

**SUPREME COURT OF NIGERIA**  
FRIDAY 18TH JANUARY, 2013. SC. 240/2009  
**CORAM:- I. T. MUHAMMAD, J. A. FABIYI, M. U. PETER-  
ODILI, O. ARIWOOLA, K. B. AKAHS, JJSC**

INTERCONTINENTAL BANK PLC ..... APPELLANT  
AND  
OLAM (NIGERIA) LTD ..... RESPONDENT

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APPEALS - Fresh issue - Grant of application to raise new points - Arising from grounds not covered in earlier notice of appeal - Would not be given - Save where the points are substantial - And not necessitating taking of fresh evidence (H1)

APPEALS - Issue - Jurisdiction - Locus standi - Since the issue is a matter of locus standi of respondent - The same shall not be merely brushed aside - Even though it did not come up at pleadings (H2)

**FACTS**

Applicant/appellant brought this application before the Supreme Court pursuant to s. 36(6) of the Constitution of the Federal Republic of Nigeria 1999 and O. 2 r. 31(1) and O. 6 r. 5(1) of the Supreme Court Rules. The prayer is for among other things, an order granting leave to applicant to raise and argue new issues which were neither raised in the High Court nor Court of Appeal.

Applicant thus contended that the issues are fundamental, substantial and arguable and that no fresh evidence will be required to resolve the new issues. Applicant relied on *Koya v. UBA Ltd* and further contended that the question of locus standi which is at the root of the prayer is substantial since it affects the jurisdiction of the High Court. On the other hand, respondent filed counter affidavit to the application. It contended that it will suffer grave injury if the application is granted as respondent will not have the opportunity of confronting the new issues to be raised adequately.

**HELD** (Unanimously allowing the application per **PETER-ODILI JSC**)

*APPEALS - Application - Fresh issue*

**1. Having gotten this summary off the ground the next step is to find out the guide in situations such as the present application. I see that guiding light in the decision of this court in:- Zacheus Abiodun Koya v. United Bank for Africa Ltd (1997) 1 NWLR (Pt.481) 251 at 266 - 267 per Ogundare, JSC.**

***“The law on the propriety of allowing a question or ground not raised or considered at the trial Court to be argued on appeal as was stated by this Court in Akpene v. Barclays Bank of Nigeria Ltd (1977) 1 SC 47 (Per Obaseki JSC) at pages 47 - 48 is:***

***“The general rule adopted in this court is that an appellant will not be allowed to raise on appeal a question which was not raised or tried or considered by the trial Court (Shonekan v. Smith (1964) All NLR 168, 173) but where the question involves substantial points of law, substantive or procedural and it is plain that no further evidence could have been adduced which would affect the decision of them, the court will allow the question to be raised and the points taken (Shonekan v. Smith (supra); Stool of Abinabina (1953) AC 205 at 215) and prevent an obvious miscarriage of justice.”***

**It needs no saying that granting of an application to raise and argue new points arising from grounds not covered in the earlier Notice of Appeal would not be given as a matter of course. This is because certain requirements must be first fulfilled as in this case, where the points are substantial, weighty, arguable and would not necessitate the taking of fresh evidence especially as the Respondent has an opportunity of Reply in his Brief and is not shut out. It cannot be rightly said that the rights of the Respondent is being compromised or jeopardized. I see no injury that would be occasioned to the respondent. (pp. 95 F/97 C)**

*APPEALS - Issue - Jurisdiction - Locus standi*

**2. Clearly the case of Koya v. UBA (supra) quoted above is apposite and has in effect settled the nagging questions including in my humble view the misgivings of the Respondent. What is being sought to be cleared in this application is indeed a**

***major hurdle, an obstacle that must get off the road if the substance of this appeal is to be holistically addressed and fully determined since it is a matter of the locus standi status of the respondent. It evokes the matter of competence and is substantial, arguable and cannot justly be brushed aside. That the issue did not come up at the pleadings or raised either at the trial or Court below would not veer off from the necessity which has arisen now and cannot be ignored. It is for situations like this that necessary procedural provisions have been provided in the 1999 Constitution (as amended) Section 36 (6), order 2 Rule 31 (1) and order 6 Rule 5 (1) (b) of the Supreme Court Rules. If such things as lapses when the field is not properly covered at the trial Court or Court of Appeal then the anticipatory constitutional provisions and those of the Rules of Court would not have been needed to be legislated on.***

(p. 96 G)

### **REPRESENTATION**

A. A. Adeniran, for the Appellant

E. O. Sofunde SAN, A. Salau, for the Respondent

### **CASES REFERRED TO**

Koya v. UBA Ltd (1997) 1 NWLR (Pt.481) 251

Fadiora v. Gbadebo (1978) 3 SC 219

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

Enang v. Adu (1981) 11-12 SC 25

### **STATUTES & RULES REFERRED TO**

Constitution of the Federal Republic of Nigeria 1999, s. 36(6)

