance(s). And no one special circumstance(s) exist or exists in the present case based on the material before us.

In conclusion, the application is refused. The motion is dismissed accordingly. There shall be costs of N2,000.00 in favour of the respondents against the applicants.” E

I am satisfied that the court below was correct in its views.

There is another important feature in the application of the defendants in the court below, which makes it (the application) repugnant in F every sense to the ends of justice. The judgment of the trial court was in favour of the defendants in that the plaintiffs’ case was dismissed on the ground that it was caught by the plea of estoppel per res judicata. That plea was upheld by the trial court, which had placed reliance on Exhibit ‘C’, the G Law Report tendered by the defendants. In their appeal to the court below from the judgment of the trial court, the plaintiffs had raised a ground of appeal contesting the propriety of the admission in evidence of Exhibit ‘C’, the Law Report. Plaintiffs’ 5th ground of appeal reads:

“5. *The learned trial Judge erred in law in admitting in evidence the H Law Report called the Selected Judgments of the Federal Supreme Court of Nigeria Volume IV 1959 at pages 132-137 (i.e. Exhibit A) and relying upon it in sustaining the plea of res judicata raised by the respondents.*

PARTICULARS OF ERROR

i. *Exhibit C is a public document within the purview of Section 109(a)(iii) of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990, and by the combined effect of Sections 97(2)(c) and 112 of the Evidence Act, the only type of secondary evidence admissible thereof is a certified true copy and none other.* B

ii. *Exhibit C is neither the original judgment itself nor a certified true copy of the original judgment.*

iii. *The reception in evidence of Exhibit C was contrary to the averment in paragraph 11 of the Statement of Defence in that whereas the respondents pleaded that they will tender and rely on ‘certified copies of proceedings in Suit No. FSC 16/1959’ (that is, the Federal Supreme Court decision aforesaid), they tendered the Law Report where the case was reported.* C

iv. *It is not within the competence of parties to a case to admit by consent or otherwise a document which by law is inadmissible.”* D

It would seem that what the defendants had tried to do by their application to call fresh evidence before the court below was to take the sting or efficacy out of the plaintiffs’ 5th ground of appeal. Clearly, the application was not brought in the furtherance of the ends of justice but merely to overreach and thus defeat the ends of justice. The defendants were in fact not seeking to call further evidence on appeal but rather to improve the quality of the evidence they had called at the court of trial. F They had wanted to put in, the proceedings in the suit, which they pleaded to supplement the Law report on the same case, which they had tendered before the trial court. The defendant’s duty as the respondents in the appeal by the plaintiffs was to defend the correctness of the judgment in their favour not to enhance the quality to the evidence they had earlier called. G If they thought that the plaintiffs’ appeal to the court below was meritorious, they should have admitted that fact so that the court below could do what was right in the circumstances.

I am satisfied that this appeal is merely a device to ensnare the plaintiffs and to clearly negate the ends of justice. It has no merit whatsoever. I would dismiss it with N10,000.00 costs in favour of the plaintiffs/respondents. H

BELGORE CJN

I agree that this appeal has no merit and for the reasons contained in the lead judgment of Oguntade, JSC. I also dismiss it with N10,000.00 costs in favour of plaintiffs/respondents.

KALGO JSC

I have had a preview of the judgment of my learned brother, Oguntade, JSC., just delivered. I entirely agree with him that there is no merit in the appeal and it ought to be dismissed. I fully associate myself with the reasoning and conclusions reached in the said judgment which I adopt as mine. This appeal therefore fails and I accordingly dismiss it with costs as assessed in the leading judgment.

TOBI JSC

I have read in draft the judgment of my learned brother, Oguntade, JSC., and I agree with him.

This appeal arises from the refusal of the Court of Appeal to enable the appellant to lead further evidence in that court. The court, in its Ruling of 17th September, 2001, said at page 88 of the Record:

“A party in the trial court ought to go thereto armed with all materials he has to prove his case or any issue involved at the trial. He therefore, calls his witness and tenders what would prove his case. The Appeal Court does not try issues. It does not generally receive evidence except in special circumstance(s). And no one special circumstance(s) exist or exists in the present case based on the material before us.”

The appellants are aggrieved by the above and have come to us. My learned brother, Oguntade, JSC., has clearly summarized the argument of counsel and I need not repeat them here.

Application to lead further evidence in an appellate court is not one of the regular applications in the judicial process. The application is generally out of the normal stream in the judicial process because it is

outside the ordinary scheme of things. This is because it is the intention of our adjectival law that parties should lead all the evidence they need or require in the case at the trial court which jurisdiction is to hear oral evidence of the parties to ventilate their different pleadings. One of the reasons behind this principle is that it is the trial court that has the eyes of the eagle to look closely at the demeanour of the witnesses, their habits, mannerisms and idiosyncrasies in the witness box. As opposed to this, an appellate court has not such eyes, by the fact of the appellate arrangement, to see the witnesses' facial and body movement in the box. On the contrary, an appellate court is regimented to the cold record before it and the rules of procedure normally do not allow that court to move out of the record.