Evidence Act, s. 115(2)

Supreme Court Rules, O. 2 r. 31(1), O. 6 r. 5(1)

### **LEAD JUDGMENT BY PETER-ODILI JSC**

This application was filed on 12/8/2011 by the Appellant/Applicant pursuant to Section 36(6) of the Constitution of the Federal Republic of Nigeria, 1999; Order 2 Rule 31(1) and Order 6 Rule 5(1) of the Supreme Court Rules and under the inherent jurisdiction of this Court. The Applicant prays for the following reliefs, viz:-

1. An order granting leave to the Appellant/Applicant to raise and argue new points arising from grounds 2, 5 and 9 of the Amended Notice of Appeal dated 22nd day of February, 2010 and filed on the 24th of February, 2010 which are issues not raised in either the High Court or Court of Appeal.

B 2. An order extending the time within which the Appellant/Applicant may file and serve its Appellant's Brief of Argument in this Appeal.

C 3. An order deeming the Appellant's Brief of argument which has already been filed and served on the Respondent as properly filed and served.

4. Such further order or other orders (sic) as this Court may deem fit to make in the circumstances.

D The grounds upon which this application is predicated are set out hereunder as follows:-

1. The Appellant/Applicant, being dissatisfied with the judgment of the Court of Appeal, Lagos, in Appeal No. CA/L/497/2005: OLAM (NIGERIA) LTD V. INTERCONTINENTAL BANK LTD, delivered on the 6th day of July, 2009, filed a Notice of Appeal dated E 27th day of July, 2009 against the said judgment.

F 2. On the 22nd of February, 2010, the Appellant was granted leave by this Honourable Court to file additional Grounds of Appeal as stated in Grounds 5, 6, 7, 8, 9 and 10 of the Amended Notice of Appeal dated the 22nd day of February, 2010 and filed on the 24th day of February, 2010.

G 3. The Appellant/Applicant intends to raise new points as set out and underlined in Ground 2, 5, and 9 of the Amended Notice of Appeal dated 22nd day of February 2010 and filed on the 24th day of February, 2010, which are reproduced in the Schedule to this application.

H 4. The new points sought to be raised in this Honourable Court in respect of the said Grounds 2, 5 and 9 of the Amended Notice of Appeal dated 22nd of February, 2010 and filed on the 24th of February, 2010, were not raised by the Appellant/Applicant in either the High Court or the Court of Appeal.

5. The new points sought to be raised by the appellant/Applicant as aforesaid, are fundamental, substantial and arguable.

6. All the evidence that would be required to resolve the new

points sought to be raised by the Appellant/Applicant already forms part of the Record of Appeal before this Honourable Court.

7. No fresh evidence would be required to resolve the new points sought to be raised by the Appellant/Applicant.

8. The time within which the Appellant/Applicant ought to file its Appellant's Brief of Argument has also elapsed. B

9. The Appellant/Applicant requires the leave of this Honourable Court to raise and argue the new points sought to be raised in Honourable Court for the first time and file its Brief of Argument out of time. C

By an 18 paragraph supporting affidavit the Applicant had deposed on its behalf by ABAYOMI ADENIRAN of counsel and the relevant portions of the affidavit are to be seen at paragraphs 8 - 11 as follows:

8. The appellant/applicant intends to raise new points not raised in either the High Court or the Court of Appeal in the course of arguing Grounds 2, 5 and 9 of the Amended Notice of Appeal. D

9. The new points sought to be raised by the Appellant/Applicant as highlighted in the underlined portions of Grounds 2, 5 and 9, which are reproduced in the schedule to the Notice of Motion are to the effect that:- E

(i) The Respondent is a separate and distinct legal entity from "Olam International Limited".

(ii) The Respondent did not sue for and on behalf of Olam International Limited. F

(iii) The Respondent was not the ultimate beneficiary of the relevant cheques which were the subject matter of the suit between the Respondent and the Appellant.

10. The relevant submissions relating to the issues highlighted in paragraph 9 above, have been adduced by the Appellant under issues 2 and 6 of the Appellant's Brief of argument, particularly, paragraphs 5.25 - 5.27 and 9.13 at pages 19-20 and 35. G

11. While deliberating with Chief F. O. Fagbohunge, SAN on the facts of this Appeal in his office at 23A Marina, Lagos at about 12.30 p.m. on 8/8/2011, I was informed by the learned senior counsel and I verily believe him that:- H

(i) The new points sought to be raised by the Appellant/Applicant as highlighted in the schedule to this application are fundamen-

tal, substantial and arguable.

(ii) No fresh evidence would be required to resolve the new points sought to be raised for the first time in this Honourable Court.

(iii) All the evidence that would be required to resolve the new points sought to be raised by the Appellant already forms part of the Record of Appeal; to wit:

- Respondent's further further further Amended statement of claim at pages 53-57 of the record and

- Exhibits 'L1', 'M' and 'M1' at pages 180A14, 180A15 and 180A16 of the record.

Respondent LATEEF OWOLABI of counsel, countered with a five (5) paragraph counter affidavit filed on 23/9/2011 and the gravamen of the averments are that respondent would suffer grave injury if the application is granted as respondent would not have the opportunity of confronting the new issues to be raised adequately.

In moving the motion on the 20/10/12, learned counsel for the Appellant/Applicant contended that in making this application for the leave of Court to raise fresh issues at this stage, they are strengthened by the case of *Koya v. UBA Ltd (1997) 1 NWLR (Pt.481) 251 at 266-267*. That the question of locus standi which is at the root of this prayer in the application is substantial since it affects the jurisdiction of the Court of first instance and the Appellant would not need to adduce new evidence. That the Respondent would not be prejudiced as they would have the opportunity to react.

Mr. Adeniran of counsel for the Applicant said the Court should strike out paragraph 4 (d) of the counter affidavit as it offends section 115 (2) of the Evidence Act and once that is done there is in effect no opposition to this application. Responding, Mr. Sofunde for the Respondent referred to their 5 paragraph counter affidavit of 23/9/2011. That the matter of Pacers being the major beneficiary is not a new point as it had been trashed out at the two Courts below. That it is Olam International that is the new point the Applicant is trying to introduce as the owners of the funds. He said the respondent before the Court is Olam Nigeria Limited. That even though it is true that locus standi is an issue of law but it must be based on facts. He referred to paragraph 6 of Exhibit 'B1', the Further Statement of claim.

For the Respondent it was further posited that the case cited by the Applicant is not apposite and does not apply. That prayers 2

and 3 being hinged on prayer 1 should fall with it.

Even though I have set out the grounds upon which this application is made and quoted extensively the supporting affidavit and referred to the counter affidavit, I would want to say that in real summary the foundation of this application is captured under paragraph 9 of the supporting affidavit to be as follows:-

(1) That the respondent is a separate and distinct legal entity from “Olam International Limited.”

(2) The respondent did not sue for and on behalf of Olam International Limited.

(3) The respondent was not the ultimate beneficiary of the relevant cheques which were the subject matter of the suit between the respondent and the appellant.

The reaction of the respondent gotten from their counter affidavit are that none of the issues in respect of which leave is now being sought to raise as fresh issues in this Court were raised either at the trial Court or the Court of Appeal. That the present Appellant/Applicant had at the Court of Appeal’s leave of Court produced a Respondent’s Notice to support the judgment upon grounds that had not been issues of consideration at the Court of trial. The present respondent further contends in objection to the instant application, that these issues sought to be brought in were not covered in the pleadings at the trial court. He said they would suffer grave injury as respondent has lost the opportunity to fully confront these new issues since counsel cannot get at further instructions from their client, the Respondent.

***Having gotten this summary off the ground the next step is to find out the guide in situations such as the present application. I see that guiding light in the decision of this court in:- Zacheus Abiodun Koya v. United Bank for Africa Ltd (1997) 1 NWLR (Pt.481) 251 at 266 - 267 per Ogundare, JSC.***

***“The law on the propriety of allowing a question or ground not raised or considered at the trial Court to be argued on appeal as was stated by this Court in Akpene v. Barclays Bank of Nigeria Ltd (1977) 1 SC 47 (Per Obaseki JSC) at pages 47 - 48 is:***

***“The general rule adopted in this court is that an appellant will not be allowed to raise on appeal a question which***

*was not raised or tried or considered by the trial Court (Shonekan v. Smith (1964) All NLR 168, 173) but where the question involves substantial points of law, substantive or procedural and it is plain that no further evidence could have been adduced which would affect the decision of them, the court*  
 B *will allow the question to be raised and the points taken (Shonekan v. Smith (supra); Stool of Abinabina (1953) AC 205 at 215) and prevent an obvious miscarriage of justice.”*

This principle has been followed consistently by this court in  
 C such cases as - Fadiora v. Gbadebo (1978) 3 SC 219 at 247; Skenconsult (Nig.) Ltd v. Ukey (1981) 1 SC 6 at 18; Enang & Ors v. Adu (1981) 11-12 SC 25. The learned jurist, Ogundare JSC went on to situate the principle above featured Koya v. UBA Ltd (supra) with the case he had on ground, by saying thus:

D *“In the case in hand, the Court below held that ground 3 complained about and with which we are here concerned, raised substantial issue of law as to whether a Nigerian Court can give judgment in foreign currency. This finding is not being challenged by the appellant. Besides, giving its reasons which informed the exercise of its*  
 E *discretion in allowing the fresh point to be taken it held inter alia:*

*Secondly, it is noteworthy that respondent’s counsel apparently in anticipation of his objection to ground 3 not being sustained, has put forward, an alternative argument that like the English Courts,*  
 F *the Courts in Nigeria have power to give judgment in a foreign currency - in this case the dollar, more so, as that was the claim at hand in the relevant paragraphs of the statement of claim.*

*Taking everything into consideration, especially the fact that respondent has argued the point albeit as an alternative proposition.*  
 G *I am inclined to the view that there will be no injustice done to the respondent if that issue is pronounced upon.*

*My answer to this issue is accordingly in the affirmative.”*

***Clearly the case of Koya v. UBA (supra) quoted above is apposite and has in effect settled the nagging questions including in my humble view the misgivings of the Respondent. What is being sought to be cleared in this application is indeed a major hurdle, an obstacle that must get off the road if the substance of this appeal is to be holistically addressed and fully determined since it is a matter of the locus standi***  
 H



***status of the respondent. It evokes the matter of competence and is substantial, arguable and cannot justly be brushed aside. That the issue did not come up at the pleadings or raised either at the trial or Court below would not veer off from the necessity which has arisen now and cannot be ignored. It is for situations like this that necessary procedural provisions have been provided in the 1999 Constitution (as amended) Section 36 (6), order 2 Rule 31 (1) and order 6 Rule 5 (1) (b) of the Supreme Court Rules. If such things as lapses when the field is not properly covered at the trial Court or Court of Appeal then the anticipatory constitutional provisions and those of the Rules of Court would not have been needed to be legislated on.***

***It needs no saying that granting of an application to raise and argue new points arising from grounds not covered in the earlier Notice of Appeal would not be given as a matter of course. This is because certain requirements must be first fulfilled as in this case, where the points are substantial, weighty, arguable and would not necessitate the taking of fresh evidence especially as the Respondent has an opportunity of Reply in his Brief and is not shut out. It cannot be rightly said that the rights of the Respondent is being compromised or jeopardized. I see no injury that would be occasioned to the respondent.***

I am satisfied from all I have said above that the application is meritorious and should be granted. I grant the application and reliefs as sought which are as follows:-

(1) Leave is granted to the Appellant/Applicant to raise and argue new points arising from grounds 2, 5 and 9 of the Amended Notice of Appeal dated the 22nd day of February 2010 and filed on the 24th of February, 2010 which are issues not raised in either the High Court or the Court of Appeal.

(2) An order extending the time within which the Appellant/Applicant may file and serve its Appellant's Brief of Argument in this Appeal.

(3) An order deeming the Appellant's Brief of Argument filed on 12/8/2011 as duly filed and served.

(4) I make no order as to costs.

**MUHAMMAD JSC**

I read in draft the ruling just delivered by my learned brother, Odili, JSC. I agree with my lord's reasoning and conclusion in granting the application. I make no order as to costs.

B

**FABIYI JSC**

I have had a preview of the Ruling just delivered by my learned brother Peter-Odili, JSC. I agree that the application should be granted.

C

The appellant desired to raise fresh point of law to wit-locus standi of the respondent in this court. The general rule is that an appellant will not be allowed to raise on appeal a question which was not raised and tried by the trial Court. But where the question involves substantial points of law, substantive or procedural and it is plain that no further evidence would be adduced to trash the issue as herein, the Court will allow the question to be raised so as to prevent an obvious miscarriage of justice. See: *Fadiora v Gbadebo* (1978) 3 SC 219 at 247; *Koya v. U.B.A Ltd.* (1997) 1 NWLR (Pt.481) 251.

E

The point touching on locus standi has to do with jurisdiction of Court which cannot be brushed aside. The respondent will have its chance to address same at the appropriate time. I cannot surmise how it will be prejudiced in the circumstances.

F

For the above and the detailed reasons given in the lead Ruling I too feel that the application is meritorious. I grant it and make no order on costs.

G

**ARIWOOLA JSC**

I had the opportunity of reading the draft of the lead Ruling of my learned brother, Mary Peter-Odili, JSC just delivered and I am in total agreement with the reasoning therein and the conclusion arrived thereat. The application without doubt has merit and substance.

H

It deserves to be allowed and granted. It is granted by me with all the reliefs sought. No order as to costs.