One of the exceptions to the above rule is that appellate courts can, in appropriate cases, receive further evidence from the parties; and the further evidence is the evidence not led by parties at the trial. And because of the general basic rule of trial court hearing trial evidence, appellate courts are reluctant or loathe to grant applications to hear further evidence on appeal except in very compelling circumstances. I can recognize here two such circumstances. The first one is that the evidence sought to be led on appeal was not available at the time of the trial or during the trial. The second one is more generic and it is that an appellate court will grant an application to lead further evidence on appeal in the interest of justice. And here, it is in the interest of justice in the case and not to one of the parties only.

The procedure for admitting further evidence on appeal is not at the disposal of an indolent or not diligent litigant. The procedure cannot be used for the repair of a case at the trial. It is not designed to overreach the other party or spring surprise at the other party when the appeal is heard.

While an applicant is free to employ clever or trickish methods to re-open his case made at the trial court to obtain judgment on appeal, an appellate court will not help him open the gate when it is against the rules of court. An appellate court will be guided by the principle of law that a party is bound to make the same case in both the trial court and the Court of Appeal. An appellate court will not encourage, or better, allow a party

make a case at the trial court and then take or make a somersault on appeal. That will be tantamount to blowing hot and cold with the same breath; a conduct which equity, with its hands of fairness and fairplay, will not allow.

B So much of the law. Let me go to the factual situation. The further evidence sought to be led is a judgment of this court. It is the case of Ihenacho Nwanari and 2 Ors. v. Nnadikwe Oriuwa and 5 Ors, (Suit No. FSC. 16/1959). I see from page 73 of the case file that the judgment was delivered way back in 1959. And so I ask: Why did the appellants not make use of it at the trial? Why did the appellants wait this long before seeking to tender the judgment? I do not see any satisfactory reasons other than an attempt to overreach the respondents.

D In this case, counsel for the appellants at the trial tendered the Law Report in the exercise of his professional wisdom and expertise. It is now the desire of the appellants to tender the certified true copy of the judgment. Learned counsel for the appellants submitted that although inadvertence or mistake of counsel will not on its own, be taken as good reason to allow E further evidence on appeal, the principle has been established that where the document sought to be adduced as further evidence is one which will have an effect on the jurisdiction of the court when admitted, that fact constitutes a special ground for allowing the document to be so received as further evidence.

F I am at a loss in respect of the submission on jurisdiction. How will the admission of certified true copy of the judgment of the court have effect on the jurisdiction of this court? Because of the important position jurisdiction occupies in the judicial process, counsel have a way of roping G it in to obtain victory. There are at times counsel tantalize it to test the strength of their clients case before the court.

Although jurisdiction is a word of large purport and signification in the judicial process, it is not a subject of speculation or gossip by counsel H as it is a matter of strict and hard law donated by the Constitution and Statutes, It is a threshold issue, the blood that gives life to the survival of the action, and occupying such an important place in judicial process; counsel cannot be heard to take a gamble on it whenever they know or feel

that the case of their client is bad. That is an employment which jurisdiction will certainly reject. In my view, I do not see any jurisdictional issue or problem arising from the admission or refusal of the certified true copy of the judgment of this court.

In sum, this appeal fails and it is dismissed. I award N10,000.00 B costs to the respondents.

MOHAMMED JSC

The appeal is against the Ruling of the Court of Appeal, Port-Harcourt, delivered on 17-9-2001, refusing the appellants' application to adduce additional or fresh evidence on appeal. The only issue raised in the appellants' brief of argument is whether the learned Justices of the Court of Appeal, having regard to all the circumstances of this case, have exercised their discretion properly when they refused to grant leave to the appellants to adduce as further evidence in the appeal, the certified true copy of the proceedings and judgment of this court in Suit No. FSC 16/1959. The power of the Court of Appeal to receive further evidence on appeal is contained in the then Order 1 Rule 20 (3) of the Court of Appeal Rules 1981 which states: -

“The court shall have power to receive further evidence on questions of fact, either by oral examination in court by affidavit, or by deposition taken before an examiner or commissioner as the court may direct, but, in the case of an appeal from a judgment after trial or hearing of any cause or matter on the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds.”

Since the documents sought to be tendered as further evidence in the form of certified true copies of proceedings and judgment of this court were available to the appellants in the course of the hearing of the case at the trial High Court, the appellants have to show special ground before the court below could have exercised its discretion in their favour. The fact that the documents though utilized by the trial court in its judgment in favour of the appellants, it is not easy for the appellants to show the

existence of any special ground to justify granting their application. I therefore entirely agree with my learned brother. Oguntade, JSC, in his judgment that the court below was right in rejecting the application of the appellants. I agree that the appeal is without merit and the same is hereby dismissed by me. I abide by the order on costs in the lead judgment.

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